THE JOURNAL OF THE NSW BAR ASSOCIATION | SPRING 2016

barnews

WHAT DO WOMEN BARRISTERS EARN?

PLUS

THE MAURICE BYERS ADDRESS:
Legal change - the role of advocates

The High Court hits 'reset' on the advocate's immunity

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EDITOR'S NOTE

This journal has in the past commented on the perils of practitioners sending unsolicited communications to judges.[1] As appears from a recent decision of the Court of Appeal in England[2], communications travelling in the opposite direction may be equally ill-advised.

The case involved an oral agreement said to have been entered into in the lobby of the Dorchester Hotel in London in the early hours of 20 June 2003 between, on the one hand, Prince Abdul Aziz bin Fahd, a member of the Saudi royal family and son of the late King Fahd and, on the other, a Mrs Janan Harb, pursuant to which (according to Mrs Harb) the prince promised to pay her £12 million and cause to be transferred to her two properties in Cheyne Walk, Chelsea. First, some background.

The case was heard at first instance before Mr Justice Peter Smith, a judge not unacquainted with public attention. Some years before Mrs Harb's case he heard a copyright case concerning the novel *The Da Vinci Code* by Dan Brown. The plot of the novel involves secret codes, cryptic messages and mysterious symbols. Getting into the spirit of things, the judge's reasons for decision incorporated their own secret code: it transpired that the initial letter of various sentences in the judgment spelled out coded messages.[3]

Moving on. In 2015 the same judge was hearing a case in which British Airways was the defendant. In July of that year, the judge and his wife went on a short holiday to Florence, on a flight booked through British Airways. Upon their return they waited in vain at Gatwick Airport for their luggage. It transpired that the flight had left Florence leaving the passengers' luggage behind.

The judge was annoyed about his missing luggage. He raised the matter in open court with counsel for British Airways ('Right, Mr Turner, here is a question for you. What happened to the luggage?'). When counsel declined to address the matter in open court, describing it as a personal complaint, Peter Smith J suggested that he might order the chief executive of British Airways to appear before him that day, presumably to provide an explanation ('In that case, do you want me to order your chief executive to appear before me today?'). Eventually, however, the trial judge recused himself.[4]

Enough background. Back to the judge's letter and the Court of Appeal case mentioned at the outset. The plaintiff, Mrs Harb, had been living in Jeddah in the late 1960s and, according to her, had married – indeed, she said they remained married, there having been no divorce under shari'a law – a man who was at that time the minister of the interior and who in due course became King Fahd. Whatever its legal status, by 1970 the relationship was at an end. Mrs Harb left Saudi Arabia.

By 1999 Mrs Harb's financial position was perilous. She advised the King through an intermediary that she had decided to publish her memoirs, including salacious details of their intimate life. A compromise was reached. Mrs Harb received £5 million and signed a deed of release.

Despite this payment, by 2002 Mrs Harb's financial position had deteriorated again. In June 2003 she discovered that the prince would shortly be visiting London. Mrs Harb and a friend waited for him in the lobby of his hotel. When he finally appeared, late in the evening, she approached him. A conversation ensued.

What was said during this conversation was at the heart of the case. According to the prince, Mrs Harb accosted him as he walked through the lobby, he told her that he would not speak to his father on her behalf until she withdrew her lies, and the encounter lasted less than a minute. According Mrs Harb they discussed, and indeed concluded, an agreement pursuant to which he would pay her £12 million and procure the transfer to her of two properties in Cheyne Walk, Chelsea and she, in exchange, would withdraw certain factual assertions she had made about the king.

Some years later proceedings were brought to enforce this alleged agreement. The claim might seem optimistic. It turned on an oral agreement allegedly entered into in a brief and impromptu conversation in a hotel lobby late at night 13 years before the trial. The well known remarks in *Watson v Foxman* come to mind.[5] However this is not the place to debate the strengths of the case. The point for present purposes is that Peter Smith J found for Mrs Harb. The prince appealed.

Now to the judge's letter. The hearing of Mrs Harb's trial concluded in July 2015. In September 2015, while judgment was still reserved, Lord Pannick QC published an article in *The Times* highly critical of Peter Smith J's handling of the British Airways case. The article concluded as follows:

> Litigants are entitled to better service than this. The reputation of our legal system is damaged by such behaviour. The Lord Chief Justice should consider whether action to address Mr Justice Peter Smith's injudicious conduct has, like his luggage, been delayed for too long.

(A curious sidenote. In one of his books Lord Pannick discusses an appellate case in California in 1979, in which two of the judges were in agreement and the third in dissent.[6] Upon reading

the dissenting judgment, the majority added a footnote to their joint opinion, in which they observed that they felt 'compelled by the nature of the attack in the dissenting opinion to spell out a response'. Their response to their judicial colleague consisted of seven sentences. Using a code which seems to presage that deployed by Peter Smith J in the *Da Vinci Code* case, the initial letters of these seven sentences were: S.C.H.M.U.C.K. But I digress.)

On 1 November 2015 Peter Smith J delivered his judgment in Mrs Harb's case.

On 1 December 2015 Peter Smith J wrote to one of the two joint heads of Lord Pannick QC's chambers, Blackstone Chambers, complaining about the article in *The Times*, and saying among other things:

> I am extremely disappointed about it because I have strongly supported your Chambers over the years especially in Silk Applications. Your own application was supported by me and was strongly supported by me to overcome doubts expressed to me by brother Judges concerning you. I have supported other people. It is obvious that Blackstone takes but does not give.
>
> I will no longer support your Chambers. Please make that clear to members of your Chambers. I do not wish to be associated with Chambers that have people like Pannick in it.

The prince's counsel in the proceedings before Peter Smith J had both been members of Blackstone Chambers. Given the views expressed in this letter, the prince included in his appeal a contention that Peter Smith J's judgment was affected by apprehended bias.

The prince's appeal was generally successful, in the sense that the Court of Appeal was not satisfied that a binding agreement had been reached between the prince and Mrs Harb and ordered a new trial.

However the Court of Appeal rejected the contention of apprehended bias. It held among other things that the fact that a judge might be, or appear to be, irritated by or hostile to a particular advocate does not preclude the judge fairly resolving the case and that an informed and fair minded observer is to be assumed to know this.

Nevertheless the Court of Appeal took a very dim view of a judge writing a letter of the kind described above:

> It is difficult to believe that any judge, still less a High Court judge, could have done so. It was a shocking and, we regret to say, disgraceful letter to write. It shows a deeply worrying and fundamental lack of understanding of the proper role of a judge. What makes it worse is that it comes on the heels of the BAA baggage affair. In our view, the comments of Lord Pannick, far from being 'outrageous' as the judge said in the Letter, were justified. We greatly regret having to criticise a judge in these strong terms, but our duty requires us to do so.

***

In this issue of *Bar News* we are delighted to include the recent Sir Maurice Byers Lecture delivered by the chief justice of Australia, the Hon Robert French AC. The chief justice examines the topic 'Legal Change – the role of advocates', by discussing some of the important cases argued by Sir Maurice Byers.

We are also delighted to introduce a new contributor, Advocata. This first column is headed Sotto Voce and looks at the advice – solicited or otherwise – a young woman may receive on coming to the bar concerning her voice and delivery.

Elsewhere this issue includes the address delivered by the Hon Murray Gleeson AC QC at the launch of the new biography of Tom Hughes QC, as well as a review of the same book by Victoria Brigden. Michael Finnane QC looks at how climate change is affecting low lying islands in the Pacific. Justin Hewitt discusses the High Court's important recent decision on advocate's immunity. And Ingmar Taylor SC examines the question whether women at the bar are paid less than men.

Jeremy Stoljar SC

Editor

Endnotes

1. *Bar News*, Autumn 2014, p.36.
2. *Harb v Prince Abdul Aziz* [2016] EWCA Civ 556
3. See eg *The Guardian*, 28 April 2006; https://www.theguardian.com/uk/2006/apr/28/books.danbrown; the judgment is *Baigent v The Random House Group Ltd* [2006] EWHC 719 (Ch).
4. *Emerald Supplies Ltd v British Airways* [2015] EWHC 2201 (Ch).
5. *Watson v Foxman* (2000) 49 NSWLR 315 at 318 – 319.
6. David Pannick *I Have To Move My Car: Tales of Unpersuasive Advocates and Injudicious Judges*, Hart Publishing, 2008 at 151; the case itself is *People v Arno* (1979) 153 Cal Rptr 624, 628n (California Court of Appeal).

Pursuing justice for innocent victims of motor accidents

By Noel Hutley SC

At the time of writing the Bar Association, along with representatives of other legal profession groups, is involved in discussions with the New South Wales Government's CTP Expert Reference Panel regarding the future of the state's motor accidents scheme.

The current form of the draft proposal prepared for consultation purposes by the state Insurance Regulatory Authority constitutes a significant attack on the common law rights of those injured in motor vehicle accidents.

The Bar Association is concerned that the government is heading towards a workers compensation-style scheme, where 90 per cent of the injured, including many with serious injuries, receive limited statutory benefits and have minimal access to legal representation. The largest flaw in the scheme the government is considering is the assumption that there are only two categories of injury – 'low severity' and 'the most seriously injured'. There is in fact a wide group in between – moderate severity injury. It is this group, in particular, who will suffer under the current proposal.

The government's Expert Panel has been established to report to the minister on issues of 'fairness' within the scheme. The association's submissions to the panel to date have focussed upon the protection of innocent accident victims ahead of at fault drivers when it comes to long-term benefits. The association has no issue with the provision of a year or eighteen months of no fault benefits for everyone, on the basis that the vast majority will recover from their injuries within that time frame. However, extending no fault benefits out to, for example, a five year period for all, regardless of fault, removes any capacity to provide 'fairness' to innocent accident victims.

The Expert Panel process is likely to continue until early September, and the final form of the legislation is expected to be introduced in October or November. The Bar Association will continue to pursue justice for innocent victims of motor accidents and advocate the retention of common law elements in the scheme, in consultative forums, both with members of parliament and in the public arena.

The Bar Council is giving ongoing consideration to issues of diversity and gender pay equity at the New South Wales Bar. The association's Diversity and Equality Committee has recommended and pursued a number of initiatives in this regard, and is currently working on a comprehensive strategic approach to diversity issues. Ingmar Taylor SC, a member of that committee, has provided an analysis of gender pay issues at our bar in this edition of *Bar News*, and also details a number of the initiatives currently under way in this regard. Taylor SC and Penny Thew have also contributed a piece on the aims of the association's best practice guidelines and the importance of their adoption by chambers. The work being undertaken regarding diversity is crucial to the bar's standing in the profession and the community as a forward thinking, responsible institution.

Part of the association's core business is to provide policy submissions and increase awareness among the broader community of legislative initiatives in the area of criminal law which impinge on fundamental legal rights. In my column in the previous edition of *Bar News*, I drew attention to the association's work in this regard concerning the state government's serious control orders legislation.

Finally, this year's practising certificate renewal process, the first under the National Uniform Legal Profession laws which came into force last year, has now run its course. For the first time, members were given the option of paying for their practising certificate renewals online, and a large number took advantage of the new facility. The Bar Association will continue to explore improvements to our services which help support our members in maintaining and developing their practices.

Bench and Bar Dinner

The 2016 Bench and Bar Dinner was held on 6 May at the Hilton Sydney. The guests of honour were the Hon R J Ellicott QC and David Jackson AM QC.

L to R: the Hon R J Ellicott QC, Elizabeth Cheeseman SC, Noel Hutley SC, David Jackson AM QC, Tony Bannon SC.

Bar Association President Noel Hutley SC

Clockwise from top left: David Jackson AM QC, Elizabeth Cheeseman SC, the Hon R J Ellicott QC, Chief Justice Tom Bathurst AC, Tony Bannon SC, Chief Justice Robert French.

L to R: Her Honour Judge Penelope Wass SC, Belinda Baker, Victoria Brigden and Bridie Nolan

David Jackson QC and
Attorney General Gabrielle Upton

Top left, L to R: Madeleine Ellicott; Louise Coleman, Tamara Phillips, Emma Bathurst. Top right, L to R: Justin Simpkins, David Robertson. Bottom left, L to R: Gaby Bashir SC and Phil Boulten SC. Bottom right, L to R: Sarah McNaughton SC, her Honour Judge Kate Traill, Chrissa Loukas SC.

Tutors and Readers Dinner

The 2016 Tutors and Readers Dinner was held on 29 July at the Rooftop Terrace in the Australian Museum. Guest speaker was the Hon Justice Natalie Adams.









Second row, L to R: Stuart Lawrance, Charles Colquhoun. Jane Taylor, Craig Lenehan, Zaina Shahnawaz, Trent March

Third row, L to R: Hugh Stowe, David Harris, Danielle Woods, Bob Stitt QC; Monique Cowden, Neha Evans, Siobhain Climo, Patricia Lowson, Indraveer Chatterjee

Fourth row: L to R: Lucy Robb Vujcic, Steve Cominos, the Hon Justice Natalie Adams.

Bar Practice Course 01/2016

Back row: Harrison Grace, Vanja Bulut, Louise Coleman, Celia Winnett, Jonathan Nathan, John Whelan, Tim Hackett, Christopher Mitchell, Philip Lonergan, David Birch

Fourth row: Siobhain Climo, Neal Funnell, Pat Williams, Katrina Musgrove, Georgia Turner, Christopher Micali, Matt Davis, Paul Madden, Peter Mann, Michael Burke,

Third row: Jane Buncle, Ian Fullerton, Benjamin Barrack, Nerissa Keay, Bharan Narula, Timothy Boyle, Indraveer Chatterjee, Trent March, Philip Santucci, John McKenzie, Tony Silva

Second row: Parisa Hart, David Keyte, Victor Kline, Jane Taylor, Irina Hoskinson, Sam Hallahan, Christopher Mitchell, Leon Apostle, Monique Cowden, Jeremy Harrison, Shanaka Jayasuriya

Front row: Lucy Robb Vujic, Nayiri Apkarian, Prue Bindon, Zaina Shahnawaz, Neha Evans, Penny Abdiel, Louise Hulmes, Surya Palaniappan, Marea Wilson, Patrick McCarthy, Michelle Rabsch

The essential elements of valid law

By John Nader QC

Australians were shocked recently by the CCTV footage which emerged from the Don Dale Youth Detention Centre in the Northern Territory. In response, the Australian Government established the Royal Commission into the Child Protection and Youth Detention Systems of the Government of the Northern Territory. The commission will examine (among other things):

- the effectiveness of any oversight mechanisms and safeguards to ensure the treatment of detainees was appropriate; and
- whether the treatment of detainees breached laws or the detainees' human rights.

The essential elements of valid law

An understanding of the essential nature of valid law would be useful to persons concerned with cases involving the possible deprivation of physical or economic freedom.

Although a court cannot invalidate legislated law made with formal correctness, in an appropriate case it may be persuaded that the sentence of an offender for breach of an unjust law should be moderated for that reason.

Persons involved in the making and administration of law should accept seriously the proposition that a law which does not possess the essential ingredients for validity is unjust and, as such, is not law in the full sense, and to the extent of its defect is objectionable.

I strongly favour the opinions of Thomas Aquinas (Aquinas), as I understand them regarding the essential requirements of valid and binding law. Aquinas was a jurist of standing in his own time and continues to be so since.

His definition of valid law by reference to its essential elements is quite ancient. It dates from the middle ages. However, his writings are so mixed with theology -- a subject that many people regard as superstition-- that they are rarely read and the force of the secular jurisprudential arguments is missed. Aquinas was very strongly influenced by Aristotle whom he referred to as 'The Philosopher'.

I will summarise his formal teachings on the essential elements of valid law.

Reasonableness

The first question dealt with was whether a valid law must be reasonable. According to Aquinas, law pertains to reason [*lex sit aliquid pertinens ad rationem*]. Because the phrase 'pertains to' originates from the Latin word '*pertineo*', it should be understood that when Aquinas used it it was more forceful than the modern English signification of the word. Latin was the language of Aquinas and in his time the word 'pertains' signified 'belongs to; extending to; or reaching.' It is worth remembering that Aquinas rejected expressly the proposition 'whatsoever pleases the sovereign has the force of law.'

In a democracy the reasonableness of a law ought to be considered by or under the authority of the legislator: a term which includes the parliament as well as delegated authorities.

In this respect delegated legislation made under power conferred upon the bureaucracy by Act of parliament is a danger zone. The generality of statutory delegations are sometimes such that public servants, without sufficient attention to the reasonableness of their delegated legislation, make laws which are not reasonable. I believe that this encourages parliament to make statutes expressed in general terms that receive little ventilation in the parliament but which confer power on bureaucrats to make more specific regulations etc which may receive little or no publicity or scrutiny.

... delegated legislation made under power conferred upon the bureaucracy by Act of parliament is a danger zone.

Loose and imprecise wording creating delegated power is open to abuse. An overzealous bureaucrat might well be tempted to interpret the imprecise wording of a delegation in such a way as to favour an intention which the relevant minister has expressed to him/her in private. It should be understood that it is important that legislation potentially affecting peoples' lives should always be safeguarded by complete unambiguity.

The work of promulgation should not be left to the media which has no relevant responsibility and which tends to publicise only laws that have a sensational quality, and then, often inaccurately.

The Youth Justice Act (NT) is a statute that forcefully illustrates the point. The generality of the words that create the power to make regulations and the regulations themselves appear to give the public servants exercising the power an open slather. Surely there can be no dispute that the effects of that legislation are so unpredictable as to render the empowering legislation itself unreasonable. Indeed, it must be conceded that, in respect of the point now under focus, the Youth Justice Act is not a reasonable law and ought to be repealed or radically amended.

I refer especially to the Youth Justice Act as an illustration of non-reasonable law – the statute – used by the parliament as a device for the creation of delegated legislation: regulations concerning serious and contentious matters that never face the scrutiny of the parliament in a session special for the purpose. Mere tabling of the subordinate legislation is insufficient. Many like laws are readily found in the statute books.

My researches did no go far enough to say with certainty, but I think that the old maxim, '*delegatus non potest delegare*' is ignored: that the Youth Justice Regulations empower even further delegation.

The common good

The second question dealt with by Aquinas was whether every law must be ordained to the common good. Aquinas regarded the promotion of the common good as an essential purpose of every valid law. He wrote, that every (valid) law is ordained to the common good. ['*omnis lex ad bonum commune ordinatur*.']

Of course, the 'common good' does not imply 'the direct material benefit of every person in society'. A law which benefits only very few persons of a society may be properly categorised as being ordained to the common good. It would be condescending to my reader if I were to illustrate that point: but consider the legal requirement that there be ramps for persons using wheelchairs to gain access to buildings.

Promulgation

The third significant matter raised by Aquinas was that a law must be promulgated to the persons to be affected or bound by it. I summarise a passage of Aquinas that explains this conclusion. He wrote that in order that a law obtain the binding force which it should possess, it must be applied to the persons who have to be bound by it. Such application is made by its being notified to them by promulgation. Therefore, promulgation is necessary in order for a law to bind those intended to be bound by it; and it must be in precise, unambiguous terms.

There is a maxim of law in this country that every person is presumed to know what the law is. That of course is no more than a fiction that has to be maintained for obvious reasons. The work of promulgation should not be left to the media which has no relevant responsibility and which tends to publicise only laws that have a sensational quality, and then, often inaccurately.

Earlier in this paper when dealing with the topic of reasonableness I referred to ambiguous and uncertain legislation. But under this heading it is appropriate to point out that official publication of ambiguous and imprecise legislation may not amount to adequate promulgation.

Summary

Near the conclusion of his treatise on law Aquinas summarised his conclusions in these words: 'a law is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.'

Climate change and low lying islands of the Pacific

By Michael Finnane QC

Michael Finnane and John O'Meally walking on the sea wall on South Tarawa.

Climate change is a reality in Australia as well as elsewhere. The recent storm damage to houses and properties on the northern beaches of Sydney made that clear. However, many people do not seem to realise how important this issue is.

In 2013, Judge John O'Meally and I both travelled to the island of South Tarawa in the Pacific nation of Kiribati. South Tarawa, the capital of Kiribati, like 31 of the other 32 islands in the group, is a coral atoll, with its highest point two metres above the Pacific Ocean.

Our aim was to find out for ourselves what it was like to live on these coral atolls. What we found was a rich and vibrant culture, with songs in the night air, people who laughed and welcomed us warmly and invited us to see and share their culture with them. They talked of their beautiful life and their desire to keep it.

The Australian High Commissioner told us that many people left the islands, some to get big jobs in other parts of the world, but they often returned to become part of the culture again. In fact, we met a number of people who had returned after living in the United States and Europe and had returned because lives in those parts of the world seemed so empty. I could see why they came back.

They also told us of coastal erosion caused by increasing storm surges, the ingress of salt water into parts of the island and bigger king tides and long periods of drought. Obviously enough, life on the islands, because of these climate change events, will increasingly become more difficult.

We both found it quite confronting to stand on land and only two metres below was the Pacific Ocean.

In 2015, I visited Tuvalu, another Pacific Ocean nation of low lying coral atolls and found similar threats to their future posed by climate change.

Bailey Koulapi is a 34 year-old tertiary educated Red Cross volunteer who lives in Tuvalu. Kotei Temakei is a 22 year-old TAFE student who lives in Kiribati. Bailey and Kotei came to Australia in June to take part in a program being run by the Pacific Calling Partnership with the aim of meeting Australians and alerting them to the reality of climate change. They are both living in Island nations that face becoming unliveable if climate change is not addressed by countries in the developed world, like Australia.

Tuvalu, formerly the Ellice Islands, is a Polynesian Island nation located in the Pacific Ocean midway between Hawaii and Australia and south of Kiribati. Tuvalu comprises 9 islands and has a population of about 11,000. The islands of Tuvalu are coral atolls and no more than 4.6 metres above sea level at their highest points.

...life on the islands, because of these climate change events, will increasingly become more difficult.

Kiribati, formerly the Gilbert Islands, is a Micronesian island nation comprising 33 islands spread over an area as large as the width of Australia. It has a population of approximately 105,000. The islands of Kiribati, with the exception of Banaba, are also coral atolls, which, on average, are only 2 metres above sea level.

Neither country has much in the way of material resources. The only substantial industry on these island chains is the fishing industry, with each nation being paid royalties by European and Asian companies that send boats to fish in their waters. Some coconut products are exported and there is a small amount of tourism.

Among the community leaders with whom Kotei and Bailey met on Tuesday,

Michael Finnane QC, 'Climate change and low lying islands of the Pacific'

Salt water on land, South Tarawa

14 June 2016 were a group of lawyers of whom I was one, with Vincent Sicari and Scott Christie of the Edmund Rice Centre. With me were two barristers, Mandy Tibby and Shane Prince. The two young islander men made a presentation to us of their concerns about climate change. The meeting was in the Board Room of Counsels Chambers on the First Floor of Selborne Chambers in Phillip Street Sydney

They spoke strongly about climate justice pointing out that the island groups did not contribute to climate change at all but their big neighbours Australia and New Zealand did, because of the greenhouse gas emissions from their heavy industry and, in the case of Australia, with the production, use and export of coal.

During my visits to Kiribati and Tuvalu, I saw for myself what it is like to live on islands that are as close to the sea as the promenades along Eastern Suburbs beaches like Bondi, Coogee and Maroubra. I have seen the water from the sea come into houses and cover fields. When each of these two young men spoke, however, it made even more real to me the difficulties of people living on these coral atolls and facing the prospect of continuing climate change.

Bailey has an interest in social work that led him to volunteer with the Red Cross. Bailey said: 'I am from the island nation of Tuvalu, which is so vulnerable to climate change, resulting in more powerful cyclones and other severe weather events. I am a volunteer with the Red Cross and I was sent by the Red Cross to help assess the damage and urgent needs in the outer islands after Cyclone Pam.'

He described how in February 2015 Cyclone Pam hit the outer islands of Tuvalu, causing very severe damage to buildings and crops, as well as to their water supplies. During the aftermath of the cyclone the Red Cross sent him to these islands. This meant a boat trip from Funafuti, of more than a day. What he saw when he got there horrified him. The cyclone hit the islands with such force that it opened graves on the island, tipping out skeletons and body parts onto the islands and into the sea. He could smell the stench of decaying body parts and was concerned about how the opening of the graves would affect the water supplies on the island.

In Kiribati it is fairly rare for the islands to be struck by cyclones but increasingly they are being adversely affected by storm surges and by longer droughts. Kotei, when he was in Australia, spoke of this, saying: 'In Kiribati, coastal erosion is getting worse. We are losing our land and people have to live closer and closer together. As an *I-Kiribati*, I don't want to lose our islands to climate change. I fear that we will lose our culture alongside our islands. Our culture is our identity and that is what we treasure. Music, dancing, story-telling are part of us and we don't want to lose them.'

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Michael Finnane QC, 'Climate change and low lying islands of the Pacific'

Kotei at Port Newcastle

All the islands are subject to king tides, which occur twice a year when the moon is closer to the earth. These king tides cause erosion of the land and damage to crops. The people of both Tuvalu and Kiribati are finding that king tides are getting higher and causing greater damage. There are also more frequent storm surges which causes salt water to be deposited on the Islands which results in damage to water supplies and to crops. In the future there will also be coral bleaching and decreased fish stocks.

In Australia, these young men and women from the islands, along with two young Fiji-Australians, took part in the KATEP Program (Kiribati, Australia, Tuvalu Exchange Program) run by the Pacific Calling Partnership with the support of Uniting World, OXFAM and many Catholic Congregations that have connections with the Pacific. The KATEP Program provided training to all the young people in it about advocacy, lobbying politicians and talking to the media. Leadership training was also given.

Because of their concern about the effects of the coal industry, Bailey and Kotei went to Newcastle with others in the program. Newcastle is the Australian port that exports the largest amount of coal. During the time they were in Newcastle, they met local, political and community leaders and observed the loading of coal on to ships and trains and, in the space of an hour were shocked to see four laden coal ships leave the port. The coal dumps in Newcastle are many times higher than any of the islands of Tuvalu and Kiribati. They also observed the scarring of the land around Newcastle caused by the creation of open cut coalmines.

Bailey and Kotei raised the question of banning the extraction and export of coal from Australia, since coal when burnt is a major contributor to climate change.

The raising of the issue of closing down the coal industry in Australia is a confronting one for Australia. Last year leaders from Pacific Island states, including Kiribati and Tuvalu, called for a global moratorium on coal mines as part of the historic Suva Declaration signed at the Pacific Islands Development Forum. At this year's meeting, the leaders discussed a proposed regional treaty agreeing to open no new coalmines or other fossil fuel projects.

The Pacific Island Climate Action Network (PICAN), a diverse network of NGO and faith groups across the Pacific, proposed this idea of a regional treaty. PICAN produced a draft treaty prepared in the Law School of the University of the South Pacific. Pacific Island governments will work on this proposal for consideration next year. The aims will include persuading Australia to stop new coalmines.

Last year leaders from Pacific Island states, including Kiribati and Tuvalu, called for a global moratorium on coal mines as part of the historic Suva Declaration signed at the Pacific Islands Development Forum.

Bailey and Kotei told us in our discussions with them that they had spoken to Sharon Claydon, the federal member of parliament in Newcastle, Senator Jenny McAllister, and MLC elect John Graham, and also addressed meetings with candidates in the Reid and Kingsford Smith electorates. The purpose of these meetings was to alert members of parliament and other community leaders to the need for climate change action.

One question that is always put to Bailey and Kotei and was put to them during our meeting was: 'Why don't you just migrate to Australia or New Zealand?' Their answer always was that they do not want to move because they fear the loss of their culture and their identity. In both island chains the culture is expressed best through dance and singing and in Kiribati in particular you can hear the people singing at night. In both countries, there are strong family and community bonds, with every islander identifying strongly with the island of

Bailey at Port Newcastle

Lawyers in Australia can be powerful voices in the community. We can influence the development of policy. We can even draft legislation. We can be powerful voices in the fight for climate justice, the transition from coal to renewable energy ...

their birth. Christian missionaries have a long association with both of these countries and most people are identified with a Christian church.

There is no doubt, though, that migration to Australia and New Zealand is a real issue, but for how many and in what circumstances? We asked: 'What about sea walls around the islands?', but that does not seem to be a real solution. The cost would be enormous and the long-term benefit uncertain.

Each of these young men impressed us and raised the question for us: 'What can you do to help us?' When that question is asked, I find it difficult to provide a real answer. I can't personally shut down coalmines to prevent coal exports, nor can I prevent the burning of coal in Australia or anywhere else, and yet I know that there must be something I can do. The building of sea walls all around the islands does not seem to be realistic, nor does the abandonment of all these islands. What then is the answer? What is it? That is the challenge issued to all of us. What is it that lawyers can do? Obviously, we have a role in drafting international agreements and we could make our contribution to the promotion and discussion of the Pacific Island treaty.

Lawyers in Australia can be powerful voices in the community. We can influence the development of policy. We can even draft legislation. We can be powerful voices in the fight for climate justice, the transition from coal to renewable energy and special visa access to people from the low lying Pacific Islands. I have ceased to invest in companies that have anything to do with coal.

One matter that lawyers could work on would be lobbying the Federal government to create a new visa category to assist people from the low lying Pacific Islands to settle in Australia. Over the next 50 years, many of the islands will become largely uninhabitable and the people on them will have to be resettled. Australia is the obvious place. The people will adapt well to Australia as many of them have done so already. We should be welcoming them, just as we welcomed migration flows from the British Isles, Europe, the Middle East and China.

Lawyers, particularly barristers, are trained to think up new legal solutions for problems in the world. If anyone who reads this has any ideas, I would be delighted to get them.

Worth a punt

Glenn Fredericks reports on *Tabcorp Limited v Victoria* [2016] HCA 4 and *Victoria v Tatts Ltd* [2016] HCA 5.

Introduction

In *Tabcorp Holdings Limited v Victoria* [2016] HCA 4 (Tabcorp Holdings) and *Victoria v Tatts Ltd* [2016] HCA 5 (Tatts Group), the High Court considered whether the State of Victoria (the state) was obliged to make significant 'terminal payments' to Tabcorp Holdings Limited (Tabcorp) and Tatts Group Limited (Tatts) following the non-renewal of certain gaming licences which Tabcorp and Tatts Group respectively held. The matters were heard concurrently and the court delivered a unanimous judgment in each matter.[1] The court decided that the state did not have to make those terminal payments.

Background

In 1992, the State of Victoria (the state) established a duopoly in the operation of gambling activity using gaming machines by Tabcorp[2] and Tatts.[3] By separate mechanisms Tabcorp and Tatts were issued licences by the state which authorised them to conduct certain gambling activities. Tabcorp held conjoined wagering and gambling licences[4] and Tatts held a gaming operator's licence.[5]

The arrangements relating to the issue of these licences and the licence fees provided that the government would make certain payments to Tabcorp and Tatts (the terminal payments). That is:

- (in the case of Tabcorp) if new licences were issued, to someone other than Tabcorp, then Tabcorp would be paid the lesser of the licence fees paid by Tabcorp and Tatts; or the licence fees paid by the new licence holders.[6]
- (in the case of Tatts) a terminal payment was to be made to Tatts if Tatts' gaming operator's licence expired without a new licence being issued to it, but not where a new gaming operator's licence was not issued at all.[7]

The arrangements were originally contained in an agreement between the state and Tatts Holdings in 1995 (the 1995 agreement) in the case of Tatts and in the *Gaming and Betting Act 1994* (Vic) (the 1994 Act) in the case of Tabcorp. However, as a result of legislative changes, these relevant provisions relating to the terminal payments were ultimately set out in the *Gambling Regulation Act 2003* (Vic) (the 2003 Act).

The intent of these arrangements was 'to level the playing field between the duopolists (Tatts and Tabcorp) and to divide that playing field between them (with the limited exception of the Crown Casino)'.[8]

In 2008 the Victorian government announced a restructure of how gaming licences in Victoria would be issued. This involved a move away from the duopoly through the issue of 27,000 'gaming machine entitlements' (GMEs).[9] As part of this restructure the above licences held by Tabcorp and Tatts would not be continued or reissued to them and the Victorian government announced that it was not obliged to pay the terminal payments.

Tabcorp and Tatts then commenced proceedings to recover the licence payments. The amounts claimed by way of the terminal payments were significant - approximately $686 million in the case of Tabcorp[10] and approximately $490 million in the case of Tatts Group.[11]

Proceedings below

The matters had different outcomes in proceedings below. Tabcorp had been unsuccessful both at first instance and on appeal[12], whereas Tatts had been successful at both. The court noted that this would entail that the objective of the Victorian government to establish an equal playing field between Tabcorp and Tatts would not be achieved.[13]

The High Court

The court examined the issue by considering the proper construction of the relevant statutes and agreements having regard to the surrounding commercial context.

The key issue in each proceeding was whether the reference in the 2003 Act to a new licence was intended to be a reference to new gambling licences generally (i.e. the GMEs) or to the specific types of licences held by Tabcorp and Tatts.[14] The court held that the latter interpretation was the correct interpretation. Accordingly, this meant that the conditions giving rise to an obligation on the state to make the terminal payments did not arise.

Part of the challenge was that the legislation which was in force at the time the obligation to pay allegedly arose (the 2003 Act) was not the statute or instrument under which the obligation originally arose. However, the court found that the proceedings could be decided by reference to the 1995 Agreement (in the case of Tatts)[15] and that the 2003 Act did not relevantly change the effect of the 1995 Act for the consideration of what was a new licence (in the case of Tabcorp).[16] In both decisions, the court gave lengthy consideration as to how the relevant statutes and other instruments were to be construed.

In undertaking this consideration, the court had regard to the commercial context of the initial arrangements which set up the licensing regime and terminal payments. The court found that the purpose of those arrangements was to establish a duopoly.[17]

Further, the changes announced in 2008 were to introduce an entirely new regulatory model - there was to be a new regime and the duopoly was not to continue.[18] Accordingly, the original commercial context for the terminal payments was no longer in existence. In *Tatts Holdings* the court considered how a reasonable business person would have understood the 1995 agreement.[19] In this context, it was relevant that, in the 1995 Agreement, the state gave no assurance that the duopoly would continue.[20] Further, the duopolists entered into the arrangements knowing of the commercial risk that the state might decide to discontinue the duopoly.[21]

Similarly, the court also considered the change in the nature of the business interests of licence holders under the pre and post 2008 regulatory regimes. That is, the intended protection of Tatts Group's and Tabcorp's commercial interests was limited. Those interests were protected while the duopoly was in place and, accordingly, lost that protection when the duopoly ended.[22]

Tabcorp also relied on the principle of legality namely, that 'as a principle of statutory construction… clear language [must] be used in legislation if a person is to be deprived of a valuable right'.[23] The court stated that this did not have regard to the contingent and limited nature of the rights of Tabcorp. Further, the rights of Tabcorp were not taken away, rather the trigger event for the terminal payments did not happen.[24]

Endnotes

1. French CJ, Kiefel, Bell, Keane & Gordon JJ.
2. At that time, the Totalisator Agency Board of Victoria. Tabcorp came into existence in 1994 as a result of the privatisation of that board (*Tabcorp Holdings* at [2]).
3. At that time, the Trustees of the Will and Estate of the late George Adams. *Tatts* came into existence as a result of the restructuring and corporatisation of the estate in 1998 (*Tatts Group* at [1]).
4. *Tabcorp Holdings* at [2].
5. *Tatts Group* at [8].
6. *Tabcorp Holdings* at [4].
7. *Tatts Group* at [3].
8. Ibid at [21].
9. *Tatts Group* at [38]–[40] and [42].
10. *Tabcorp Holdings* at [48].
11. *Tatts Group* at [43].
12. *Tabcorp Holdings* at [49].
13. *Tatts Group* at [22].
14. *Tabcorp Holdings* at [6] to [9] and *Tatts Group* at [5].
15. *Tatts Group* at [26].
16. *Tabcorp Holdings* at [85].
17. *Tabcorp Holdings* at [90] and *Tatts Group* at [64].
18. *Tatts Group* at [40], *Tabcorp Holdings* at [74].
19. Ibid at [71]–[72].
20. Ibid at [72].
21. *Tabcorp Holdings* at [68].
22. *Tatts Group* at [74] and *Tabcorp Holdings* at [92].
23. *Tabcorp Holdings* at [68].
24. Ibid at [68].

Above the line

Glenn Fredericks reports on *Day v Australian Electoral Officer for the State of South Australia & Anor; Madden v Australian Electoral Officer for the State of Tasmania & Ors* [2016] HCA 20; 90 ALJR 639.

The proceedings in *Day v Australian Electoral Officer for the State of South Australia & Anor; Madden v Australian Electoral Officer for the State of Tasmania & Ors* [2016] HCA 20; 90 ALJR 639 (Day) were a challenge to recent changes to the manner in which voters could cast a vote in the election for the Senate. The High Court[1] rejected the challenge as being without any merit.[2]

Background

Earlier this year, and prior to the recent Commonwealth election, the *Commonwealth Electoral Act 1918* (Cth) was amended[3] by changing the form of the Senate ballot paper and how it was to be marked. These changes included:

- Requiring voters to number sequentially at least six squares 'above the line' on the ballot paper or at least 12 squares 'below the line' on the ballot paper.[4] Prior to the amendments, voters were required to mark only 1 box above the line or to number sequentially all the boxes below the line in order of preference.[5]
- Allowing groups of candidates who had a square above the line to have the names of the political parties who endorsed them and their logos next to their square.[6] Previously, the name of parties could be included on the ballot paper in respect of groups of candidates, but not party logos.[7]
- Alterations to the manner in which above the line votes were counted.
- Amendments to what constituted an informal vote.

With respect to counting the above the line vote, prior to the amendments, a voter could only mark one square. Preferences were then distributed in accordance with a written statement lodged by the relevant party with the Australian Electoral Commission.[8] Since the introduction of the amendments, a vote above the line is considered to be a vote for the candidates under that square (i.e. below the line) in the order they appear below the line.[9]

The requirements for what constituted a formal (or informal) vote were changed so that ballot papers with at least one square numbered above the line, or at least six squares numbered consecutively below the line constituted formal votes.[10]

The challenge to the amendments

The plaintiffs claimed that the changes introduced by the Amendment Act were unconstitutional. In their challenge the plaintiffs relied principally on s 7 and s 9 of the Constitution which respectively require that senators be 'directly elected by the people of [each] state' and that the 'method of choosing senators shall be uniform for all the states.'[11]

The court's consideration of the plaintiffs' arguments

The court conducted a review of the history of voting process for the Senate,[12] including the introduction of preferential voting in 1919,[13] proportional representation in 1948[14] and the introduction of above the line voting in 1983.[15] In this review the court considered previous decisions of the court which had decided that parliament had a wide discretion in legislating how the Senate vote is to be conducted.[16] The court then dismissed each of the five arguments put forward by the plaintiffs, noting that '[a]rguments A, B and C [see below] sought to challenge features of the system that have existed since at least 1983.'[17]

Argument A: not a uniform method of choosing senators

The plaintiffs argued that the different systems of above the line and below the line voting breached s 9 of the Constitution as they constituted more than one method of voting.[18] The court held that the requirement for a uniform method of electing senators should be 'construed broadly' and that the method could allow for more than one manner of choosing candidates, provided that the method was applied uniformly across the states.[19]

Argument B: Senators not directly chosen

This argument was that the method of above the line voting was a method of voting for political parties and breached s 7 of the Constitution as the Senators were not 'directly chosen by the people'.[20]

The court held that voting above the line was not a vote for an intermediary (i.e. a political party) which would breach the requirements in s 7 of the Constitution that Senators be 'directly chosen'. Rather, a 'vote above the line is as much a direct vote for individual candidates as a vote below the line'.[21] The court regarded the constitutional requirement of a direct vote as excluding a mechanism such as an electoral college.[22]

Argument C: the new ballot paper infringed the 'directly proportional representation' principle

The plaintiffs claimed that the amendments infringed a 'constitutional requirement of 'directly proportional

representation' in the Senate'.[23] The direct proportionality principle was said by the plaintiffs to be derived from s 7 of the Constitution as read with s 24[24] and s 128[25] of the Constitution.[26] The plaintiffs summarised their argument as being that the changes would mean that the proposed principle would be breached as 'minor parties would 'lose the benefit of their vote flowing down the preference chain''.[27]

The court described this argument as 'elusive'[28] and dismissed it on the basis that votes still had the option of marking all the squares above or below the line.[29] The court considered that the plaintiffs' argument was simply about the choices which a voter could make as to the method in which they could fill out the ballot paper.[30]

Argument D: the ballot paper was misleading

This argument was that the new form of the ballot paper was likely to mislead or deceive voters and in particular, did not disclose other ways in which a vote might be formal where the vote did not comply with the instructions on the paper.[31] The plaintiffs argued that this constituted a burden on the implied freedom of political communication.[32]

The court held that that this argument 'failed at the threshold' as the ballot papers did not mislead voters. The statement on the ballot papers that voters must either fill in six squares above the line or 12 squares below 'correctly stated the statutory requirements'.[33] The court considered that the provisions in the Act regarding what constituted a formal vote were 'vote savings provisions' and so it was not surprising that the ballot papers did not refer to them.[34]

Argument E: impairment of the implied freedom of political communication and the system of representative government

The plaintiffs submitted that the new form of ballot paper mandated an uninformed choice by electors, preventing the free flow of information and hence impairing the implied freedom of political communication and the system of representative government.[35]

The court regarded this argument as a catch-all argument which repeated complaints made in previous arguments. Accordingly, this argument was also rejected.[36]

Endnotes

1. Joint judgment of French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ.
2. Day at [37].
3. By the *Commonwealth Electoral Amendment Act 2016* (Cth) (the Amendment Act).
4. Ibid at [1].
5. Ibid at [26].
6. Ibid at [1].
7. Ibid at [21].
8. Ibid at [22].
9. Ibid at [1].
10. Ibid at [33]–[34].
11. Ibid at [4].
12. Ibid at [6]–[14].
13. Ibid at [7].
14. Ibid at [10].
15. Ibid at [11].
16. Ibid at [74].
17. Ibid at [37].
18. Ibid at [37].
19. Ibid at [44].
20. Ibid at [37].
21. Ibid at [48].
22. Ibid at [49] citing *Attorney General (Cth); Ex rel McKinley v The Commonwealth* (1975) 135 CLR 1.
23. Ibid at [37].
24. Section 24 deals with the manner of the election of the House of Representatives including that it be 'directly chosen by the people' and that it have twice the number of members as the Senate.
25. Section 128 deals with the manner in which the Constitution may be altered.
26. Day at [51].
27. Ibid at [52].
28. Ibid at [52].
29. Ibid at [54].
30. Ibid at [54].
31. Ibid at [37].
32. Ibid at [55].
33. Ibid at [56].
34. Ibid at [56].
35. Ibid at [37].
36. Ibid at [57].

Trustee's powers of advancement

Ingrid King reports on *Fischer v Nemeske Pty Ltd* [2016] HCA 11.

In *Fischer v Nemeske Pty Ltd* [2016] HCA 11 the High Court considered the scope of a trustee's powers of advancement. The majority of French CJ, Bell and Gageler JJ considered the wording of the trust deed and found that the power of advancement conferred by clause 4(b) of the trust deed had been validly engaged. In dissent, Kiefel and Gordon JJ found that the challenged distribution was not a valid exercise of the power of advancement, and that because there had not been a change in the beneficial ownership of the shares, there had been no application of the capital of the trust.

The challenged capital distribution took place in 1994. The only assets in the trust were the shares in named Aladdin Ltd, a company incorporated in Norfolk Island. The trustee was Nemeske Pty Ltd, and the directors of the trustee at the time of the challenged distribution did not benefit from the capital distribution.[1]

The transaction took place through the trustee revaluing the Aladdin Ltd shares from their settlement value of $1,000 to $3,904,300 as an account entry in the 'asset revaluation reserve'. The trustee then resolved to make a distribution out of the 'asset valuation reserve' to Emery Nemes and his wife Madeleine Nemes. It was not in dispute that the resolution of the trustee company making the advance was badly worded.[2] No monies were paid to Emery and Madeleine Nemes, but instead the amount of $3,904, 300 was credited to them in the trusts accounts, and the trustee granted a charge over the shares in favour of Emery and Madeleine Nemes. The motivation for the transaction seemed to be to achieve tax benefits for Emery and Madeleine Nemes.[3] Madeleine Nemes died 2010 and Emery Nemes died in September 2011. Emery Nemes was the sole beneficiary of the estate of Madeleine Nemes.

The appellants (the Fischers) were siblings of the Fischer family who were related to Emery Nemes. In his will Emery Nemes had bequeathed shares in the trustee company and in Aladdin Ltd to the Fischers. The residue was bequeathed to other beneficiaries. Emery Nemes was recorded in the minutes of the director's meeting where the distribution was made as being present by invitation.[4] Emery Nemes' will did not specifically deal with the debt owed to him and Madelaine Nemes, thus the debt to the estate owed by the trust formed part of the residue of his estate. If the distribution was upheld in the proceedings then the specific gift to the Fischers in the will of Emery Nemes was of no value.

First instance and Court of Appeal

The Fischers commenced proceedings in the Supreme Court of NSW against the executors of Emery Nemes seeking a declaration in the NSW Supreme Court that the trust was not indebted to Emery Nemes' estate. The trustee sought and received judicial advice about whether to defend those proceedings,[5] and was then successful in defending the transaction before Stevenson J.[6] The Fischers then appealed to the Court of Appeal where they were also unsuccessful.[7]

Issues in the High Court

The issues in the appeal were[8]:

1. Whether the 'Capital Distribution' effected by the resolution of 23 September 1994 and the subsequent entry in the trust accounts was a valid and effective exercise of the Trustee's powers under cl 4(b) of the Deed of Settlement to advance and apply capital or income for the benefit of any of the Specified Beneficiaries.
2. Whether the resolution and the subsequent recording in the Trust's accounts of a loan of $3,904,300 would have entitled Mr and Mrs Nemes to bring an action for money had and received against the Trustee for the amount of the loan.
3. Whether, in any event, the covenant contained in the Deed of Charge imposed a binding obligation on the Trustee to pay the amount of the advancement to Mr and Mrs Nemes.

Resolution of the Appeal to the High Court

French CJ and Bell J dismissed the appeal, holding that 'the creation of a debt to be satisfied out of the property of the Trust was a means of effecting an advance and application of the capital of the Trust.'[9] Instead of referring to more general understandings of advancement, they considered the scope of the power specifically conferred by clause 4(b) of the trust deed which conferred the power of advancement, and that the intention of the trustee was confirmed by the entry of the debt in the accounts.[10]

Gageler J also dismissed the appeal, beginning his reasoning by restating the conclusions of the Court of Appeal:

> '[90] The Court of Appeal did not disturb the primary judge's interpretation of the resolution of 23 September 1994 as a resolution by the Trustee 'to distribute to Mr and

> Mrs Nemes an amount of money equal to the value of the asset revaluation reserve, namely $3,904,300'. The Court of Appeal acknowledged that the resolution 'did not result in any cash payment or change in ownership of specific property'. The Court of Appeal nevertheless held the resolution so interpreted to have been a proper exercise of the power conferred by cl 4(b) of the Deed to 'advance' and 'apply' 'any part or parts of the whole of the capital or income of the Trust Funds' and, as such, to have given rise to an immediate unconditional equitable obligation on the part of the Trustee to account to Mr and Mrs Nemes in the sum of $3,904,300 out of the Trust Funds.
>
> [91] The Court of Appeal went on to hold that the Trustee's implementation of the resolution, by recording a liability to Mr and Mrs Nemes in the sum of $3,904,300 in the Trust's balance sheet, was sufficient to have given Mr and Mrs Nemes a cause of action against the Trustee to recover that sum at common law. (footnotes omitted)

Gageler J found that those conclusions had not been successfully challenged in the appeal. He concluded there is no reason why an advance of capital from a trust 'must take the form of an alteration of the beneficial ownership of one or more specific trust assets,'[11] and that an 'advance' of capital can occur by the creation of a debt owing to a beneficiary, which becomes a common law debt payable to the beneficiary. Gageler J also looked specifically at the terms of the trust deed, commenting that there was no bar to an action for money had and received where the terms of the settlement required the trustee 'to get the trust property in, protect it, and vindicate the rights attaching to it'.[12]

In dissent, Kiefel J held that the resolution to make the advance was not authorised because it did not identify:

1. The source of power to make an advance;[13]
2. That the distribution was made for the 'advancement in life or benefit' of the Nemes.[14]
3. Whether the distribution was made from capital or income .[15]

Further, Kiefel J held that no capital or income had actually been applied to the Nemes:

> '[64] (…) for a conclusion that capital was applied, there should be a corresponding reduction in the capital of the Trust.'

Gordon J held that the trust deed did not authorise the challenged advance because the power to advance was not engaged without a change in the beneficial ownership in the shares.[16] Her judgment concludes with a warning:

> [183] The text and purpose of cl 4 attaches precise legal effect to dealings with the capital and income of the Trust Funds. That precision is more than a mere formality. Specific legal meaning has been given to terms such as 'advance', 'raise', 'pay' and 'apply', so that, upon the exercise of a power such as that contained in cl 4(b), one can ascertain precisely the effect that the exercise of the power has on the capital and income of a trust. Unless provisions such as cl 4 are construed, are exercised and operate according to their terms, the potential for imprecise or wrongful dealings with trust property may be increased. Imprecise and wrongful dealings with trust property concern and affect not only a trust, its trustee and its beneficiaries but also third parties dealing with that trust.

Endnotes

1. [9], [25] *Fischer v Nemeske Pty Ltd* [2014] NSWSC 203 (10 March 2014) per Stevenson J.
2. [32] per French CJ and Bell J.
3. *Fischer & Ors v Nemeske Pty Ltd & Ors* [2015] HCATrans 321 (2 December 2015) 289–293 where Noel Hutley SC appearing for the appellants commented 'In a sense there seems to have been a very clear determination not to alter the beneficial interests in the shares perhaps for very good tax reasons associated with the fact that I do not think they went to Norfolk Island for the pines – and a desire that whatever happened those assets not leave the control of the trust or be vested in the Nemeses'.
4. [50] *Fischer v Nemeske Pty Ltd* [2014] NSWSC 203 (10 March 2014).
5. *Lorand Loblay and Karen Loblay* [2013] NSWSC 1195 (30 August 2013).
6. *Fischer v Nemeske Pty Ltd* [2014] NSWSC 203 (10 March 2014).
7. *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6 (11 February 2015) per Barrett JA, Beazley P and Ward JA concurring.
8. [13] per French CJ and Bell J.
9. At [30].
10. At [31].
11. At [96].
12. At [111] citing *CGU Insurance Ltd v One.Tel Ltd* (In liq) [2010] HCA 26; (2010) 242 CLR 174 at 182 at [36].
13. At [51]–[52].
14. At [52].
15. At [53].
16. At [170].

The *De Simoni* principle and concurrent sentences

Louise Hulmes reports on *Nguyen v The Queen* [2016] HCA 17.

Introduction

The appeal raised two primary issues:

1. Whether the principle enunciated in *R v De Simoni*[1] applies to preclude a sentencing judge from taking into account, favourably to the offender, the absence of a factor which, had it been present, would have rendered the offender liable for a more serious offence.
2. The scope of a sentencing judge's discretion to impose wholly concurrent sentences for offences that are the product of the same act.

Facts

The appellant shot and caused a non-fatal wound to the deceased, who was a police officer, while the deceased was lawfully executing a search warrant in the basement of the appellant's unit complex, in the company of other police officers. In response to the shot fired by the appellant, another police officer fired a shot which was intended for the appellant, but the bullet instead struck the deceased in the neck, fatally wounding him.

About two weeks prior to the incident, the appellant had been a victim of an attempted robbery in the basement of his unit complex by two masked men armed with cricket bats. Following that event, the appellant obtained a pistol, with a view to defending himself against any further attempted robbery. When the appellant was interviewed after his arrest, he gave an account that he thought two men were about to rob him. He told the police about the previous robbery and the police confirmed that account.

Section 421(1)(c) of the *Crimes Act 1900* (NSW) applies to a person who uses force involving the infliction of death where that conduct was not a reasonable response in the circumstances as the person perceives them, but the person believes the conduct is necessary in self-defence or defence of another. In such a case, section 421(2) provides that a person is not criminally responsible for murder but, on a trial for murder, is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

The prosecution accepted that it could not exclude as a reasonable possibility that, when the appellant fired at the deceased, the appellant honestly believed that the deceased was someone posing as a police officer who was attempting to rob the appellant.[2]

The appellant pleaded guilty to the manslaughter of the deceased and to wounding the deceased with the intent to cause grievous bodily harm, each of which are offences with a maximum penalty of imprisonment of 25 years.

Sentencing decision at first instance and in the New South Wales Court of Criminal Appeal

At first instance, the appellant was sentenced to a term of nine years and six months' imprisonment[3] for the manslaughter offence and to a concurrent term of six years and three months' imprisonment[4] for the wounding offence.[5]

In assessing the objective gravity of the manslaughter offence, the sentencing judge contrasted it with what the sentencing judge supposed would have been the gravity of the offence if the appellant had known the deceased was a police officer. The sentencing judge concluded the offence was not in the 'worst category'.[6]

The sentencing judge also determined that the two sentences should be served concurrently, on the basis that the same criminal conduct was common to both offences and that the total criminality constituted by the appellant's offending could be comprehended by the sentence for manslaughter.[7]

The director of public prosecutions (DPP) appealed against the sentences. The Court of Criminal Appeal (CCA) allowed the appeal and held that:

- the sentencing judge erred in assessing the objective seriousness of the manslaughter offence by taking into account that the appellant did not know that the deceased was a police officer when, if he had known that fact, he would have been liable for murder. In upholding this ground, the CCA accepted the DPP's submission that the error constituted a breach of the *De Simoni* principle;
- there had been error in the sentencing judge's determination that the appellant's overall criminality could be comprehended by the sentence for manslaughter; and
- the sentence imposed for each offence was manifestly inadequate.

The CCA quashed the sentences imposed in the Supreme Court and, in their place, sentenced the appellant to a term of 16 years and two months' imprisonment[8] for the manslaughter offence, and a term of eight years and one month's imprisonment[9] for the wounding offence.[10] The sentence for manslaughter was accumulated by 12 months on the sentence for the wounding offence[11] so the aggregate sentence was a term of 17 years and two months' imprisonment.[12]

The *De Simoni* principle

The principle in *De Simoni* is that:[13]

> [A] judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.

Appeal to the High Court

In the High Court, the appellant contended that the CCA erred:

- in its application of the *De Simoni* principle;
- in holding that the sentencing judge was wrong not to cumulate some part of the sentence imposed for the offence of wounding on the sentence imposed for the offence of manslaughter; and
- as a consequence, in holding that the sentences imposed by the judge were manifestly inadequate.

In two separate judgments, the High Court unanimously dismissed the appeal.

In relation to the first issue, Gageler, Nettle and Gordon JJ held that the CCA was correct in holding that the sentencing judge erred in her assessment of the objective gravity of the offence of manslaughter by contrasting it with what the judge supposed would have been the gravity of the offence if the appellant had known the deceased was a police officer. That is because if the appellant had known the deceased was a police officer, and had shot him with intent to cause grievous bodily harm, the appellant would have been guilty of murder (as there would have been no basis to invoke the partial defence of excessive self-defence).[14] In other words, it is irrelevant in assessing the objective gravity of an offence of manslaughter to contrast it with what would be an offence of murder.[15]

Gageler, Nettle and Gordon JJ held that the CCA was not correct, however, in characterising the judge's comparison as a contravention of the *De Simoni* principle. That principle prohibits a judge from taking into account, as an aggravating circumstance of the offence, a circumstance or factor that would render the offence a different and more serious offence.[16] It has nothing to say about the impropriety of a judge taking into account the absence of a circumstance which, if it were present, would render the subject offence a different offence. The latter course is erroneous simply because it is irrelevant to the assessment of objective gravity.[17]

That principle prohibits a judge from taking into account, as an aggravating circumstance of the offence, a circumstance or factor that would render the offence a different and more serious offence.

In relation to the second issue, their Honours also expressed doubts about the CCA's conclusion that it was not open to the sentencing judge to decline to cumulate any part of the sentences. Their Honours accepted that there could be circumstances in which the judge might properly have concluded that the criminality of the offence of wounding with intent to cause grievous bodily harm was sufficiently comprised within the criminality of the offence of manslaughter to warrant that the sentences be made wholly concurrent.[18]

However, both issues only had relevance if the sentence was not otherwise manifestly inadequate. Although the CCA reference to the *De Simoni* principle was misplaced, Gageler, Nettle and Gordon JJ considered it was not a material error. Ultimately, their Honours found that the Court of Appeal was correct to find that the sentence imposed by the judge for the offence of manslaughter, and consequently the total effective sentence, was manifestly inadequate.[19] The offence of manslaughter was a particularly serious instance of the crime. In the circumstances, it was also appropriate to cumulate a small part of the sentence imposed for the offence of wounding on the separate sentence imposed for manslaughter. The offences were separate and distinct and, despite the commonality of the acts which comprised them, the offence of wounding with intent to cause grievous bodily harm involved an element of intent which was absent from the offence of manslaughter.[20]

In their separate judgment, Bell and Keane JJ agreed that the CCA's adoption of the *De Simoni* principle was misplaced, but noted that contrary to the appellant's argument in the High Court, that the CCA did not conclude that the offence was in the worst category of case. Their Honours stated that the CCA reasoned that the hypothesised case suggested that the sentencing judge wrongly considered that the appellant's lack of awareness that the deceased was a police officer lessened the objective seriousness of the manslaughter. This conclusion explained the imposition of a sentence that was manifestly inadequate.[21]

In relation to the structure of the sentences, Bell and Keane JJ held that in the circumstances, it could not be said that it was

not open to the sentencing judge to impose wholly concurrent sentences, provided the criminality of both offences was appropriately reflected in the sentence for manslaughter.[22] The appellant's liability for the manslaughter was inextricably linked to the wounding offence.[23]

However, the appellant was unsuccessful, on the basis that Bell and Keane JJ, like Gageler, Nettle and Gordon JJ, held that the CCA's conclusion that the original sentence was manifestly inadequate to reflect the seriousness of the offence, was plainly correct.[24]

Endnotes

1. (1981) 147 CLR 383; [1981] HCA 31.
2. *Nguyen v The Queen* [2016] HCA 17 ('Judgment in *Nguyen*'), Gageler, Nettle and Gordon JJ at [47].
3. With a non-parole period of seven years.
4. With a non-parole period of four years and nine months.
5. *R v Nguyen* [2013] NSWSC 197 at [72].
6. *R v Nguyen* [2013] NSWSC 197 at [57].
7. *R v Nguyen* [2013] NSWSC 197 at [69].
8. With a non-parole period of 12 years.
9. With a non-parole period of six years.
10. *R v Nguyen* (2013) 234 A Crim R 324 at [128].
11. *R v Nguyen* (2013) 234 A Crim R 324 at [123].
12. With a non-parole period of 13 years*; R v Nguyen* (2013) 234 A Crim R 324 at [126].
13. (1981) 147 CLR 383 per Gibbs CJ at 389.
14. Judgment in *Nguyen*, Gageler, Nettle and Gordon JJ at [57].
15. Judgment in *Nguyen*, Gageler, Nettle and Gordon JJ at [58].
16. (1981) 147 CLR 383 at 389 per Gibbs CJ (Mason and Murphy JJ agreeing at 395).
17. Judgment in *Nguyen*, Gageler, Nettle and Gordon JJ at [60].
18. Judgment in *Nguyen*, Gageler, Nettle and Gordon JJ at [62].
19. Judgment in *Nguyen*, Gageler, Nettle and Gordon JJ at [66].
20. Judgment in *Nguyen*, Gageler, Nettle and Gordon JJ at [67].
21. Judgment in *Nguyen*, Bell and Keane JJ at [35]
22. Judgment in *Nguyen*, Bell and Keane JJ at [39].
23. Judgment in *Nguyen*, Bell and Keane JJ at [39].
24. Judgment in *Nguyen*, Bell and Keane JJ at [43].

Verbatim

James Patrick ('Jimmy') Page from Led Zeppelin giving evidence in Los Angeles: 15 June 2016.

Q: Well, I imagine you picked up the guitar at a younger age. How old were you?

A: About 12.

Q: And I guess it's safe to assume you weren't a session musician at 12, correct?

A: That's absolutely correct.

Q: Later on -- you had a gift in being able to play the guitar, correct?

A: Well, yeah.

(Laughter.)

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The scope of a solicitor's duty of care to intended beneficiaries redefined

Tim Hackett reports on *Badenach v Calvert* [2016] HCA 18.

Introduction

The High Court of Australia[1] ('High Court') has allowed an appeal on the extent and scope of the duty of care of a solicitor in the context of a will dispute. The High Court clarified that *Hill v Van Erp*[2] is not authority for the proposition that a solicitor instructed to prepare a will always owes a duty of care to an intended beneficiary.

First instance decision

The first appellant, a solicitor, prepared a will that devised the entirety of the testator's estate to the respondent ('beneficiary'). After the testator died, it emerged that the appellant's firm (the second appellant) had prepared two wills in 1984, one of which included a bequest to an estranged daughter. She sued for maintenance out of the estate and was awarded a significant portion of the estate plus legal costs. The beneficiary then sued the appellant and the appellant's firm in negligence.

At first instance, the beneficiary's action failed.[3] Blow CJ held that while the solicitor owed a duty of care to the testator and breached that duty, causation was not established. His Honour found that the solicitor and his firm owed a duty of care to the testator to enquire as to the existence of any family members who could make a claim under the *Testator's Family Maintenance Act 1912* (Tas) ('TFM Act'). His Honour held that if the solicitor had made the enquiries, then the testator would have disclosed the existence of the daughter and the solicitor would have advised the testator of the risk of a successful claim under the TFM Act.

However, his Honour concluded that it was unnecessary to make a finding as to whether the solicitor owed a duty of care to the beneficiary as pleaded, because no causation could be established on the facts. His Honour was not satisfied, on the balance of probabilities, that the testator would have accepted the solicitor's advice (in the event the duty had been properly discharged) and would have taken action to prevent a successful maintenance claim by the daughter.

Full Court

The Full Court of the Supreme Court of Tasmania ('Full Court') allowed the beneficiary's appeal[4], holding that the trial judge confined the scope of the solicitor's duty of care unnecessarily[5] and that the duty of care extended to advising the testator about possible maintenance claims.[6] In their Honours' view, the solicitor's duty to the testator extended not only to a duty to enquire whether he had any children, and to advise on a potential claim under the TFM Act and the impact on his estate, but also to advise on the possible steps he could take to avoid that occurring. This was so, even if the testator did not make any enquiry about the relevant steps.

The Full Court held that the duty of care owed by the solicitor to the intended beneficiary could not be less than that owed to the testator under the terms of the retainer or in tort. As such, the Full Court held the duty the solicitor owed to the testator was co-extensive with that owed to the beneficiary. The Full Court also held that the loss suffered by the beneficiary, as a result of the solicitor's negligence, was the loss of opportunity[7] that the testator may have taken steps to protect the beneficiary's position.

High Court

Before the High Court, the appellants argued that the Full Court erred in extending the scope of the solicitor's duty of care. The High Court unanimously allowed the appeal, with French CJ, Kiefel and Keane JJ delivering a joint judgment and Gageler and Gordon JJ each delivering separate concurring judgments.

In relation to the scope of the solicitor's duty of care to the testator, French CJ, Kiefel and Keane JJ held that on receiving the original instructions the solicitor would have observed that no provision had been made for any family member. Therefore 'prudence' would have dictated an enquiry about the testator's family.[8] That would have led to information regarding the daughter. Accordingly, in the circumstances of this retainer, the solicitor was obliged:

- to advise the testator that it was possible that a claim might be brought by the daughter against the testator's estate under the TFM Act;[9]
- to inform the testator that, in the absence of further enquiries, the solicitor could not advise on whether the daughter would qualify for provision out of the client's estate under the TFM Act;[10]
- to advise the testator that it could not be known whether the daughter would in fact make a claim;[11]
- to identify the options available to the testator to deal with a possible TFM Act claim by the daughter (with the High Court noting that the testator could have made further enquiries to assess the risk of a successful TFM claim);[12] and
- to ensure that the testator considered the claims that might be made on the estate before giving instructions on his testamentary dispositions.[13]

However, French CJ, Kiefel and Keane JJ held[14] that the scope of the solicitor's duty of care to the testator could not have extended to providing voluntary advice about how to defeat any possible TFM claim against the testator's estate by, for example, *inter vivos* transactions with property interests as alleged by the beneficiary. This was because the testator's initial instructions were limited to the drafting and execution of his will to solely benefit the beneficiary.

French CJ, Kiefel and Keane JJ also noted that the solicitor, without more information, had no reason to consider that a TFM claim was likely to be made or that the testator wanted to take steps to defeat any possible claim. The beneficiary's case was not put on the basis that the testator, on hearing that a TFM claim by the daughter was a mere possibility, would have instructed the solicitor that he wished to take all lawful steps to defeat such a claim. It was not known whether a TFM claim would be successful and, if so, the extent of the provision that might be made for the daughter from the testator's estate.[15]

In relation to causation, French CJ, Kiefel and Keane JJ noted that because the allegations related to a failure to advise, the focus was not on what occurred but on what should have occurred if the solicitor had acted with requisite professional skill and care.[16] Their Honours held that causation could not be established even on the duty of care as alleged because it could not be concluded, on the balance of probabilities, what course of action the testator would then have taken if so advised. In addition to the choices available to the testator, there would have been other matters put to the testator for his consideration including the risks concerning the irreversible nature of the *inter vivos* transactions and the associated cost and delay.[17] Accordingly, French CJ, Kiefel and Keane JJ held that the beneficiary had not discharged the 'but for' test of causation required by s 13(1)(a) of the *Civil Liability Act 2002* (Tas).[18]

As to the question of whether a duty was owed to the beneficiary, French CJ, Kiefel and Keane JJ considered that any duty owed to the testator could not be one which extended to the beneficiary by analogy with *Hill v Van Erp*[19]. Their Honours held that the solicitor's duty to the beneficiary, as recognised by the Full Court, did not arise because the interests of the testator were not the same as the interests of the beneficiary and the advice and warnings which the solicitor would need to give about such transactions would reflect that the interests of the testator and beneficiary were not coincident.[20]

French CJ, Kiefel and Keane JJ held that the duty for which the beneficiary contended was not the same as the more limited duty recognised in *Hill v Van Erp* to give effect to a testamentary intention.[21] Their Honours noted, by way of example, that at any point prior to completion of the creation of interests, the testator could change his mind despite any promise having been made to the beneficiary. Accordingly, this was not a circumstance which could arise where a solicitor was merely carrying into effect a testator's intentions as stated in his or her final will.[22]

Gageler J held that the central flaw in the reasoning of the Full Court was in treating the scope of the duty of care owed by the solicitor to the beneficiary as co-extensive with the scope of the duty owed to the testator.[23] His Honour emphasised that the duty owed to a testator was 'more narrowly sourced and more narrowly confined'[24] to performing the specific action of preparing the will on the basis of the testator's instructions to confer an intended benefit to particular beneficiaries, rather than a broader duty to take reasonable care for future contingent interests of a range of possible beneficiaries.[25]

His Honour considered that in the present case, the solicitor's duty was to carry out the testator's instructions, namely to ensure that the beneficiary was given a legally effective testamentary gift of the client's estate.[26] While that duty may have extended to enquiring about the daughter and her possible claims, it did not extend to advice to avoid possible claims, and even if it were an omission, that advice was not within the scope of the duty owed to the beneficiary.[27]

Gordon J held that the appellants did not owe a duty of care to the beneficiary because at the time it could not be said that the interests of the testator were the 'same, consistent or coincident'[28] as those of the beneficiary: the will had not been drawn, it was not clear what the testator would have done had he enquired about other family members, and the testator might have made a different decision.[29] However, even if a duty was owed to the beneficiary and had been breached, the beneficiary failed to adduce any evidence to establish what the client would have done but for that breach, and only managed to show that it was more probable than not that he would have received the entirety, or more of the estate than he did, as beneficiary.[30]

Conclusion

The High Court's decision makes it clear that the scope of the duty of care owed by a solicitor to a testator will depend on the circumstances of the case, in particular, the precise instructions received and the solicitor's actual or implied knowledge about the circumstances of the testator. Further, the High Court confirmed that a solicitor instructed to prepare a will will not always be found to owe a duty of care to an intended beneficiary.

Endnotes

1. French CJ, Kiefel, Gageler, Keane and Gordon JJ.
2. (1997) 188 CLR 159.
3. *Calvert v Badenach* [2014] TASSC 61 per Blow CJ.
4. *Calvert v Badenach* [2015] TASFC 8.
5. At [19].
6. At [21], [59], [70].
7. *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 355–6.
8. At [27].
9. At [27].
10. At [28].
11. At [28].
12. At [29].
13. At [30].
14. At [31] – [33].
15. At [31] – [33].
16. At [26].
17. At [34].
18. At [36] and [41].
19. (1997) 188 CLR 159.
20. *Badenach* at [47].
21. At [45].
22. At [47].
23. At [56].
24. At [58].
25. At [57] – [59], and also at [62] – [63].
26. At [64].
27. At [66] – [68].
28. At [74].
29. At [83] – [91].
30. At [92].

The law relating to penalties

John Eldridge reports on *Paciocco v Australia and New Zealand Banking Group Limited.*

On 27 July 2016, the High Court handed down the latest in a series of significant decisions on the scope and content of the rule against penalties ('the penalty rule'). *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28 (*Paciocco*) involved a challenge to the enforceability of credit card late payment fees charged by the ANZ. The fees were impugned on two independent bases. It was first contended that the fees offended the general law rule against penalties. It was further argued that the charging of the fees contravened the statutory proscription of unconscionable conduct and that the relevant terms of the credit card contracts were unjust and unfair within the meaning of a number of statutory provisions.[1] The court (constituted by French CJ, Kiefel, Gageler, Keane and Nettle JJ) rejected both of these contentions by 4:1 (Nettle J dissenting).

The Penalty Rule in flux

Recent years have seen a number of significant developments in the law relating to penalties. The first key decision was that in *Andrews v Australia and New Zealand Banking Group Limited* (2012) 247 CLR 205 (*Andrews*), an earlier instalment in the representative proceedings of which *Paciocco* is the conclusion. *Andrews* involved an appeal against the decision by Gordon J (delivered when her Honour was a member of the Federal Court of Australia) that non-payment fees, honour fees, dishonour fees and overlimit fees were not capable of being characterised as penalties as they were not payable upon breach of contract.[2] In arriving at this conclusion, Gordon J considered herself bound by the decision of the New South Wales Court of Appeal in *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd* (2008) 257 ALR 292, in which it was held that the scope of the penalty rule was limited to provisions triggered by breach of contract.

In allowing the appeal, the High Court rejected the contention that the equitable jurisdiction to relieve against penalties had 'withered on the vine', declaring instead that the jurisdiction continued to exist and could offer relief in an appropriate case.[3] Significantly, the scope of this extant equitable jurisdiction was held not to be limited to provisions which are triggered by breach of contract.[4]

The decision in *Andrews* has been the subject of considerable comment, and not inconsiderable criticism.[5] Most significantly, it was expressly not followed by the Supreme Court of the United Kingdom in *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Limited v Beavis* [2015] UKSC 67; [2015] 3 WLR 1373 (*Cavendish*).[6] Declaring the decision in *Andrews* to be 'a radical departure from the previous understanding of the law',[7] Lord Neuberger and Lord Sumption stated:

> [T]he High Court's decision does not address the major legal and commercial implications of transforming a rule for controlling remedies for breach of contract into a jurisdiction to review the content of the substantive obligations which the parties have agreed. Modern contracts contain a very great variety of contingent obligations. Many of them are contingent on the way that the parties choose to perform the contract … The potential assimilation of all these to clauses imposing penal remedies for breach of contract would represent the expansion of the courts' supervisory jurisdiction into a new territory of uncertain boundaries, which has hitherto been treated as wholly governed by mutual agreement.[8]

This divergence between the law of the United Kingdom and that of Australia in respect of the scope of the penalty rule would be significant by itself.[9] But the decision in *Cavendish* was also noteworthy in that the Supreme Court engaged in an extensive re-examination of the status of Lord Dunedin's seminal 'tests' for gauging whether a provision is penal.[10] Lord Neuberger and Lord Sumption concluded that:

> The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation … In the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach, and we therefore expect that Lord Dunedin's four tests would usually be perfectly adequate to determine its validity. But compensation is not necessarily the only legitimate interest that the innocent party may have in the performance of the defendant's primary obligations.[11]

The *Paciocco* litigation

This survey of developments highlights the two distinct areas of recent activity in respect of the penalty rule. Though it is the question of the rule's scope which has sparked the more animated debate, it was chiefly the status of Lord Dunedin's tests which the judgments in *Paciocco* were expected to weigh in upon.[12] This was because the credit card late fees which were the subject of the appeal were payable upon breach of contract, and thus fell within uncontroversial territory as a matter of the rule's scope.[13]

The first-instance decision in *Paciocco* was delivered in the Federal Court by Gordon J, and fell for determination against the backdrop of the formal declaration in *Andrews*. The matter at first instance involved a determination of whether any or

all of credit card late fees, non-payment fees, honour fees, dishonour fees and overlimit fees offended the penalty rule or any of a number of statutory provisions.[14] Mr Paciocco was successful in respect of the credit card late payment fees alone.[15] Key to Gordon J's decision in respect of the characterisation of the credit card late payment fees was her Honour's approach to the parties' competing contentions respecting the relevant loss or cost consequent upon a customer making a late payment of a sum due under a credit card contract.

Mr Paciocco led expert evidence which sought to quantify 'how much money it would take to restore ANZ to the position it would have been in if the particular event giving rise to the entitlement to charge [the credit card late payment fee] had not occurred'.[16] The incremental operational costs incurred by ANZ's Collections Business Unit in contacting Mr Paciocco after each event of default were examined, and were found to amount to an average of $2.60.[17]

ANZ led expert evidence respecting 'the costs that may have been incurred by ANZ in connection with the occurrence of events that gave rise to an entitlement to charge [the credit card late payment fee]'.[18] ANZ's evidence highlighted three distinct categories of cost which were incurred by ANZ in consequence of late credit card payments.[19] These were provisioning costs (being diminutions in the value of customer accounts referable to an increased probability of default), regulatory capital costs (defaults operate to increase the amount of capital required to be held by the bank in order to comply with prudential regulations) as well as operational costs.[20] ANZ's evidence assessed the average cost of a late payment under Mr Paciocco's credit card contracts as amounting to a sum in excess of $50 in respect of one of Mr Paciocco's accounts and a sum in excess of $35 in respect of another.[21] As the credit card late fees applicable to Mr Paciocco were $35 prior to December 2009 and $20 thereafter,[22] the difference between the parties' contentions as to ANZ's costs were of great significance.

Gordon J commenced her analysis by noting that '[t]he same fee was payable regardless of whether the customer was 1 day or 1 week late (or longer), and regardless of whether the amount overdue was $0.01 (trifling), $100, $1000 or even some larger amount',[23] such that a presumption arose as to the penal character of the impugned provisions.[24] Her Honour then proceeded to ask 'to what extent (if any) did the amount stipulated to be paid exceed the quantum of the relevant loss or damage which can be proven to have been sustained by the breach, or the failure of the primary stipulation, upon which the stipulation was conditioned'.[25] In answering this question, her Honour rejected the contentions by ANZ as to the proper assessment of the costs occasioned by its customers' defaults. Gordon J explained that 'provisions and regulatory capital [are] part of the costs of running a bank in Australia … [n]o increase in them [can] be directly or indirectly related to any of the payments by Mr Paciocco'.[26] Her Honour concluded that the credit card late payment fees were penalties. She rejected Mr Paciocco's contentions in respect of the other exception fees.

The ANZ appealed against Gordon J's conclusion in respect of the credit card late payment fees. Mr Paciocco appealed against her Honour's conclusions in respect of the other classes of exception fees noted above. In the Full Court, Allsop CJ (who gave the principal judgment) criticised Gordon J's approach as having involved 'an ex post inquiry of actual damage as a step in assessing whether the prima facie penal character of the late payment fee was rebutted',[27] and an impermissible narrowing of 'the content of the notion of genuine pre-estimate of damage as a reflex of penalty'.[28] Allsop CJ concluded that the costs set out in the evidence led by ANZ could legitimately be taken into account when assessing whether the late credit card payment fees were penal.[29] His Honour ultimately concluded that 'the fees were not demonstrated to be 'extravagant, exorbitant or unconscionable',[30] and thus were not penalties. His Honour also rejected Mr Paciocco's statutory claims.

As noted above, it was the credit card late payment fees alone which remained in issue when the matter reached the High Court. At the heart of the resolution of the appeal was the question of whether the costs identified by ANZ could legitimately be taken into account when assessing whether the impugned provisions were penal. All members of the court with the exception of Nettle J were of the view that these costs could be taken into account.

Kiefel J (with whom French CJ agreed in relation to penalties), framed the question as being that of 'whether the sum is 'out of all proportion' to the interests said to be damaged in the event of default'.[31] Her Honour went on to note that '[t]he ANZ had an interest in receiving timeous repayment of the credit that it extended to its customers … late payment impacted the ANZ's interests in three relevant respects: through operational costs, loss provisioning and increases in regulatory capital costs'.[32] On this footing, Kiefel J concluded that Gordon J erred in declining to take account of the costs identified by ANZ.[33] Her Honour also agreed that Mr Paciocco's statutory claims ought to fail for the reasons given by Keane J.

Gageler J framed the inquiry as turning upon the question of whether 'the stipulation in issue is properly characterised as having no purpose other than to punish'.[34] Insofar as this formulation differs from that adopted in *Cavendish*, his

Honour noted:

> Framing the inquiry in terms of whether the stipulation in issue is properly characterised as having no purpose other than to punish compels a more tailored inquiry into the commercial circumstances within which the parties entered into the contract containing the stipulation than might be involved in asking, as did the Supreme Court of the United Kingdom in *Cavendish*, whether the stipulation serves a 'legitimate interest'. That is not, of course, to say that the differently framed inquiries might not lead to the same result.[35]

His Honour went on to conclude:

> Each category of costs identified by [ANZ] represented a commercial interest of ANZ in ensuring observance by its consumer credit card customers of the principal stipulation in each of their contracts for payment of the minimum monthly payment by the due date … In light of those interests, it cannot be concluded that the inclusion in the credit card contracts of the stipulation for charging and payment of the late payment fee properly had no purpose other than to punish the account holder in the event of late payment. The stipulation was not merely in terrorem; the late payment fee was not just a punishment.[36]

In setting out the guiding test, Keane J quoted with approval the statement in *Cavendish* that whether an impugned provision is penal turns on 'whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract'.[37] His Honour went on to state that Gordon J 'erred in treating characterisation of the late payment fee as turning upon a comparison between the quantum of the fee and the amount that might have been recovered in an action for damages',[38] holding instead that '[a] genuine pre-estimate of … damage may encompass items of loss actually suffered, albeit too remote to be compensable by way of damages … [a]n agreement for the recovery of such loss is consistent with the absence of a punitive purpose'.[39] Finally, his Honour rejected Mr Paciocco's statutory claims for reasons with which French CJ and Kiefel J concurred.[40]

Nettle J was the sole dissentient. His Honour commenced his analysis by stressing that Lord Dunedin's approach in *Dunlop* is consonant with the law as stated in *Andrews* and *Cavendish*. His Honour explained:

> Asking whether the sum agreed is out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation reprises the test formulated by Lord Robertson *Clydebank Engineering and Shipbuilding Company v Yzquierdo y Castaneda* … for application to a case where the damage suffered by the innocent party as a result of a breach is incapable of precise or even approximate quantification. The *Andrews* description of *Dunlop*, as being concerned with whether the sum agreed was commensurate with the interest protected by the bargain, was part of the Court's consideration of cases in which damage is incapable of even approximate quantification. Nothing said in *Andrews* runs counter to the approach adopted in *Ringrow* that 'in typical penalty cases, the court compares what would be recoverable as unliquidated damages with the sum of money stipulated as payable on breach'.[41]

Nettle J's view of the matter was ultimately a product of his Honour seeing the case as 'one of the straightforward kind in which the *Dunlop* tests are 'perfectly adequate' to resolve the issues',[42] rather than as 'one of the more complex types of cases referred to in *Cavendish* which necessitate considerations beyond a comparison of the agreed sum and the amount of recoverable damages'.[43] As Nettle J found the impugned provisions to be penal on this footing, his Honour did not find it necessary to consider the various statutory claims.[44]

Conclusion

Though *Paciocco* offers guidance as to the status of Lord Dunedin's tests and the proper approach to the assessment of a term which is prima facie penal, there may be a sense of disappointment in some quarters that the court declined to comment at length on the divergence between the United Kingdom and Australia as to the rule's scope.[45] It may therefore be salutary to conclude by noting the comments of French CJ in respect of the divergence:

> Differences have emerged from time to time between the common law of Australia and that of the United Kingdom in a number of areas. Those differences have not heralded the coming of winters of mutual exceptionalism. All of the common law jurisdictions are rich sources of comparative law whose traditions are worthy of the highest respect, particularly those of the United Kingdom as the first source. No doubt in a global economy convergence, particularly in commercial law, is preferable to divergence even if harmonisation is beyond reach. The common law process will not always be the best way of achieving convergence between common law jurisdictions. The penalty rule in the United Kingdom, a product of that process, was described by Lord Neuberger and Lord Sumption in their joint judgment in *Cavendish* as 'an ancient, haphazardly constructed edifice which has not weathered well'. More than one account of its construction

> and more than one view of whether it should be abrogated or extended or subsumed by legislative reform is reasonably open. There has been much activity in this area within national jurisdictions and in the development of internationally applicable model rules and principles … It may be that in this country statutory law reform offers more promise than debates about the true reading of English legal history.[46]

Endnotes

1. The appellants relied upon: *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CB, 12CC, 12BG; *Fair Trading Act 1999* (Vic) ss 8, 8A, 32W; *National Consumer Credit Protection Act 2009* (Cth) sch 1 (the National Credit Code) s 76. This note is principally concerned with the significance of the decision insofar as it relates to the rule against penalties.
2. *Andrews v Australia and New Zealand Banking Group Limited* (2011) 211 FCR 53. The appeal against the first-instance decision was removed to the High Court pursuant to *Judiciary Act 1903* (Cth) s 40(2).
3. This involved a rejection of the view of Mason and Wilson JJ in *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, 191.
4. *Andrews*, 223.
5. John Carter, Wayne Courtney, Elisabeth Peden, Andrew Stewart and Gregory Tolhurst, 'Contractual Penalties: Resurrecting the Equitable Jurisdiction' (2013) 30 Journal of Contract Law 99; Edwin Peel, 'The Rule Against Penalties' (2013) 129 *Law Quarterly Review* 152; Anthony Gray, 'Contractual Penalties in Australian Law after Andrews: An Opportunity Missed' (2013) 18(1) *Deakin Law Review* 1; Paul Davies and P G Turner, 'Relief Against Penalties Without a Breach of Contract' (2013) 72(1) *Cambridge Law Journal* 20.
6. For a discussion of the decision, see Jonathan Morgan, 'The Penalty Clause Doctrine: Unlovable but Untouchable' (2016) 75(1) *Cambridge Law Journal* 11; John Eldridge, 'Revisiting the Penalty Rule' (2015) *Bar News* (Summer) 23.
7. *Cavendish*, [41].
8. *Cavendish*, [42].
9. For a detailed discussion see: Sirko Harder, 'The Scope of the Rule Against Contractual Penalties: A New Divergence' in Andrew Robertson and Michael Tilbury (eds), *Divergences in Private Law* (Hart Publishing, 2016).
10. These tests are derived from Lord Dunedin's statement of the law in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79.
11. *Cavendish*, [32].
12. See, e.g., Katy Barnett, 'Are Late Payment Fees on Credit Cards Enforceable?' (2015) 37(4) *Sydney Law Review* 595, 599 – 602.
13. Paciocco, [126].
14. See footnote 1.
15. *Paciocco v Australia and New Zealand Banking Group Limited* (2014) 309 ALR 249.
16. See the summary of this evidence by Gageler J: Paciocco [91] – [102].
17. Ibid.
18. Ibid.
19. Ibid.
20. Ibid.
21. Ibid.
22. Ibid.
23. *Paciocco v Australia and New Zealand Banking Group Limited* (2014) 309 ALR 249, 280.
24. Ibid.
25. Ibid 283.
26. Ibid 287.
27. *Paciocco v Australia and New Zealand Banking Group Limited* (2015) 236 FCR 199, 236.
28. Ibid 244.
29. Ibid 243.
30. Ibid 251.
31. Paciocco, [57].
32. Ibid [58].
33. Ibid [66].
34. Ibid [165].
35. Ibid [166].
36. Ibid [176].
37. Ibid [270].
38. Ibid [279].
39. Ibid [283].
40. Ibid [286] – [304].
41. Ibid [320].
42. Ibid [322].
43. Ibid.
44. Ibid [375].
45. But see Gageler J's discussion at [118] – [127].
46. *Paciocco*, [10].

Trials without juries

Lucy Robb Vujcic reports on *Alqudsi v The Queen* [2016] HCA 24.

In *Alqudsi v The Queen* [2016] HCA 24, a majority of the High Court held that s 80 of the Constitution prevents state courts exercising federal jurisdiction from trying indictable offences in the absence of a jury. In the course of doing so, the court reaffirmed the principles expressed in *Brown v The Queen* [1968] HCA 11; (1968) 160 CLR 171.

The procedural background

The hearing arose out of a motion by Mr Alqudsi for an order that his trial proceed by judge alone under s 132 of the *Criminal Procedure Act 1986* (NSW) ('the CPA').

Mr Alqudsi was charged with seven offences against s 7(1)(e) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) (the CFIR Act=). Each count charged him with performing services in New South Wales for another person with the intention of supporting or promoting the commission of an offence against s 6 of the Act. Section 6 of the CFIR Act prohibits engagement in hostile activity in a foreign state and entry into a foreign state with intent to engage in such activity. The penalty for commission of an offence under s 7 is imprisonment for 10 years. Section 9A of the Act provides that prosecutions shall be on indictment.

The trial was listed to commence on 1 February 2016 before a judge and jury in the Supreme Court of NSW. The Supreme Court is conferred with jurisdiction to try a person on indictment for a Commonwealth offence by s 68(2)(c) of the *Judiciary Act 1903* (Cth) ('the Judiciary Act'). The jurisdiction of the court is expressly made subject to s 80 of the Constitution.

On 25 November 2015, the applicant filed a notice of motion in the Supreme Court seeking a trial by judge alone order under s 132 of the CPA. Section 132 relevantly provides:

(1) An accused person or the prosecutor in criminal proceedings in the Supreme Court or District Court may apply to the court for an order that the accused person be tried by a judge alone (a 'trial by judge order').

(2) The court must make a trial by judge order if both the accused person and the prosecutor agree to the accused person being tried by a judge alone.

(3) If the accused person does not agree to being tried by a judge alone, the court must not make a trial by judge order.

(4) If the prosecutor does not agree to the accused person being tried by a judge alone, the court may make a trial by judge order if it considers it is in the interests of justice to do so.

Under s 68(1)(c) of the *Judiciary Act*, state laws regarding the procedure for trial and conviction on indictment can be applied to persons accused of federal offences.

The High Court ordered the removal of the notice of motion to the court. The question was whether s 68(1)(c) could have any operation in relation to s 132 of the CPA given s 80 of the Constitution. Section 80 provides:

> The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

By a majority of six to one, French CJ dissenting, the High Court answered that it could not. In essence, s 132 creates a mechanism that allows a judge, on the application - one or both parties, to opt out of trial by jury in prosecutions for indictable offences. This is contrary to the mandatory terms of s 80. Therefore, s 132 can have no application in the context of an indictable federal offence.

The arguments

The applicant accepted that s 80 was mandatory on its face. Nevertheless, he submitted that s 80 permitted trials of indictable federal offences by judges alone in 'exceptional circumstances.' The statutory conditions governing the exercise of a judge's power to make orders under s 132 were said to be exemplars of 'exceptional circumstances.' Accordingly, s 132 could be picked up and applied by s 68(1) of the Judiciary Act because there was no inconsistency between the requirements of s 80 and the CPA.

The attorneys-general of the Commonwealth, Tasmania, Queensland and Victoria intervened, largely in support of the arguments raised by the applicant (hereafter, 'the interveners'). The attorney-general for South Australia also intervened on a more limited basis in relation to the proper construction of s 80.

The attorney-general for the Commonwealth made three further submissions. First, that as a matter of construction, there was no 'trial by jury' unless and until all the conditions specified by the parliament that might lead to a judge alone trial (including s 132 of the CPA) had been exhausted. Second, that s 132 was an 'elective mechanism' that mirrored, 'functionally and substantively', similar mechanisms that existed prior to the enactment of s 80. Third, that s 132 fully respected the individual and community values that underpinned s 80.

The applicant and interveners submitted more generally that s 80 should be construed purposively. Viewed through that lens, it accommodated elective mechanisms for judge-alone trials in federal indictable offences. Any other construction ignored the historical circumstances within which s 80 was enacted, as well as developments in the use of jury trials since federation.

To succeed, the applicant and the interveners had to address the court's earlier decision in *Brown v The Queen*[1]. That case concerned a South Australian statute that enabled an accused person to elect to be tried by judge alone. The High Court held that the statute was inconsistent with s 80 when applied in the context of a federal indictable offence.

The Brown decision

In *Brown*, the Commonwealth intervened and, in an argument adopted by Brown, submitted that s 80 confers a personal right or guarantee, capable of being waived by those who stood to benefit from it. Brennan, Deane and Dawson JJ separately held that s 80 was not a personal right or privilege. It was an integral part of the structure of government and the distribution of judicial power under Chapter III of the Constitution. Moreover, it was mandatory.

The applicant and the interveners submitted that *Brown* ought to be distinguished because it was limited to instances of 'unilateral waiver' of the right to jury trial.

The majority in *Alqudsi* rejected the submission. They held that the decision in *Brown* was based on the structure of the Constitution, rather than the specific characteristics of the South Australian Act. As such, there was no reason to distinguish the two cases.

The applicant's only recourse was to have *Brown* overturned. For a variety of reasons, the majority refused to do so. The salient points of the different judgments are set out below.

Section 80 in historical perspective

The applicant submitted that *Brown* adopted an overly literalist interpretation of the text. The proper approach was to construe s 80 in its historical context. According to the Commonwealth, this meant acknowledging the prevalence of elective-mechanisms for non-jury criminal trials at the time of federation, as well as the continued evolution in jury trials since.

The joint judgment of Kiefel, Bell and Keane JJ addressed these arguments. Their Honours found that by Federation, there was a well-understood distinction between trial on indictment and summary proceedings. They also acknowledged that, by federation, the Australian colonies had enacted legislation permitting summary disposal of indictable offences. The problem with the applicant's and interveners' argument, however, was that it 'equat[ed] trial on indictment before a judge and jury with the summary trial of an indictable offence before two justices or a magistrate.'[2]

Their Honours held that the two processes are fundamentally distinct. In the former, an offence is to be tried on indictment; in the latter, the offence (although serious enough to merit indictment) is, by promulgation of parliament, disposed of summarily. This was the basis of the High Court's decision in *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (*Archdall*) (1928) 4 CLR 128; [1928] HCA 18.

The drafting history of s 80 makes it clear that the draftsmen went through a careful and deliberate process of determining which type of offences would fall within the remit of the Constitution. Any argument that suggested s 80 could accommodate different styles of federal trials overlooked this drafting history.

The applicant and the Commonwealth treated the *Archdall* decision in different ways. The applicant argued that the ruling in *Archdall* was a basis for criticising the current construction of s 80 because it allowed parliament to 'eviscerate' s 80 and circumvent its protections by enacting laws declaring that serious offences would not be tried on indictment. The Commonwealth submitted that *Archdall* was evidence that s 80 could flexibly accommodate laws that evoked the same values of 'parliamentary designation, the accused's participation and community involvement' that enlivens s 132 of the CPA.[3] According to the Commonwealth, s 132 was merely the 'functional and substantive' successor to the provisions sanctioned in *Archdall*.[4]

Their Honours considered both arguments to be fundamentally misconceived. The drafting history of s 80 makes it clear that the draftsmen went through a careful and deliberate process of determining which type of offences would fall within the remit of the Constitution. Any argument that suggested s 80 could

accommodate different styles of federal trials overlooked this drafting history.

Furthermore, it is no argument to say that s 80 cannot be construed to allow parliament to choose which offences shall be tried on indictment and which shall not. This is the clear import of the provision. Parliament shall choose and once it does, the section applies without equivocation.

The submission that s 80 could adapt or evolve to accommodate other methods of trial for indictable federal offences ignored the simple, mandatory language of the text. As the joint judgment of Kiefel, Bell and Keane JJ acknowledged: 'It suffices to observe that whether one characterises trial on indictment by judge alone as a qualification relating to the operation of an evolving institution of trial by jury or not, trial by judge alone is not trial by jury.'[5]

The democratic purpose of s 80

Gageler J articulated a further reason for dismissing the motion. While his Honour was prepared to accept the merits of adopting a purposive approach to the text, his Honour held that the argument failed because the applicants ascribed to s 80 the wrong purpose. In his Honour's view, the purpose of s 80 went beyond protection of personal liberty, or the broader public interest in the administration of justice. Section 80 was designed to protect democracy, by ensuring that the power to make decisions concerning the personal liberty of people accused of serious crimes was not removed from the populace. The submissions of the applicant and the interveners overlooked this factor. Once the democratic purpose of s 80 was understood, it was clear that s 80 could not be interpreted in a way that departed from its basic tenets.

Section 80 and the federal system

Nettle and Gordon JJ dismissed the motion on the further basis that it was 'directly contrary to principles which underpin our federal system of government and which have stood since at least *R v Kirby; Ex parte Boilermakers' Society of Australia* [1956] HCA 10; (1956) 94 CLR 254'. Their Honours held that 'Chapter III is an exhaustive statement of the manner in which the judicial power of the Commonwealth can be exercised.'[6] Simply put, this meant that federal jurisdiction cannot be exercised in a manner inconsistent with the requirements of Chapter III, including s 80. No Commonwealth or state legislature can enact laws that would require federal judicial power to be exercised inconsistently. Thus, s 132 of the CPA, which is valid in the context of state criminal jurisdiction, can have no operation in relation to federal criminal jurisdiction.

The dissent

French CJ was the sole voice of dissent.

His Honour considered that the decision in *Brown* should be reopened on the ground that 'the principle which underpinned the ruling was too broad, imposing an unwarranted rigidity upon the construction of s 80.'[7] His Honour accepted that s 80 had both an institutional dimension and a rights protective dimension.[8] Adopting the language of Gaudron J in *Cheng v The Queen* [2000] HCA 53; (2000) 203 CLR 248 at 278, his Honour held that, like any other constitutional guarantee, 'it should be construed liberally, and not pedantically confined.'[9] There was no basis for excluding elective mechanisms for judge alone trials on the basis of the drafting history, as the Constitution's framers had probably not turned their mind to the question. Moreover, if a rigid construction were adopted, it would lead to potential incongruity. His Honour was doubtful of any construction that would vest such absolute power in the legislature that it could enact a law that gave an accused the power to choose to have a summary trial but, at the same time, prohibit a law enabling an accused being tried on indictment from waiving the right to a jury.

The ultimate point was that the Constitution's final and paramount purpose is to do justice.[10] Section 132 does no injustice. On the contrary, an overly-rigid approach to s 80 was likely to be productive of injustice. On this basis, his Honour concluded, the law ought to be reconsidered.

Endnotes

1. [1968] HCA 11; (1968) 160 CLR 171.
2. At [99].
3. At [106].
4. At [106].
5. At [98].
6. At [168].
7. At [76].
8. At [70].
9. At [58].
10. At [1].

Federal application of state laws

Vanja Bulut reports on *Mok v Director of Public Prosecutions (DPP) (NSW)* (2016) 330 ALR 201; (2016) 90 ALJR 506; [2016] HCA 13.

This case concerned Mr Mok, the appellant, who was arrested in Victoria pursuant to a warrant issued in New South Wales and, during his transportation, attempted to escape.

The appellant was charged with attempting to escape from lawful custody in NSW (notwithstanding that he was in Victoria at the time), by virtue of the *Service and Execution of Process Act 1992* (Cth) (the SEP Act).

The very narrow question for the High Court was whether the SEP Act, in applying the NSW law, adopted the elements of the NSW offence.

Facts

The appellant was arrested and charged in NSW in February 2003 with fraud offences. He pleaded guilty in the Local Court and was required to appear in the District Court for sentencing in April 2006. The appellant failed to appear before the District Court and Freeman DCJ issued a Bench Warrant to apprehend him.

Some years later, in December 2011, the appellant was charged in Victoria with two Commonwealth offences relating to the possession of a false Australian passport and money laundering. In February 2013, the appellant appeared in the Melbourne Magistrates' Court on those charges and as he left the court he was arrested by an officer of the Victorian Police pursuant to the warrant which had been issued in NSW by Freeman DCJ, by operation of s 82 of the SEP Act.

The following day, on 27 February 2013, a Victorian magistrate issued a warrant headed 'Service and Execution of Process Act 1992 Warrant to Remand Person to Another State'. The warrant commanded a named NSW police officer to take the appellant to the Sydney Police Centre in NSW and take him before a magistrate for that state to answer the charges and be further dealt with according to law. This order was made pursuant to s 83(8)(b) of the SEP Act.

The next day, two NSW police officers escorted the appellant to Tullamarine Airport (a 'Commonwealth place', the relevance of which will be seen later), where he was to board a plane to Sydney. At the airport, the appellant tried to escape by running away from the officers. He ran for about 100 metres before he was re-arrested.

On his return to New South Wales he was charged under s 310D of the *Crimes Act 1900* (NSW) (the Crimes Act), being the offence of escaping or attempting to escape from lawful custody.

Although the charge as set out in the Court Attendance Notice was misleading as it conveyed that it relied upon the direct application of s 310D of the Crimes Act, in fact the appellant was charged with an offence pursuant to s 310D of the Crimes Act, applied by virtue of s 89(4) of SEP Act.

First instance

At first instance, the magistrate correctly treated s 310D of the Crimes Act as being applicable by virtue of s 89(4) of SEP Act. However, the magistrate dismissed the charges on the basis that the elements of the s 310D charge could not be made out, namely the appellant was not an 'inmate' (as defined) at the time of the attempted escape.[1]

NSW Supreme Court and Court of Appeal

On appeal to the NSW Supreme Court, Rothman J allowed the DPP's appeal and set aside the order of the magistrate and remitted the hearing of the charge to the Local Court.[2]

His Honour held that s 83(8)(b) of the SEP Act attracted the application of s 89(4), which in turn applied s 310D of the Crimes Act to the appellant's conduct as an offence under federal law. His Honour found that the magistrate had failed to appropriately take into account the effect of the SEP Act on s 310D of the Crimes Act.

The Court of Appeal (Meagher, Hoeben and Leeming JJA) dismissed Mr Mok's appeal.[3] Their Honours found that Rothman J was correct to conclude that the appellant must be taken to have been charged with a federal offence and rejected the common premise that it was a necessary condition of the application of s 310D of the Crimes Act, by operation of s 89(4) of the SEP Act, that the appellant satisfy the definition of 'inmate'.

The Court of Appeal held that the new federal offence created by s 89(4) of the SEP Act, acting upon s 310D of the Crimes Act, applied to all persons being taken to NSW in compliance with an order under s 89(1) of the SEP Act, and the appellant was such a person.

The High Court decision

The High Court (French CJ, Kiefel, Bell, Keane and Gordon JJ) unanimously dismissed Mr Mok's appeal, but three separate reasons for the decision were provided.

Whilst French CJ, Kiefel, Bell and Keane JJ agreed with the Court of Appeal decision, Gordon J disagreed, but nonetheless dismissed the appeal on different grounds.

What is the effect of s 89(4) of the SEP Act?

Section 89(4) of the SEP Act states that:

> (4) The law in force in the place of issue of a warrant, being the law relating to the liability of a person who escapes from lawful custody, applies to a person being taken to the place of issue in compliance with an order mentioned in subsection (1).

The question for the High Court was whether it was necessary to show that the appellant was an 'inmate' (as defined in s 310D of the Crimes Act) for a conviction under the federal offence created by s 89(4) of the SEP Act.

French CJ and Bell J found that there is no reason, in principle, which prevents the Commonwealth from adopting the text of a state law and applying it analogically or modifying it.[4]

Their Honours found that the construction of s 89(4) of the SEP Act does not require a binary choice between picking up s 310D unaltered and picking it up altered so as to eliminate the requirement that the person attempting to escape must be an 'inmate' (as defined). Analogical application does not strictly involve alteration, but rather, it is a way of describing how s 89(4) uses the text of the relevant state law.[5]

On the proper construction of the provision, taking into account the text, context and purpose of s 89(4), their Honours found that a general law prohibiting escape or attempted escape from lawful custody, such as s 310D of the Crimes Act, would answer the requirements of s 89(4).[6]

As such, the Court of Appeal was right in finding that s 89(4) treats the applicable aspects of s 310D as surrogate federal law 'upon the assumption that escape from lawful custody imposed by an order made by a magistrate in another state is not outside their field.'[7]

Kiefel and Keane JJ reinforced the Court of Appeal's finding that, put simply, s 89(4) of the SEP Act applied to the appellant because he was a person being taken to the place of issue of the warrant in compliance with an order made under s 89(1) of the SEP Act.[8] Their Honours agreed with French CJ and Bell J as to the general approach of resolving the question of the application of s 89(4), but found that s 89(4) more directly answers the question of its application.[9] The provision describes the relevant state law in force as a 'law relating to the liability of a person who escapes from lawful custody' and their Honours concluded that those words are referable to a law which makes it an offence to escape from lawful custody, without more.[10] Accordingly, s 89(4) does not pick up the Crimes Act's reference to an 'inmate'.

Gordon J agreed that the appeal should be dismissed but found that, contrary to the conclusion reached by the Court of Appeal, all elements of s 310D(a) of the Crimes Act must be proved.[11] Her Honour reached this conclusion on the basis that, in enacting s 89(4) of the SEP Act, the parliament made a deliberate decision to enact an 'application' provision and it did so for the purpose of creating liability by reference to a state law.[12] Her Honour found that, if s 89(4) applied the state law otherwise than according to its terms, that purpose would be frustrated because it would no longer be applying the chosen state law but rather be creating a new and independent federal offence, the elements of which are unclear.[13]

In this case, her Honour found that the appeal should be dismissed as her Honour was satisfied that the elements of s 310D of the Crimes Act were capable of proof in relation to the appellant.

Does the *Commonwealth Places (Application of Laws) Act 1970* (Cth) apply?

The High Court also considered the submission made by the appellant that if he had committed an offence, it would have been a Commonwealth offence in light of the *Commonwealth Places (Application of Laws) Act 1970* (Cth) (CPAL Act). Section 4(4) of the CPAL Act makes provision for the application of the laws of a state (which have extraterritorial effect) to Commonwealth places. The appellant submitted that the CPAL Act applied the applicable state law (in this case, s 310D of the Crimes Act) without rewriting it. That is to say, by virtue of the CPAL Act, s 310D applies at Tullamarine Airport (a 'Commonwealth place') and he is required to have been an 'inmate' within the meaning of s 310D in order to offend against it.

French CJ and Bell J found that, to the extent that s 310D has extra-territorial operation, that extra-territorial operation did not operate in this case because any such operation was displaced by s 8(4) of the SEP Act, which states that the SEP Act applies to the exclusion of a law of a state.[14] Gordon J came to the same conclusion.[15]

Endnotes

1. *Police v Mok*, Local Court of New South Wales, 1 July 2013, unreported.
2. *Director of Public Prosecutions (NSW) v Yau Ming Mathew Mok* [2014] NSWSC 618.
3. *Mok v Director of Public Prosecutions (DPP) (NSW)* (2015) 90 NSWLR 492; (2015) 320 ALR 584; (2015) 294 FLR 432; [2015] NSWCA 98.
4. At [36].
5. At [37].
6. At [37] and [39].
7. At [42].
8. At [52].
9. At [57].
10. At [58].
11. At [116].
12. At [105].
13. At [105].
14. At [20].
15. At [91].

The Bell Act tolls for Western Australia

Nicolas Kirby reports on *Bell Group NV (In Liquidation) v Western Australia* [2016] HCA 21.

This case concerned the constitutional validity of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) (the Bell Act).

The High Court heard three proceedings where the plaintiffs, each significant creditors[1] of the Bell Group, and the ATO (also a significant creditor)[2], challenged the validity of the Bell Act. The plaintiffs argued that the Act was invalid by the operation of s 109 of the Constitution for being inconsistent with the *Income Tax Assessment Act 1936*, the *Taxation Administration Act 1953*, the *Corporations Act 2001* and the *Judiciary Act 1903*. In two proceedings, the plaintiffs further argued that the Bell Act infringed Chapter III of the Constitution.

The court held that the Bell Act was invalid in its entirety for its inconsistency with the two Tax Acts.[3] The court did not address the further grounds of alleged validity.

French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ delivered a joint judgment. Gageler J delivered separate reasons, agreeing in the plurality's conclusions, but basing his conclusion on narrower grounds.

The context of the Bell Act

The Bell Group, once controlled by Robert Holmes a Court and later Alan Bond, collapsed in the 1990s and has been in liquidation and, it seems, litigation, ever since.

The liquidator of Bell Group received a $1.7 billion settlement from a consortium of banks. The Western Australian Government then enacted the Bell Act 'to provide a mechanism, that avoids litigation, for the distribution' of those funds.[4]

The scheme set up by the Bell Act

The Bell Act established a fund and an authority to administer it. Section 22 of the Bell Act provided that the property of the various Bell companies would be transferred to the authority.[5] Further provisions directed how creditors should lodge proofs of debt with the authority. Part 4 of the Bell Act was:[6]

> ...entitled 'Completion of winding up of WA Bell Companies', but that heading is misleading. The Part does not provide for the completion of the winding up… Rather, it provides for the termination of the winding up… under the *Corporations Act*, and, among other effects on creditors, the purported annihilation of the rights of the Commonwealth as creditor…

The authority had an absolute discretion to determine the property and liabilities (including their priority) of each Bell Company. The rules of natural justice did not apply. The authority had an absolute privilege in relation to its recommendation to the governor.[7]

The governor had a further discretion whether to pay a creditor. Or not. The governor was not required to give reasons and was not required 'to determine that any amount is to be paid to… any person on any account whatsoever.' And, once the governor's determination was made, every liability of each Bell Company to any person to whom nothing was paid was to be 'by force of this Act, discharged and extinguished.'[8]

Finally, though expressed not to affect the jurisdiction of the Supreme Court of WA to grand relief for jurisdictional error, the Bell Act provided that the acts of the governor, the minister, the authority and its administrator were final and conclusive, must not be challenged, appealed against, reviewed, quashed or called into question in any court and are not subject to review or remedy by way of prohibition, mandamus, injunction, declaration, certiorari or any remedy or writ to similar effect.[9]

Section 109 of the Constitution

Section 109 requires comparison between a Commonwealth law and a state law which creates rights, privileges or powers and duties or obligations said to be in conflict with that Commonwealth law. If any conflict exists, it is resolved in the Commonwealth's favour.

A 'direct inconsistency' occurs where the state law significantly alters, impairs or detracts from, the operation of the Commonwealth law. A conflict may also arise from the laws' legal operation or practical effect.

Section 109 invalidates the state law only so far as it is inconsistent. But, as Dixon J explained in *Wenn v A-G (Vic)* (1948) 77 CLR 84:

> … it does not intend the separation [of the inconsistent from the consistent parts of the State law] to be made where division is only possible at the cost of producing provisions which the State Parliament never intended to enact.

Inconsistency with the Tax Acts

The effect of the Tax Acts is that the production of a notice of assessment is conclusive evidence of the due making of the assessment of a tax liability and, other than in proceedings under Pt IVC of the TAA, that the assessment is correct. Accordingly, the amounts assessed against by the Bell Companies were debts due to the Commonwealth.[10]

The plurality explained the operation and effect of the Bell Act as follows:

> [56] [T]he State of Western Australia collects, pools, and vests in a State authority, the property of each WA Bell Company [and] then determines in its 'absolute discretion' who is paid an amount… (if anyone). And then, to the extent that the State of Western Australia chooses not to distribute the pooled property… the surplus vests in the State of Western Australia.
>
> [57] The Authority has an absolute discretion to determine the *existence of a liability*… to the [ATO]… also… as to the *quantification* of any liability… The Governor has an absolute discretion… whether to make a *payment*… and the *amount* to be paid… And the Governor is given the power to *extinguish* the tax debts of the Commonwealth simply by making *no* determination in respect of them… [their Honours' emphasis]
>
> [60] The Bell Act thus purports to create a scheme under which Commonwealth tax debts are stripped of the characteristics ascribed to them by the Tax Acts as to their existence, their quantification, their enforceability and their recovery.

The plurality also found that the Bell Act was inconsistent with ss 215 and 254 of the 1936 Tax Act that imposed obligations on the liquidator to retain the companies' assets so that provision may been made for tax which the company will be obliged to pay.

Section 22 of the Bell Act, by which the companies' property was vested in the authority, prevented the liquidator from complying with his obligations pursuant to the Tax Acts.[11] This inconsistency was sufficient, in Gageler J's view, to invalidate the Bell Act.

The court held that the parts of the Bell Act which were inconsistent with the Tax Acts were not able to be read down or severed[12] as they were 'so fundamental to the scheme' and 'so bound up with the remaining provisions that severance… would leave standing a residue of 'provisions which the state parliament never intended to enact.''[13]

Endnotes

1. Plurality at [14]*ff*.
2. Plurality at [16], [18].
3. Plurality at [9]; Gageler J at [78].
4. Plurality at [21].
5. Plurality at [30].
6. Plurality at [37].
7. Plurality at [40], [41].
8. Plurality at [44], [45].
9. Plurality at [49].
10. Plurality at [54].
11. Plurality at [65]; Gageler J at [80].
12. Plurality at [69]–[70]; Gageler J at [81].
13. Plurality at [70].

Legal change – the role of advocates

Chief Justice Robert French AC delivered the Sir Maurice Byers Lecture in the Bar Association Common Room on 22 June 2016.

Introduction

I learned from Maurice Byers a great advocate's perspective on the High Court — 'they're just chaps Bob, just chaps' — or so he told me, as we prepared for the hearing in *Koowarta v Bjelke-Peterson*[1] in 1982. As a description of the gender of the court it was accurate. I learned from him in *Fencott v Muller*[2] in 1983 that one line of dismissive humour could do more for a wide view of the corporations power than an hour of earnest argument. In 1986 on my appointment to the Federal Court he sent me a note expressing confidence that I would eventually be appointed to the High Court. Perhaps he was encouraging me to stay on for the long haul and was relying upon the proposition, a little like the one about monkeys typing Shakespeare, that given enough time almost anything has a finite probability of happening. Six years later, in 1993, I barely found the strength, when he appeared before me for the plaintiff in *Newcrest Mining (WA) Ltd v Commonwealth*,[3] on remitter from the High Court in all respects save for the constitutional question, to resist his siren song invitation to have a go at the constitutional question anyway. Our encounters were brief, but each a delight in its own way. I have been invited to present many lectures named after significant legal personalities. None has given me greater pleasure than the invitation to present this the 16th lecture in the series established by the New South Wales Bar Association to honour his memory. There are few public lectures named for advocates. Maurice Byers is properly honoured. He was an important figure in the development of Australian constitutional and public law. He was an unforgettable advocate and as those who had the privilege of working with him know he was a man of integrity, modesty and humour.

A search of the *Commonwealth Law Reports* discloses that Maurice Byers appeared in the High Court in more than 200 cases between 1946 and 1996. His first reported appearance was as junior to Spender KC representing one Caldwell who had been convicted of selling meat on the black market contrary to the National Security (Prices Regulations). The meat comprised two pounds and three ounces by weight of gravy beef and four lamb kidneys sold for three shillings and eight pence, being a greater price than the maximum of two shillings and four pence which was fixed in relation to those goods under the regulations. Mr Caldwell was sentenced to three months imprisonment and hard labour for that offence. The relevant regulation, however, was found invalid on appeal to a Court of Quarter Sessions and the conviction quashed. The informant, represented by two Kings Counsel, Mason KC, an uncle of Sir Anthony Mason, and Badham KC, leading Benjafield as junior counsel, appealed by special leave to the High Court. The appeal was allowed and the conviction restored.[4]

From a small and inauspicious beginning in *Horsey v Caldwell*, a beginning of the kind familiar to many advocates, Maurice Byers rose to answer the description that Sir Gerard Brennan applied to him in the first of these lectures as 'one of the towering figures of the bar'.[5] Of his ability to persuade the High Court, Sir Gerard spoke from personal experience:

> The High Court was his milieu. He knew its members well — indeed, he had led several of us at the Bar. He knew its cast of mind and, I suspect, its internal dynamics. His enjoyment of advocacy there evoked a corresponding judicial response. His forensic triumphs were notable. May I repeat the estimate I made from the bench on an earlier occasion: 'His participation in the work of this Court was perhaps no less on that side of the Bar table than it would have been on this.'[6]

And in his 2007 Byers Lecture, Justice Heydon remarked on what he called Maurice Byers' 'mesmeric powers over the High Court' and his extraordinarily high rate of victory and correspondingly great influence on constitutional development.[7]

Sir Anthony Mason cast some light on the relationship between Byers at the bar table and the justices on the bench in a paper on the 'Role of Counsel in Appellate Advocacy', delivered to the Australian Bar Association in 1984. Sir Anthony warned his listeners against reading lengthy passages from the court's decisions saying it was suggestive of a belief that the members of the court were ravaged by Alzheimer's disease. He added:

> The belief is unfounded. It is not shared by Sir Maurice Byers QC. Instead, he attributes to us an elephantine recollection of the most obscure decisions. Almost invariably he introduces a reference to authority by saying: 'Your Honours will forgive me for reminding you of ...'. He often delights in then mentioning a case which is a total stranger.[8]

My personal encounters with Maurice Byers were relatively few and relatively brief and I have already mentioned most of them, save one which I will mention in closing. It is in part through the prism of his work that I want to say something about advocacy and legal change, perhaps opening with his

own modest disclaimer in his 1987 article 'From the Other Side of the Bar Table: An Advocate's View of the Judiciary', when he wrote:

> [The advocates'] effect upon the law, and thus upon society is second hand, contingent and transmuted; occasionally burlesqued. It is manifested in the judgments of those he has addressed; sometimes it emerges more powerful, subtle and convincing because of its passage through the prism of another reflecting mind. Sometimes not.[9]

Koowarta, the external affairs power and the *Racial Discrimination Act 1975* (Cth)

There were many cases in Sir Maurice's long career which could be chosen as a basis for talking about legal change. For sentimental reasons, I will refer to *Koowarta*, in which I was briefed as one of two junior counsel led by Sir Maurice as Commonwealth solicitor-general. It was our first substantive engagement. The legal question was whether provisions of the *Racial Discrimination Act 1975* (Cth), prohibiting discrimination based on race, colour, nationality or ethnic origin, were laws with respect to external affairs. The Preamble to the Act recited that it had been passed to give effect to the International Convention on the Elimination of All Forms of Racial Discrimination to which Australia was a party. The external affairs power had not previously been considered by the court with respect to a subject so sharply focussed on the domestic behaviours of members of the Australian community in dealing with each other and others.

An expansive interpretation had been foreshadowed in dicta in *Burgess' Case* in 1936.[10] Chief Justice Latham thought it impossible to say *a priori* that any subject was necessarily such that it could never properly be dealt with by international agreement.[11] Starke J, in similar vein, accepted that the power was comprehensive in terms and must be commensurate with the obligations that the Commonwealth may properly assume in its relations with other powers or states.[12] He floated the criterion that the matter should be 'of sufficient international significance to make it a legitimate subject for international co-operation and agreement'.[13] Dixon J said that it could not be supposed that the primary purpose of the external affairs power was to regulate conduct occurring abroad. However it seemed an 'extreme view' that merely because the Executive Government undertook with some other country that the conduct of persons within Australia should be regulated in a particular way, the legislature thereby obtained the power to enact that regulation.[14] Evatt and McTiernan JJ approached what Dixon J regarded as the extreme view when they said:

> the fact of an international convention having been duly made about a subject brings that subject within the field of international relations so far as such subject is dealt with by the agreement.[15]

Sir Owen Dixon's 'extreme view' epithet was to be deployed by Daryl Dawson QC, the solicitor-general for the State of Victoria intervening in support of Queensland in *Koowarta*, when submitting that the logical conclusion of that view was that there were no limits to the external affairs power. It might, over the course of time, be the vehicle for the obliteration of legislative powers of the states.[16]

Although there were other decisions on the external affairs power between *Burgess* in 1936 and *Koowarta* in 1983,[17] no case had dealt with the application of the external affairs power to legislation with such a wide-ranging application to purely domestic conduct. Maurice Byers had argued the *Seas and Submerged Lands Case* for the Commonwealth in 1975. *Koowarta* was the beginning of a watershed moment in Australian constitutional history. It came before the court at a time when the question whether the external affairs power extended to the subject matter of all treaties or was confined by a requirement that the subject matter be international in character or of sufficient international significance was unresolved. *Koowarta* set the stage for its resolution. It had not come squarely before the High Court previously because Commonwealth governments had generally not ratified treaties on subjects outside their heads of legislative power unless there were state laws in conformity with the treaty.[18] Subject to an elusive exclusion of 'colourable treaties' Mason, Murphy and Brennan JJ found the existence of the Convention sufficient to give rise to an external affair.[19] Stephen J, the fourth member of the 4–3 majority, maintained a requirement that the Convention had to be on a topic of sufficient international concern.[20]

A more definitive exposition emerged from the *Tasmanian Dam Case*,[21] decided 14 months after *Koowarta*. Provisions of the *World Heritage Properties Conservation Act 1983* (Cth), giving effect to the Convention for the Protection of the World Cultural and Natural Heritage, were held to be within the external affairs power.[22] Again, Maurice Byers appeared for the Commonwealth defending the validity of its legislation against a challenge by Tasmania, represented by Robert Ellicott QC and Murray Gleeson QC, among others, supported by David Jackson QC for Queensland and JD Merralls QC for the Hydro Electric Commission of Tasmania. Byers invoked the views of Mason, Murphy and Brennan JJ in *Koowarta* as to the scope of the power. Leslie Zines was one of the junior counsel for

Tasmania, uncharitably characterised by some of his academic colleagues as having gone over to the dark side of the Force. He described the decision in the case as resolving the issue left unresolved in *Koowarta*. As he put it:

> This time a clear majority (Mason, Murphy, Brennan, and Deane) held that the Commonwealth could give effect to any international obligation imposed by a bona fide treaty or by customary international law. They all indicated that the power was not limited to the fulfilment of obligations.[23]

Koowarta was a step in a process of change in the interpretation of the scope of the external affairs power. It had a more particular consequence. The Racial Discrimination Act, coupled with s 109 of the Constitution, was later to play a central role in conferring a constitutional protection, as against state and territory parliaments, upon the customary native title which was to be recognised by the High Court in 1992. That consequence is discussed later in this lecture. One of its most politically and socially charged sequelae was the decision of the High Court in *Wik Peoples v Queensland*[24] that statutory pastoral leases granted under state laws before the enactment of the Racial Discrimination Act did not necessarily extinguish native title. The possibility therefore arose that native title could be asserted over large areas in which it was thought to have been extinguished by historic leases. If such native title subsisted beyond the time of enactment of the Racial Discrimination Act it would be protected against uncompensated and therefore discriminatory extinguishment by state laws. The implications for indigenous claimants as well as for the pastoral and mining industries were obvious. In *Wik* Maurice Byers appeared as leading counsel for the Thayorre People alongside Walter Sofronoff, who represented the Wik Peoples, claiming that the relevant pastoral lease had not extinguished native title.

Factors in legal change

There are many variables at play when legal change is effected through the courts, not the least of those variables being their composition at different times. Generally, however, change occurs within broadly understood boundaries of judicial law-making applicable to the interpretation of the Constitution and statutes made under it and in the development of the common law. For the most part it is incremental. Case-by-case a body of law is built up and evolves through that process. Evolution may be quickened in response to new classes of case thrown up by changing political, social and economic conditions, commercial practice and new technologies. When the possibility of major development arises, be it in the interpretation of the Constitution, in the common law and equity, or a new application of an important statute, more than one plausible choice may be presented.

Where the Constitution and statutes are concerned, any development must take place within the limits set by their texts. Within those limits, even those set by the most tightly drafted statutory text, there are nuances and shades of meaning and sometimes silences. There is no interpretive equivalent of 19th century Newtonian physics to provide complete and determined answers. The uncertainty principle which lies at the heart of much 20th and 21st century physics, expressed mathematically as $\Delta p.\ \Delta x = h$, can roughly be translated as 'nothing in the universe can be nailed down'. Nevertheless it is a principle, not a prescription for cosmic anarchy. Similarly, when it comes to texts, uncertainty underpins meaning, but meaning is not at large. If a constructional choice is identified and made according to rules which reflect the proper function of the interpreter, it can be regarded as legitimate even though reasonable minds may differ about which choice is preferable. This is the case with the Constitution, which uses broad language and has gaps and silences which, according to perspective, leave room for or require implications. The point was made with respect to statutory interpretation and the discernment of legislative intention in a joint judgment of six Justices of the High Court in *Lacey v Attorney-General (Qld)*[25] when they said:

> Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.[26]

Textual, contextual, purposive and historical factors will be in play and called upon in advocacy about the interpretation of a constitutional text. To use a metaphor borrowed from the almost equally difficult area of contested market definition in competition law, construction may involve something analogous to a purposive focussing process. The preferred construction may be that which appears to the judge to present the sharpest picture of meaning having regard to the question which is posed. This is a cognitive aspect of judicial decision-making. There is also a volitional aspect for there may in the end be more than one clear and obvious answer to a question and one must be chosen. Advocacy resides in sharpening for the judge a preferred picture and offering reasons for one choice over others. There are many variables in play and it is rarely that

one can say that advocacy was determinative as distinct from instrumental. One thing is clear, however. Timid, pedestrian, narrowly focussed or muddled advocacy is likely to have little effect on the outcome of the case, save to allow superior advocacy to make the difference where the choice is a close call.

The dynamics of the interaction

Although there has been much literature on the role of the academic writer in influencing judicial decision-making, there is much less on the role of the advocate. In 2001, Stephen Gageler wrote of the heavy emphasis placed by the adversary system on the role of counsel.[27] Ideally, as he described it, the system relies upon all available arguments being put on behalf of the parties or by *amici curiae* leaving it to the court to evaluate the competing arguments and choose between them. That is an ideal conception and perhaps one which casts the court as a kind of passive receptor. As he went on to say however:

> The system in reality has always seen the Court take a significant part in shaping the form of the arguments presented to it. The Court has also been inclined—to different degrees at different times—to formulate its own solutions to problems independently of the arguments presented.[28]

A recent example of that phenomenon arose in the course of argument in *Williams v Commonwealth*,[29] which concerned the validity of funding arrangements entered into by the Commonwealth for a National School Chaplaincy Program. In the early stages of the argument for the plaintiff, the court questioned what became known in the judgment as 'the common assumption' among the parties that the Executive Government of the Commonwealth had power to expend money on activities without statutory authority if they concerned a matter within a head of Commonwealth legislative power. The report of the argument in Volume 248 of the *Commonwealth Law Reports* shows an unusually high number of questions on that point directed to their beneficiary, senior counsel for the plaintiff in the Special Case.[30] Heydon J in his dissenting judgment described, with the aid of colourful metaphor, what ensued:

> The extent to which the Common Assumption was actually common began to break down when Western Australia began its oral address. It withdrew the relevant part of its written submissions. Victoria and Queensland followed suit. In due course, the plaintiff and most government interveners withdrew their assertion of the Common Assumption and lined up against the defendants. This great renversement des alliances created a new and unexpected hurdle for the defendants. So the Court was as on a darkling plain, swept with confused alarms of struggle and flight, where ignorant armies clash by night – although the parties were more surprised than ignorant.[31]

The task of the advocate beneficiary in such a circumstance is to seize the moment. On the other side of the argument it may be to persuade the court that it is heading in a wrong direction. Sir Anthony Mason made the point in his paper on advocacy:

> It sometimes happens in argument that the Court demonstrates a propensity to go off suddenly on a wild frolic of its own. It will express a view which, though not explicitly rejected by the cases, is nevertheless not entirely consistent with the approach which they take. When this disturbing propensity is manifested counsel is justified in reading the relevant passages from the judgments until all outward signs of heresy have been extirpated.[32]

A picture of the adversarial system which would present the court as passive receptor of argument, is a caricature. In the High Court today when the parties come before it for oral argument extensive written submissions in chief and in reply have been filed. The court has read the submissions. What follows should be an adversarial endeavour as between the parties and an interactive endeavour as between the parties and the court in which the court seeks a path to the outcome of the case and principles, pre-existing or developed in the decision itself, which support that outcome.

It is no purpose of this lecture to discuss the techniques of good appellate advocacy. They are generally well known and Maurice Byers was a master of them, including the use of light touch humour which was not always self-deprecating. He did demonstrate, however, that it helps to have an established track record and a degree of natural authority with the court. When, in *Fencott v Muller* I sat down after presenting my submissions for the respondent in support of an expansive approach to the accrued jurisdiction of the Federal Court and to the corporations power, Maurice Byers rose, intervening for the Commonwealth in support of our side of the argument. It was not my imagination that the court suddenly seemed more attentive and more pens seemed to be at the ready. He did not disappoint. I had been taxed in argument by Justice Dawson about the validity of accessorial liability provisions of the *Trade Practices Act 1974* (Cth) with the affecting example of an office boy taking a misleading and deceptive message from one company to another. Maurice Byers observed of what he called 'that wretched office boy' that 'he probably hailed from Victoria' and that he proposed to say nothing further about him. The decision in that case followed the 4–3 divide of a number of important judgments around that time.

It was important for what it had to say about the ability of the Federal Court to entertain non-federal claims which were closely connected to the federal claim or claims grounding jurisdiction. That decision and subsequent expositions of the accrued jurisdiction took a lot of the sting out of the failure of the state to federal cross-vesting system as a result of the decision of the High Court in *Re: Wakim; Ex parte McNally*.[33] It was also, I think, conducive to a strengthening of the notion of a national integrated judicial system which was to play a part in the *Kable* decision,[34] another product of the advocacy of Maurice Byers, and the cases which followed on from it. The Federal Court moved further from its original conception as a court of specialised statutory jurisdiction and in functional terms closer to a court of general civil jurisdiction.

A tipping point for change — *Engineers*

For an advocate to effect a development or change in the law, it is generally necessary that he or she first perceive the existence of possibilities for development. It may be the case that a proposition which has emerged from a line of decisions may be under stress in dealing with novel circumstances to which it nominally applies. Sir Anthony Mason in his paper on advocacy pointed out that persuasion calls not only for mastery of the materials but also for an element of constructive imagination and boldness of approach. He added that it remained a matter of surprise to him that controversial propositions, though supported by some authority, were not subjected to earlier challenge.[35] The particular example he chose was *R v Marshall; Ex parte Federated Clerks' Union of Australia*[36] in which the High Court indicated that it might be prepared to reconsider the prevailing narrow interpretation of 'industrial disputes' in s 51(xxxv) of the Constitution.[37] However the point was not argued in the court until the *Australian Social Welfare Union Case*[38] some eight years later.

A paradigm example of a major change whose time had come, although the allocation of credit for the change is somewhat obscured by the passage of time and the paucity of records, was the decision of the High Court in the *Engineers' Case*[39] in 1920. The particular question was whether a Commonwealth industrial award could bind Western Australian state entities. The question could have been answered in favour of the Commonwealth even within the existing doctrine of inter-governmental immunities on the basis that the state entities were engaged in trading activities.[40] Instead, the court took the opportunity to overturn that doctrine along with the doctrine of reserve state powers which was a kind of implied carve-out from Commonwealth heads of power.

There is no transcript of the argument in the case, which took six days. Some credit for the change was later claimed by Robert Menzies who at the age of 25 as a barrister of two years standing, appeared for the Amalgamated Society of Engineers. In his book *Central Power in the Australian Commonwealth* published in 1967,[41] he recounted that he was putting the argument that the state entities were trading enterprises when Starke J intervened saying '[t]his argument is a lot of nonsense.' Menzies, in what he said was an 'inspired moment', agreed. Chief Justice Knox asked why he was putting the argument if he agreed it was nonsense. Menzies replied '[b]ecause ... I am compelled by the earlier decisions of this court. If your Honours will permit me to question all or any of these earlier decisions, I will undertake to advance a sensible argument.'[42] He was given leave to challenge the decisions, the case was adjourned to allow for interveners to participate and the rest, as they say, was history. Sir Gerard Brennan in a paper entitled 'Three Cheers for Engineers',[43] observed that Menzies account did not seem to accord with the entries in the notebooks of Chief Justice Knox and Sir Isaac Isaacs at the time. Isaacs made a particularly detailed note of the argument of counsel for the Commonwealth, Leverrier KC, recording it thus:

> We say that what is called the reciprocal doctrine in *Railway Servants Case* is not only not derivable from the Constitution but is inconsistent with it. The powers of the Commonwealth must be ascertained externally by the ordinary rules of construction applied to the Constitution as a Constitution.[44]

Sir Gerard Brennan commented, '[i]t seems quite clear that Menzies lit the fuse in Melbourne, though the main charge for exploding the notion of reciprocal supremacy seems to have been provided by Isaacs and Rich JJ in the earlier *Municipalities Case*. Yet it was Leverrier's rather than Menzies' advocacy which seems to have had the greatest impact on the putative author of the majority judgment.'[45]

More recently, and following the discovery of Robert Menzies' handwritten notes made before and during his appearance as counsel, Professor Gerard Carney has essayed a reassessment of his role in the case.[46] Menzies' notes included a passage, the last sentence of which, as Carney says, 'resonates across the decades of Australian constitutional history'.[47] It was embedded in point 10 of a series of numbered propositions:

> For certain purposes *one country and one people*. No answer to say that States reserve their independence on those matters. Contrary argument based on a distrust of Federal Govt. Abuse of power no argument against existence of powers.[48]

The *Engineers' Case* took six days to hear. This was an era in which much more time was allowed for the development of oral argument than is the case today. Menzies later recounted that Sir Edward Mitchell KC, principal counsel for the states, when asked about a point on Tuesday afternoon, said he proposed to deal with it on Thursday afternoon.[49]

If one of the worst written judgments of the High Court in its long history, *Engineers'* was nevertheless the most important in terms of the direction it set for the Australian Federation. Notwithstanding that the young counsel who at the very least 'lit the fuse that led to the explosion of the notion of reciprocal supremacy' was later to establish Australia's major conservative party, it is regularly denounced by conservative commentators.[50] Whether one agrees with that criticism or not, the direction set in *Engineers* informed the expansive ambulatory approach to the external affairs power developed through *Koowarta* and *Tasmanian Dams* and the approach to the corporations power reflected in the *Work Choices Case*.[51]

New readings of old cases

Not every legal change is flagged by a helpful judicial tipoff or initiated by an inspired response to an intervention from the bench. There are, however, indicators of the existence of opportunities for change which arise from time to time. One such is a subsisting interpretation of an authority or line of authorities as defining necessary or sufficient conditions for the existence of some right, obligation, liability, immunity or for application of some legal characterisation. It is not unusual for judicially developed principles to be so read because under those characters they offer tick-box answers to pressing legal questions. Sometimes, however, a careful reading of the judgments from which those conditions are said to emerge, will demonstrate that they are properly applicable in some but not all circumstances. The question has arisen now and again about the activities test for characterisation of a corporation as a financial trading corporation. Is it necessary or sufficient? The question was raised in *Fencott v Muller* concerning a corporation which had not begun to trade. Another example of recent occurrence was the question whether it is enough to characterise a claimed invention as patentable that it answered the description of an 'artificial state of affairs', a term derived from the High Court's decision in *National Research Development Corporation v Commissioner of Patents*.[52] In the great majority of cases that will be a sufficient criterion. That is not always so as appears from the decision of the court in *D'Arcy v Myriad Genetics Inc*.[53] A related question is whether what appears to be an established principle is in truth a factor to be weighed in the application of some larger principle.

Overruling earlier decisions

The advocate should also be astute to observe whether circumstances exist which might persuade the High Court to overrule or depart from a previous decision. An example from a few years ago was the decision of the court in *Wurridjal v Commonwealth*[54] that the just terms requirement in s 51(xxxi) limiting the powers of the Commonwealth to make laws with respect to the acquisition of property, could apply to laws in relation to the territories made pursuant to s 122 of the Constitution. The court overruled its earlier decision in *Teori Tau v Commonwealth*,[55] decided in 1969, in which it had held that the guarantee did not extend to laws made in the exercise of that power. The decision had always been under a degree of pressure. Gummow J pointed to some of the difficulties in his judgment in *Newcrest* when the constitutional question was being considered in its proper forum. In particular, as he said, a construction of the Constitution which treated s 122 as disjoined from s 51(xxxi) produced absurdities and incongruities particularly with respect to the people of the Northern Territory, which was formerly part of the State of South Australia and was surrendered to the Commonwealth in 1910.[56]

Criteria for overruling a previous decision of the court were set out in *John v Federal Commissioner of Taxation*[57]. They were:

1. Whether the earlier decision rested upon a principle carefully worked out in a succession of cases.
2. Whether there was a difference between the reasons of the justices constituting a majority in the earlier decision.
3. Whether the earlier decision had achieved a useful result or on the contrary caused considerable inconvenience.
4. Whether the earlier decision had been independently acted upon in a way that militated against reconsideration.

It is not necessary in applying those criteria to ascertain some 'error' in the earlier decision. Where a constitutional decision is concerned, there is the additional factor that, short of a referendum, only the High Court can correct what comes to be perceived as a wrong turning or a misinterpretation or a construction not to be preferred. Any invitation to the court to depart from a previous decision of course confronts the threshold of the cautionary conservative principle that the court will not lightly depart from an earlier decision.

In his 1987 paper, Maurice Byers spoke of the common law as contingent and temporary because it is embodied in the judges. Coherence was mostly maintained because judicial techniques had been developed to make it so. Predictability ensued, but it

was only approximate. Past decisions are beacons to indicate the future path but do so only broadly. He went on to say '[t]oo assiduous a respect for what has been said in the past cripples the law's development and hamstrings both the advocate and the judge.'[58] He referred to Sir Owen Dixon's approach to arriving at departures in principle. His example was the judgment of the court in *Commissioner for Railways (NSW) v Cardy*[59] departing from the notion of an implied licence as a criterion of an occupier's liability to a trespasser in favour of a duty of care. Byers characterised Dixon's approach as achieving change by the tools of legalism and a kind of inspired semantics.[60] He contrasted this with what he called the 'fresh and welcome voice' of Sir Anthony Mason in his Wilfred Fullagar Memorial Lecture in 1987, in which he described the proper function of the courts as to protect and safeguard the democratic process. That process was an evolving concept moving beyond an exclusive emphasis on parliamentary supremacy and majority will and embracing a notion of responsible government which respects the fundamental rights and dignity of the individual and calls for the observance of procedural fairness in matters affecting the individual.[61] Sir Anthony's observation was directed to public law and constitutional law. Byers generalised it to suggest that the means of change in the future would be different in the sense that the only recognised agent of change need no longer be found implicit in the past. The judge would be left free to perform his task guided by such values as Sir Anthony had indicated in the passage he quoted and able to employ a freer, less arthritic judicial process still yielding that predictability which the system demands.[62] The proposition is pitched at what we are accustomed to call 'a high level of abstraction'. Nevertheless, in the style of Byers' advocacy it inspires reflection on fundamental ideas for judicial function.

A constitutional shift — *Mabo*

I mentioned earlier that the Racial Discrimination Act, upheld against constitutional challenge in *Koowarta*, had a part to play in the rather convoluted history which led to the recognition of native title at common law. That history can be traced back to a significant litigious failure in *Milirrpum v Nabalco Pty Ltd*.[63] Blackburn J, applying the decision of the Privy Council in *Cooper v Stuart*,[64] held that there was no common law doctrine of native title in Australia. *Cooper* had entrenched as a proposition of law for the Australian colonies a particular view of history, namely that the colony of New South Wales was 'a tract of territory practically unoccupied, or without settled inhabitants or settled law at the time when it was peacefully annexed to the British dominions'. That was notwithstanding Justice Blackburn's finding that the evidence before him disclose 'a subtle and elaborate system highly adapted to the country in which the people led their lives', a system he was prepared to describe as a government of laws, not of men.[65] The counsel who argued for the Aboriginal plaintiffs in resisting the grant of bauxite mining leases did not take it further. That may well have been a piece of inspired and disciplined restraint on their part. Had they taken the matter on appeal through to the High Court they may well have had a negative answer from that court as then composed. Instead of appealing, senior counsel, AE Woodward QC, accepted appointment to a royal commission into land rights in the Northern Territory.

As a result of the report of the Woodward Royal Commission the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) was enacted. Its object as described by the first commissioner appointed under the Act, Toohey J, was 'to give standing, within the Anglo-Australian legal system, to a system of traditional ownership that has so far failed to gain recognition by the courts.'[66] It was a statutory land rights scheme based upon an administrative recognition by the Aboriginal land commissioner of traditional Aboriginal owners of land under claim. Grants under the Act are made by the governor-general acting on the recommendation of the relevant Commonwealth minister following a report by the commissioner.[67]

The Northern Territory Government litigated the Act in the High Court on numerous occasions in relation to a variety of issues, many focussing on the jurisdiction of the commissioner and legal limits on the class of land available for claim. There were no less than 14 reported decisions of the High Court touching matters connected with the administration of the Act before the court's decision in *Mabo v Queensland (No 2)*.[68] In those cases the court was involved in the construction of a Commonwealth statute. But it was a statute in which the concept of traditional land ownership was firmly embedded. Members of the court who took part in the *Mabo (No 2)* decision, in particular Justices Mason, Brennan, Deane and Dawson, heard many of those cases. Justice Toohey of course had been the first Aboriginal land commissioner and had conducted on-country inquiries into traditional ownership. It would be drawing a long bow to propose a direct causative relationship between the High Court's recognition of native title at common law in 1992 and its exposure to a decade of land rights litigation out of the Northern Territory. But the values underpinning the Act could not have been lost on the

court. There was a strong normative element in the *Mabo (No 2)* judgment. It is not unreasonable to suppose that some of it may have been informed by the experience of the contentious land rights statute. However, another very strong and more explicit normative input, which also had significant practical consequences for native title law was the Racial Discrimination Act.

Mabo and the *Racial Discrimination Act*

The Racial Discrimination Act was critical to the ultimate success of the *Mabo* litigation. After the claim had been instituted in the High Court and remitted for trial of factual issues to the Supreme Court of Queensland, the State of Queensland enacted the *Queensland Coast Islands Declaratory Act 1985* (Qld) which effectively purported to extinguish the rights which Mabo and other plaintiffs claimed in respect of the land and waters of their home island, Mer. In *Mabo v Queensland*[69], decided in 1988, the High Court held that the Act was invalid for inconsistency with s 10 of the Racial Discrimination Act. The invalidation of the Queensland law foreshadowed large consequences if the court were to ultimately recognise native title at common law. All state or territory laws or executive acts done after the Racial Discrimination Act came into effect were in question if they operated in a discriminatory fashion in relation to native title. For the Commonwealth there was the further question whether its laws or its executive acts might have operated to effect acquisitions of native title rights without just terms and therefore contrary to the requirement of s 51(xxxi).

The process of historic change with respect to indigenous customary title came to fruition with the decision of the High Court in *Mabo (No 2)*.[70] If one has to assign an instrumental role to advocacy in that litigation, it can be assigned to the late Ron Castan QC, who appeared for the plaintiff, in particular, and his legal team in general. Maurice Byers did not appear in *Mabo* but, as mentioned earlier, took an important part in the *Wik* litigation which led to the setting aside of the assumption that historic pastoral leases extinguished native title. So that which was thought to have been extinguished now came under the protection of the Racial Discrimination Act. That protection was, of course, affected by the 1998 amendments to the Native Title Act but the foundation for more extensive assertions of native title rights and interests throughout Australia than previously imagined had been laid.

Conclusion

Maurice Byers as solicitor-general and as a member of the New South Wales Bar played an instrumental role in Australian legal history. In 1992 he led my colleague, Stephen Gageler, appearing for the plaintiffs in *Australian Capital Television Pty Ltd v Commonwealth*[71] which, coupled with the decision of the court in *Nationwide News Pty Ltd v Wills*,[72] established an implied freedom of communication on matters relevant to political discussion. The implications of that implication are still being worked out. Of equal if not greater importance, as it turned out, was the decision of *Kable* in which he appeared as leading counsel for the appellant, Gregory Wayne Kable. The report of his argument in the *Commonwealth Law Reports* begins with the proposition that the *Community Protection Act 1994* (NSW) was not a valid law of the Parliament of New South Wales. That was on the basis that the Act prescribed no rule and allowed no defence. He invoked Austin's *Lectures on Jurisprudence* for the proposition that essential to a law is a command which obliges a person or persons to a course of conduct. A law which in substance directs the judicial arm to imprison a particular individual is specific to the point of absurdity. It is about one aspect of one person and is there exhausted.[73]

It was not the argument which succeeded. At our last encounter before the hearing of the *Kable* case we had a conversation about it. It was the argument in which he was most interested and about which he was almost excited. It was, as they say, right up his alley. However, his argument which laid the foundation for the decision in *Kable* and the cases which followed appears at page 54 of the report:

> Chapter III of the Constitution applied to State courts from 1 January 1901; they were impressed with the characteristics necessary for the possession and exercise of Commonwealth judicial power. No legislature, State or federal, might impose on them jurisdiction incompatible with the exercise of that judicial power. Nor could it control the manner of the exercise of judicial power whether conferred by the Commonwealth or States. Since Ch III envisages State courts as being capable of investiture with and exercise of the judicial power of the Commonwealth, it grants to them or prevents their deprivation of those characteristics required of recipients of that power.

The rest, as they say, is history. Maurice Byers' personal history demonstrates that advocacy can be instrumental in effecting legal change. It is rarely solely determinative for there are many other factors at play and sometimes, as is demonstrated in the *Milirrpum*, good advocates will keep in reserve an argument whose time has not yet come.

Once again, my thanks for the opportunity to deliver this lecture in honour of a man fondly remembered and greatly admired by all who knew him.

Endnotes

1. (1982) 153 CLR 168.
2. (1983) 152 CLR 570.
3. (1993) 119 ALR 423.
4. *Horsey v Caldwell* (1946) 73 CLR 304.
5. Sir Gerard Brennan, 'Strength and perils: The bar at the turn of the century' in Nye Perram and Rachel Pepper (eds) *The Byers Lectures 2000–2012* (Federation Press, 2012) 4, 4.
6. Ibid citing Sir Gerard Brennan, 'Retirement of Chief Justice Sir Gerard Brennan' (1988) 193 CLR v, vi.
7. The Hon Justice JD Heydon AC, 'Theories of constitutional interpretation: A taxonomy' in Perram and Pepper (above n 5) 132, 133.
8. The Hon Justice AF Mason, 'The Role of Counsel and Appellate Advocacy' (1984) 58 *Australian Law Journal* 537, 539.
9. Sir Maurice Byers, 'From the Other Side of the Bar Table: An Advocate's View of the Judiciary' (1987) 10 *UNSW Law Journal* 179, 179.
10. *R v Burgess; Ex parte Henry* (1936) 55 CLR 608.
11. Ibid 641.
12. Ibid 658.
13. Ibid citing Westel W Willoughby, *The Constitutional Law of the United States* (Baker, 2nd ed, 1929) 519.
14. Ibid 668–9.
15. Ibid 681.
16. (1982) 153 CLR 168, 171.
17. For example, *R v Sharkey* (1949) 79 CLR 121; *Airlines of New South Wales Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54; *New South Wales v Commonwealth* ('*Seas and Submerged Lands Case*') (1975) 135 CLR 337.
18. Leslie Zines, 'External Affairs Power' in Tony Blackshield, Michael Coper and George Williams (eds) *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 263.
19. (1982) 153 CLR 168, 231 (Mason J), 241–2 (Murphy J), 260 (Brennan J).
20. Ibid 216–7.
21. *Commonwealth v Tasmania* (1983) 158 CLR 1.
22. Other heads of power supportive of aspects of the legislation included the race power (Constitution, s 51(xxvi) and the corporations power (Constitution, s 51 (xx)).
23. Zines, above n 18, 263.
24. (1996) 187 CLR 1.
25. (2011) 242 CLR 573.
26. Ibid 591–92 [43] (footnote omitted).
27. Stephen Gageler, 'Role of Counsel' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 167.
28. Ibid.
29. (2012) 248 CLR 156.
30. Ibid 161–2.
31. Ibid 296 [343].
32. Mason, above n 8, 539.
33. (1999) 198 CLR 511.
34. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
35. Mason, above n 8, 538.
36. (1975) 132 CLR 595.
37. Ibid 608–9.
38. *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297.
39. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
40. Kevin Booker and Arthur Glass, 'The Engineers Case' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 34–61.
41. Sir Robert Menzies, *Central Power in the Australian Commonwealth: An examination of the growth of Commonwealth power in the Australian Federation* (University Press of Virginia, 1967).
42. Ibid 38–39.
43. Gerard Brennan, 'Three Cheers for Engineers' in Michael Coper and George Williams (eds) *How Many Cheers for Engineers?* (The Federation Press, 1997).
44. Ibid 148.
45. Ibid.
46. Gerard Carney, 'Reassessment of Robert Menzies' Contribution in the Engineers Case' (2015) 89 *Australian Law Journal* 331.
47. Ibid 345.
48. Ibid (emphasis in original).
49. Ibid.
50. See, for example, Professor Geoffrey de Q Walker, 'The Seven Pillars of Centralism: Engineers' Case and Federalism' (2002) 76 *Australian Law Journal* 678, 714. For an extended critique of *Engineers* and its sequelae and the role of the High Court see James Allan and Nicholas Aroney, 'An Uncommon Court: How the High Court of Australia has Undermined Australian Federalism' (2008) 30 *Sydney Law Review* 245.
51. *New South Wales v Commonwealth* (2006) 229 CLR 1.
52. (1959) 102 CLR 252.
53. (2015) 325 ALR 100; 89 ALJR 924.
54. (2009) 237 CLR 309.
55. (1969) 119 CLR 564.
56. *Newcrest Mining (WA) Limited v Commonwealth* (1997) 190 CLR 513, 600–1.
57. (1989) 166 CLR 417, 438–9.
58. Byers, above n 9, 181.
59. (1960) 104 CLR 274.
60. Byers, above n 9, 182.
61. Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13(3) *Monash University Law Review* 149.
62. Byers, above n 9, 183.
63. (1971) 17 FLR 141.
64. (1889) 14 App Case 286.
65. (1971) 17 FLR 141, 267.
66. Report on Yingawunarri (Old Top Springs) Mudbura Lands Claim, Report No 5 (Canberra, Australian Government Printing Service, 1980) [70].
67. *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), Pt II and s 50.
68. (1992) 175 CLR 1 ('*Mabo (No 2)*'). For a list of cases see Robert French, 'The Role of the High Court in the Recognition of Native Title' (2002) 30 *Western Australian Law Review* 129, 136.
69. (1988) 166 CLR 186.
70. (1992) 175 CLR 1.
71. (1992) 177 CLR 106.
72. (1992) 177 CLR 1.
73. (1996) 189 CLR 51, 53.

What do women barristers earn?

By Ingmar Taylor SC

Rough justice: the job with a 141 per cent gender pay gap

Everyone knows the gender pay gap is just a myth, right? Once you control for experience, seniority, hours worked and the industries they work in, women receive equal pay for equal work. So what are we ladies yapping about?

Dismissing the gender pay gap has become fashionable of late.

It's true there are a lot of measurement issues when it comes to

Jessica Irvine

pay gap shrinks again to about 11.5 per cent. However, "there are some occupations with significantly larger gaps than typical, such as finance, medical and legal pro-

workers, finance and insurance brokers, crane operators and metal machinists.

Again, the figures don't distinguish between seniority in those jobs or experience.

But accepting the reductionist arguments about whether women get equal pay for work of equal value involves ignoring a host of other important questions, such as: Why aren't women in more

On 10 June 2016 the *Sydney Morning Herald* reported that, on average, men at the bar earn 184 per cent more than women at the bar, and 141 per cent more after adjusting for hours worked. The story stated the average male barrister who does his taxes declares a taxable annual income of $169,000 and the average female barrister just $60,000.

The story went on to say: 'It would surprise absolutely no one on Phillip Street to learn that barristers exhibit the biggest gender pay gap on these figures.'

It is not a surprise to be told there is a significant gender pay gap at the New South Wales Bar. However aspects of the SMH story did not ring true, not least the reported taxable annual income for both men and women at the bar.

The story, by Jessica Irvine, was reporting on data prepared by Associate Professor Ben Phillips of the Australian National University College of Arts and Social Sciences. He had prepared a spreadsheet recording taxable income by occupation adjusted for hours worked, drawn from publicly available Australian Tax Office data for the 2013–14 tax year adjusted using Australian Bureau of Statistics census data of hours worked for each occupation.

Professor Phillips provided me with a copy of his spreadsheet which, when reviewed, raised further questions. Reflecting the

The story stated the average male barrister who does his taxes declares a taxable annual income of $169,000 and the average female barrister just $60,000.

ATO data on which it was based, it recorded that only 1574 barristers across Australia had completed a tax return for the 2013–14 tax year by 31 October 2015, and that about half of them were women. That did not sit happily with the census data which Professor Phillips had used to derive the hours worked, which counted more than 6500 barristers across Australia. And women do not comprise anything close to half the number of all barristers across Australia.

Professor Phillips directed me to the ATO statistics team. They revealed the reason for the odd results: the ATO taxable income data drew on *employees* only. The published material counted data where the occupation of barrister had been identified by an employee completing their return. In other words, it was data of 1574 employees who identified as a 'barrister'.

Who are these employee 'barristers'? That is not entirely clear. In other states law firms can employ 'barristers'. Perhaps there are also government advocates amongst those counted. Upon

Who are these employee 'barristers'? That is not entirely clear. In other states law firms can employ 'barristers'. Perhaps there are also government advocates amongst those counted. Upon my inquiries, the ATO were not able to cast any further light on the subject.

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What the ATO statistics team made clear however was that the data set did not include data of taxable income from anyone who was a sole trader, which would include all those at the private bar. They said:

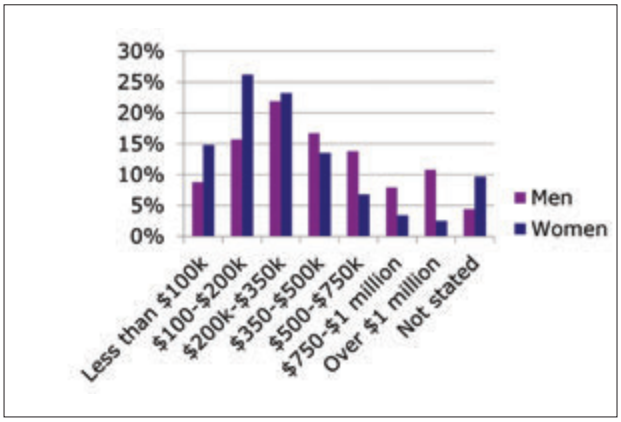
> Occupation code is only listed on the part of the form where you report income from salary and wages.' 'Sole traders use a 'supplement' to the [individual tax return] form called the 'supplementary tax return' . . . In the schedule, they report an industry code, not an occupation code.

The relevant industry code used by barristers (legal services) does not allow one to disaggregate barristers from others. In fairness to the author of the SMH article, that was not clear from the data set provided to her. Nor had Professor Phillips mischaracterised the position – he had faithfully prepared a spreadsheet that recorded data for every 'occupation' that had been published by the ATO.

If not 184 per cent, what is the gender pay gap at the New South Wales Bar?

There is a gender pay gap at the New South Wales Bar of about 62 per cent according to data from a NSW Bar Association survey obtained in 2014, which recorded responses from about 50 per cent of all members.

Arthur Moses SC, now senior vice-president, speaking in 2015, drew on that survey data to report that average fees for men in 2014 were $437,450 and for women were $269,958. Those numbers do not take into account practice fees nor do they attempt to analyse net earnings. Given that a certain level of practice expenses are fixed one might expect that such an analysis would show a greater net income gender gap. It would however certainly show that both male and female barristers have an average annual taxable income much greater than the amounts reported by the SMH article.



Why is there a gender pay gap at the New South Wales Bar?

Hours worked does not explain the gap – male and female barristers work on average the same hours. The New South Wales Bar 2014 survey data revealed that similar 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 less 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 New South Wales Bar. Second, women on average charge lower fees for the same number of years at the New South Wales Bar than their male counterparts.

Hours worked does not explain the gap – male and female barristers work on average the same hours.

Of all women at the New South Wales 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 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).

Given that there is a pay gap between those who are senior counsel and those who are not, and that women barristers currently make up approximately 10 per cent of the number of senior counsel in NSW, much of the gender pay gap can be explained by that gap.

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.

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

What can be done about the gender pay gap?

Anthony McGrath SC, chair of the Bar Association's Diversity and Equality Committee, believes that the key to the issue of reducing the gender pay gap for barristers in NSW lies in increasing retention of women.

> We need to ensure that the number of female barristers who are coming to the Bar in increasing numbers are retained to the point in their careers where they are considered experienced juniors and who might be considered for appointment as senior counsel.

He identified that the bar has been taking a series of steps to achieve that goal in recent times

> most significantly including the promotion of the recently adopted national Equitable Briefing Policy, the establishment of the New South Wales Bar sponsored childcare scheme, the creation of an extended sitting hours protocol in each of the major courts, the significant commitment of resources to the new barristers' mentoring scheme, the waiver of practising certificate fees for those barristers taking periods of parental and other leave, giving unconscious bias training, and the promotion of Best Practice Guidelines recommended to be adopted by chambers covering such matters as parental leave and standards of conduct.'

But, he readily concedes, 'much more work needs to be done to address this issue to bringing about financial equality'.

Among this work, McGrath SC is of the view that initiatives could be taken to reinforce to women barristers the value of their own work and the need to charge commensurately with seniority and their peers, whether male or female. He believes guidance on this matter can be provided by the Bar Association through the Bar Practice Course, continuing professional development programs and mentoring schemes to assist in ensuring that women charge appropriately to their level of seniority and at rates that properly reflect the worth of the work performed.

> Such a message sent from senior levels within the New South Wales Bar could act not only to persuade women barristers (particularly at the junior bar) to charge appropriately for their own work, but could also influence the perception of the profession generally about the value of the work performed by women barristers.

The pursuit of excellence: the Bar Association's Best Practice Guidelines

By Penny Thew and Ingmar Taylor SC[1]

The future of a strong and independent bar in New South Wales depends upon the pursuit of excellence so as to retain essential public confidence in it. That requires not only the attraction of the best practitioners drawn from the widest possible pool but, just as importantly, their retention within the profession. To assist to achieve these ends the bar must strive to ensure that all who practise are free from harassment, discrimination, vilification, victimisation and bullying and that appropriate steps are taken whenever a grievance arises in those areas. For these reasons the adoption of the Bar Association's *Model Best Practice Guidelines* (BPGs) [2] and the adherence to them are fundamental steps which should be taken by chambers. Important protective legal effects arise for those who do so.

In the context of the Bar Association's current second annual review of the BPGs, it is timely to consider the impetus for their creation and adoption by Bar Council on 19 June 2014, as well as their operation and desired effect, which provide the reasons for the Bar Association's ongoing strong recommendation that they be adopted and implemented by chambers.

Why the BPGs were developed

Several events came together in 2014 to trigger the re-evaluation of the Bar Association's then *Model Sexual Harassment and Discrimination Policy*[3] which led to a decision to provide members with comprehensive guidelines that could be adopted, in line with recent Federal Court of Australia authority.[4]

The prime mover was the introduction on 6 January 2014 of former Rule 117 of the *New South Wales Barristers' Rules*,[5] now Rule 123 of the *Legal Profession Uniform Conduct (Barristers') Rules 2015*,[6] which proscribed (for the first time) discrimination, sexual harassment and workplace bullying by barristers. Until then, discriminatory and bullying conduct between barristers had been largely unregulated in New South Wales,[7] since anti-discrimination legislation[8] generally does not cover conduct *between* self-employed persons such as barristers.[9] Regulation 175 of the *Legal Profession Regulation 2005* (NSW) (now repealed) proscribed discriminatory conduct, but only conduct that breached the NSW AD Act.[10] In contrast Rule 123, discussed below in more detail, specifically covers all discriminatory[11] or bullying conduct in the practise of law by barristers, including conduct not otherwise caught by anti-discrimination legislation.

Second, in tandem with the introduction of Rule 117, in February 2014 the Law Council of Australia released its widely publicised National Attrition and Re-engagement Study Report (NARS Report) which contained some startling findings.[12] Arising out of a study of 3960 men and women participants

Launch of the best practice guidelines in August 2014 with Jane Needham SC (then president of the Bar Association) in foreground and Major General Morrison (retired) (2016 Australian of the Year).

in the legal profession across Australia, the NARS Report disclosed 'a very high level of discrimination and harassment at work' among both men and women legal practitioners,[13] with half of all women respondents reporting having experienced sex discrimination[14] and one in two women, and more than one in three men, reporting having been bullied or intimidated in their current workplace.[15] The 'unsustainability' of the 'pressure, stress and poor work/life balance' were said to be the drivers for those leaving the profession altogether.[16]

Third, only days before the introduction of Rule 117[17] (which included a provision proscribing 'workplace bullying'), amendments were made to the *Fair Work Act 2009* (Cth) (FW Act) implementing Australia's first dedicated, statutory anti-bullying regime. The regime applies to workers[18] 'at work' at a constitutional corporation.[19] While the anti-bullying regime in the FW Act does not apply to interactions between individual barristers,[20] it does apply to workers engaged by barristers' chambers (or engaged directly by barristers who are members of those chambers) where those chambers are operated by constitutional corporations,[21] as is usually the case.

This meant that with the introduction of Rule 117 on 6 January 2014, many barristers were required to comply with two new and different proscriptions against workplace bullying,[22] depending upon how a barrister's chambers operations happen to be structured. This has continued to be the case under Rule 123 since it commenced operation on 27 May 2015. This duplication in standards applicable to many barristers was a further driver to the introduction by the Bar Association of the BPGs.

These factors, combined with the effect of successive decisions of the Federal Court of Australia heralding an upward shift in awards of general damages in harassment cases generally[23] and an apparent increased willingness of courts and tribunals to impose disciplinary penalties on legal practitioners as a result of findings of sexual harassment,[24] led the Bar Association to encourage members and chambers to adopt new equality, diversity and anti-discrimination standards.

Aims of the BPGs

The BPGs aim to:

(a) assist members to be aware of, and comply with, their obligations under the Rules and Legal Profession Uniform Law (NSW) generally, as well as under Commonwealth and state anti-discrimination and employment legislation in a barrister's capacity as an employer or service provider;

(b) assist in the management of risk by providing a pro forma policy reflecting the requirements set out in the Federal Court of Australia authority;[25]

(c) provide a uniform benchmark to be used for guidance in complying with various obligations; and

(d) provide a mechanism for addressing and managing grievances, while taking into account the particular features of a barrister's practice.

The Bar Association encourages members and chambers of the private bar to implement the BPGs as a means to assist with achieving best practice in professional conduct and in minimising exposure to the risks outlined above.

It is best practice for any organisation that employs or engages staff to avoid exposure to risk by implementing appropriate workplace policies. In particular, their adoption reduces the likelihood of the employer or principal being liable where an employee or agent discriminates against or harasses a person, since such liability is more likely to be established where the employer or principal failed to take 'all reasonable steps'[26] to prevent the impugned conduct.[27]

Taking 'all reasonable steps' requires an employer or principal to, at the least, formulate, implement and train employees in appropriate and specifically worded workplace policies. It has been held that to be legally effective such policies must: include statements that the proscribed conduct (such as sexual harassment) is unlawful; identify the legislative foundation of the prohibition of the conduct; state that the conduct is against company policy; and state that the employer may be vicariously liable for the conduct.[28] This applies to any employing entity,

Cartoon: By Mike Flanagan / CartoonStock.com

including any entity or principal by which chambers staff are engaged, and to any barristers who are themselves employers or principals.

The *Model Harassment, Discrimination, Vilification and Victimisation BPG* has been specifically drafted to take into account the particular obligations falling on chambers and barristers as employers or principals to assist in minimising the risk of findings of vicarious liability for discriminatory conduct.[29]

Obligations under the rules and otherwise

The reach of Rule 123 is broad. It provides:

> A barrister must not in the course of practice, engage in conduct which constitutes:
>
> (a) discrimination;
>
> (b) sexual harassment; or
>
> (c) workplace bullying.

A breach of Rule 123 potentially has serious consequences because conduct amounting to a breach of the Rule is capable of constituting professional misconduct or unsatisfactory professional conduct by operation of section 298(b) of the Legal Profession Uniform Law (NSW).

The extensive breadth of Rule 123 is a result of the definition of 'discrimination' under Rule 125. That definition significantly extends the reach of Rule 123(a) so as to catch not only 'unlawful discrimination' but also all forms of unlawful harassment,[30] vilification[31] and victimisation.[32] This is because 'unlawful discrimination' is defined in section 3 of the AHRC Act to include all 'acts, omissions or practices that are unlawful'

under the operative provisions of Commonwealth anti-discrimination legislation.

The reach of Rule 123(a) and (b) is broadened further still by deliberately capturing discriminatory conduct *between* barristers. This is as a result of the definition of 'discrimination' and 'sexual harassment' contained in Rule 125 specifically including conduct that is *defined* as such under anti-discrimination legislation, rather than only conduct that is *unlawful* under such legislation.[33]

The scope of Rule 123(c), 'workplace bullying', is likely sufficiently wide to capture conduct not caught by Rule 123(a) or (b). The term 'workplace bullying' for the purposes of Rule 123(c) is defined in Rule 125 to mean 'unreasonable behaviour that could reasonably be expected to intimidate, degrade, humiliate, isolate, alienate or cause serious offence to a person working in a workplace.'

That captures a wider class of conduct than is caught by the FW Act where three distinct elements need to be established, namely: that the conduct was unreasonable; repeated; and constituted a risk to health and safety.[34] Rule 123(c) requires satisfaction of only the first of these elements (namely that the conduct be unreasonable), so presents a significantly lower hurdle for complainants in establishing bullying by a barrister. In addition, there is no exception to the bullying proscription under the Rules, whereas the FW Act contains a carve-out for reasonable management action carried out in a reasonable manner.[35]

The apparent breadth of Rule 123, including compared to its predecessor, increased the obligations of barristers substantially and increased the importance of appropriate standards to assist with compliance.

Operation of the BPGs

The *Model Harassment, Discrimination, Vilification and Victimisation BPG,* the *Model Bullying BPG* and the *Model Grievance Handling BPG* are similarly structured. Each is internally separated into two operative parts, Parts A and B. Part A sets out best practice for participating floors and Part B sets out best practice applicable to the Bar Association.

Part A of these three BPGs applies where adopted by participating floors, which can be done either in the form set out in the BPG (as recommended) or in a modified form.

Part B to these three BPGs applies now to all barristers as a consequence of its adoption by Bar Council. Its provisions apply to:

Cartoon: By Loren Fishman / CartoonStock.com

(a) barristers attending any event, function and/or seminar convened by the Bar Association, including barristers attending any social function, any continuing professional development seminars, the Bar Practice Course and associated seminars (Bar Association event attendees);

(b) all barrister members of Bar Association committees and sections while attending any such committee or section meetings, events, functions and/or seminars convened by such committees and sections and/or while undertaking any committee or section duties or functions (Bar Association committee members);

(c) all examination candidates while sitting the bar examinations conducted by the Bar Association (Bar Association examination candidates); and

(d) the Bar Association (and its employees and other workers) in respect of all services it provides, including events, functions and/or seminars it convenes in relation to any matter on any premises, including in respect of all social functions, all continuing professional development seminars, the Bar Practice Course and associated seminars and the bar examinations.

The *Model Grievance Handling BPG* also contains a Part C, which describes the suggested steps likely to be taken by a grievance handler in respect of a grievance and the importance of dealing with any grievance confidentially, impartially, promptly and without repercussion.

The *Model Parental and Other Extended Leave Best Practice Guideline* is structured differently from the other BPGs. It provides a guideline for chambers members and licensees,[36] as well as a guideline to be applied to chambers staff[37] where those staff are entitled to the minimum standards provided under the National Employment Standards (NES) of the FW Act.[38] The NES are minimum standards that apply to employees in NSW[39] and cannot be excluded by the provisions of awards or other industrial instruments.[40] A failure to comply with the NES can attract pecuniary penalties.[41]

Barristers of the private bar, not being employees, are not entitled to the protections of the NES. The *Model Parental and Other Extended Leave BPG* recognises this and makes provision, at clauses 11–14, for benefits that a participating chambers may choose to make available to its members as a matter of best practice. These provisions are included as options that chambers can adopt, recognising that continuing to have to pay floor fees and other costs of practice during a period of parental leave can impose a significant burden. Those chambers who are adopting these provisions are doing so in the view it will assist them to attract and retain the requisite diversity of talent.

Implementing the BPGs

If a set of chambers decides to implement the BPGs, particular steps should be taken to promulgate them and ensure chambers' members and staff are educated and trained in their operation. The law is clear that policy adoption is insufficient to avoid findings of vicarious liability under anti-discrimination legislation in the absence of comprehensive education, training and dissemination of relevant policies. Also, the policies are only going to be effective if all floor members and staff are aware of them.

Guidance from the Bar Association can be obtained by chambers in respect of the education, training and dissemination of the BPGs.

In taking steps to educate and train chambers members and staff of their rights and obligations as explained under any particular BPG, it is prudent to ensure that no steps are taken that would inadvertently incorporate a part or the whole of a BPG into a chambers member's conditions of membership of the floor, or a chambers staff member's contract of employment unless that is the intention of the floor. This principle applies to any written or unwritten policy or procedure applicable in any chambers. A policy document will not have contractual force unless certain conduct occurs that clearly incorporates by reference that policy document into a written or verbal contract, *and* the policy that has been incorporated is by its own wording promissory and binding in nature rather than explanatory and aspirational.[42] Further, a mechanism for precluding incorporation by reference of written or verbal policies into contractual arrangements is to include in any contract a clause expressly excluding any such policy (or part of it), and advising members and staff during any education and training forums that written or verbal policies and procedures form no part of any agreement binding on them. Giving policies contractual force runs the risk that a failure to abide by them creates a breach of a legal obligation. That would be counter-productive given the intention of the BPGs is to reduce liability, not increase it.

The BPGs are not statutory instruments and have not been made pursuant to any legislative provision. Hence it is only if they are made contractual obligations by some deliberate act that they create legal obligations. They were not drafted to create legal obligations. Rather they are explanatory and aspirational educative tools and guidelines to assist with compliance with various laws, the Rules and best practice which, if followed, will minimise liability, discourage discrimination and encourage diversity at the bar.

Annual review

The BPGs are currently undergoing an annual review for the purpose of taking into account relevant legislative changes, as well as members' submissions as to their effect and practical operation. A primary outcome of the first annual review of the BPGs in 2015 was to incorporate the amendments introduced by the commencement of the Legal Profession Uniform Law (NSW) and to amend the BPGs to enhance uniformity.

A foreshadowed outcome of the current 2016 annual review is the incorporation of the BPGs into an equity and diversity handbook produced by the Bar Association. It is intended to be in digital and hard copy form, in a not dissimilar format to that used by bars in other common law jurisdictions,[43] to continue to reflect best practice and meet community expectations as to appropriate workplace and professional standards of conduct.[44]

Conclusion

The landscape covered by the myriad Commonwealth and state anti-discrimination and workplace legislation and the legislation and rules governing the conduct of barristers is

demonstrably detailed and technical. The BPGs are designed to assist chambers with compliance with these provisions in a real and substantive way. They seek to do as their name suggests - guide best practice for chambers wanting to take all reasonable steps in an effort to prevent the occurrence of potentially contravening conduct.

The adoption and implementation of the BPGs by individual chambers is not only good for their members, but is ultimately good for the strength of the whole profession given the role they undoubtedly play in attracting and retaining the best of talent.

Endnotes

1. The authors are grateful to and would like to kindly acknowledge Anthony McGrath SC for his valuable input and comments on, and careful reading of, this article.
2. Consisting of the Bar Association's Model Harassment, Discrimination, Vilification and Victimisation Best Practice Guideline; Model Bullying Best Practice Guideline; Model Parental and Other Extended Leave Best Practice Guideline; Model Grievance Handling Best Practice Guideline. Each will be described using the shorthand BPG for the balance of this article.
3. Adopted by Bar Council on 17 June 2004.
4. See for instance *Richardson v Oracle Corporation Australia Pty Limited* (2013) 232 IR 31 at [154]–[164] per Buchanan J. The findings at [154]–[164] were not overturned on appeal: (2014) 312 ALR 285.
5. Rule 117 commenced operation on 6 January 2014.
6. Rule 123 commenced operation on 27 May 2015.
7. Although as early as 1995 the then New South Wales Office of the Legal Services Commissioner issued a statement advising 'It is the Commissioner's position that complaints of discrimination or sexual harassment may amount to professional misconduct or unsatisfactory professional conduct regardless of whether or not there is a rule against such conduct': Office of the Legal Services Commissioner Annual Report 1994–95, Sydney p19.
8. Consisting of (1) federal legislation: the *Racial Discrimination Act 1975* (Cth) (RD Act), the *Sex Discrimination Act 1984* (Cth) (SD Act), the *Disability Discrimination Act 1992* (Cth) (DD Act), the *Age Discrimination Act 2004* (Cth) (AD Act), the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act), the *Australian Human Rights Discrimination Regulations 1989* (Cth); and (2) New South Wales legislation: *Anti-Discrimination Act 1977* (NSW) (NSW AD Act).
9. Although Commonwealth and state anti-discrimination legislation does proscribe discrimination (including various forms of harassment, vilification and victimisation) in the areas of employment and the provision of services, including in respect of barristers in their capacity as employers and/or service providers (see below).
10. Former Regulation 175 provided that 'conduct, whether consisting of an act or omission, that constitutes unlawful discrimination (including unlawful sexual harassment) under the *Anti-Discrimination Act 1977* against any person must not be engaged in (a) by a local legal practitioner, in connection with the practise of law in this or any other jurisdiction,…'. Regulation 175 was repealed on 1 July 2015 and no similar regulation has been enacted.
11. Including sexual harassment and all other forms of unlawful harassment and vilification, for the reasons below.
12. A study undertaken by the Law Council of Australia to investigate and analyse the drivers of attrition of women from the legal profession in Australia: LCA, NARS Report, 2014, p6.
13. LCA, NARS Report, 2014, p4.
14. LCA, NARS Report, 2014, p6.
15. LCA, NARS Report, 2014, p6.
16. LCA, NARS Report, 2014, p7.
17. Sub-rule (c) of which proscribed workplace bullying.
18. Defined to include employees, contractors or subcontractors, labour hire employees, apprentices or trainees, work experience students and volunteers: section 789FC(2) of the FW Act.
19. Section 789FD provides that a worker is 'bullied at work' if the bullying occurs while at work at a 'constitutionally covered business', which is in turn defined to primarily include a constitutional corporation. A constitutional corporation is a corporation to which paragraph 51(xx) of the Constitution applies (section 12 of the FW Act), which includes a corporation that trades.
20. Because barristers do not fall within the definition of 'worker' and are not constitutional corporations.
21. Part 6-4B of the FW Act does not specify that a worker must be employed or engaged by a constitutional corporation, but only that the bullying must occur while the worker is 'at work' at the constitutionally covered business. Therefore employees or others performing work for barristers who are members of chambers that are operated by constitutional corporations could be caught by Part 6–4B of the FW Act. As such, the FW Act anti-bullying regime applies in respect of such chambers to both interactions between barristers and staff, as well as between staff members.
22. The definition of 'workplace bullying' associated with Rule 117(c) (now Rule 123(c)) was amended in 2015 to assist in aligning it more closely with the statutory definition of 'bullying at work' contained in section 789FD(3) of the FW Act.
23. See for instance *Richardson v Oracle Corporation Australia Pty Limited* (2014) 312 ALR 285 in which Kenny J (with Besanko and Perram JJ agreeing) increased an award of general damages from $18,000 to $100,000 by reference to 'general standards prevailing in the community': at [90]–[118], especially [95].
24. See for instance *PLP v McGarvie and VCAT* [2014] VSCA 253.
25. As referenced at footnote 4 above, see the findings of Buchanan J in *Richardson v Oracle Corporation Australia Pty Limited* (2013) 232 IR 31 at [154]–[164] (this aspect not overturned on appeal: (2014) 312 ALR 285).
26. This requirement is differently worded under section 123 of the DD Act and section 57 of the AD Act, requiring the employing corporation to have taken 'all reasonable precautions and exercised due diligence to avoid the conduct.'
27. Section 106 of the SD Act; section 123 of the DD Act; sections 18A and 18E of the RD Act; section 57 of the AD Act; section 53 of the NSW AD Act.
28. *Richardson v Oracle Corporation Australia Pty Limited* (2013) 232 IR 31 at [154]–[164] and particularly [163] per Buchanan J. This aspect was not overturned on appeal: (2014) 312 ALR 285.
29. Notably, employer (body corporate) liability will be automatic in the circumstances set out under section 793 of the FW Act in respect of any discrimination claim made under section 351 of the FW Act. In such a case, it will not matter whether an employer or principal has taken 'all reasonable steps' or any precautions at all in minimising risk.
30. Including sexual harassment as defined under section 28A of the SD Act and relevantly proscribed in the areas of employment and the provision of goods and services under sections 28B and 28G respectively (which is in any event proscribed under Rule 123(b)), and disability-based harassment as relevantly proscribed in the areas of employment and the provision of goods and services under sections 35 and 39 respectively of the DD Act.
31. Including racial vilification as defined under Part IIA of the RD Act and racial, transgender, homosexual and HIV/AIDS vilification under Part 2, Div 3A; Part 3A, Div 5; Part 4C, Div 4; and Part 4F respectively of the NSW AD Act.
32. Defined generally as subjecting a person to a detriment because they have done or propose to inter alia make a complaint under anti-discrimination legislation or a complaint about unlawful discrimination generally.
33. In this way Rule 123 captures conduct between barristers not necessarily unlawful under anti-discrimination legislation. This is because it is generally only discriminatory conduct (as defined) occurring within specified areas of public life, such as the areas of employment or the provision of services, that is unlawful

under anti-discrimination legislation. Self employment is not included in the definition of employment under such legislation.

34. Section 789FD(1) of the FW Act.
35. Section 789FD(2) of the FW Act.
36. Clauses 11–14 of the Model Parental and Other Extended Leave BPG.
37. Clauses 15–18 of the Model Parental and Other Extended Leave BPG.
38. The NES are contained in Part 2-2 of the FW Act.
39. They apply to 'national system employees' defined in section 13 of the FW Act to be an individual 'usually employed' by a 'national system employer', which is in turn defined in section 14 as including constitutional corporations. A constitutional corporation is a 'trading corporation', or a corporation to which paragraph 51(xx) of the Constitution applies (see above). Hence they apply to all employees in NSW other than those employed by the Crown or local government entities.
40. Section 59 of the FW Act.
41. Section 44 and Part 4-1 of the FW Act.
42. See for instance *Westpac Banking Corporation v Wittenberg* (2016) 256 IR 181 particularly at [108]–[114] per Buchanan J with McKerracher and White JJ agreeing at [334], [336]–[337], [341]. Significantly, the employer in *Wittenberg* conceded that the policy in question had been incorporated, meaning the issue did not need to be decided: see [114] per Buchanan J; [338] per McKerracher J; [344]–[345] per White J.
43. For instance, the United Kingdom's Bar Standards Board provides its Equality and Diversity Rules of the BSB Handbook in hard copy and digital form (by way of an App) and produces webinars and podcasts on the applicable Equality Rules: https://www.barstandardsboard.org.uk/about-bar-standards-board/equality-and-diversity/equality-and-diversity-rules-of-the-bsb-handbook/.
44. In line with the objectives described in the BPG Explanatory Memorandum, [5] and [8].

The High Court hits 'reset' on the advocate's immunity

By Justin Hewitt

Introduction

On 4 May 2016, the High Court handed down a decision reconsidering the scope of the advocate's immunity from suit. A majority of the High Court (French CJ, Kiefel, Bell, Gageler and Keane JJ) held that the advocate's immunity from suit does not extend to negligent advice given by a lawyer which leads to the settlement of a case by agreement between the parties embodied in consent orders. The appeal from the decision of the NSW Court of Appeal in *Jackson Lalic Lawyers Pty Limited v Attwells* [2014] NSWCA 335 was allowed.

At the hearing of the special leave application on 7 August 2015 (before Bell, Gageler and Gordon JJ) special leave was granted to allow the appellant to seek a reconsideration of the advocate's immunity and the principles in *Giannarelli v Wraith* (1988) 165 CLR 543 and *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1: [2015] HCATrans 176. However, the High Court ultimately declined unanimously to reconsider its previous decisions on the advocate's immunity. Nevertheless, the majority clarified and restated the scope of the immunity under the tests stated in *Giannarelli* and *D'Orta*.

The court held, by majority, that the respondent was not immune from suit because the advice to settle the proceedings was not intimately connected with the conduct of the case in court in that it did not contribute to a judicial determination of issues in the case. This conclusion was not affected by the circumstance that the parties' settlement agreement was embodied in consent orders.

Decisions concerning the advocate's immunity require line drawing between work related to court proceedings that is and is not covered by the immunity. At the heart of the immunity is work done in court. The precise scope of the immunity for out of court work turns upon the connection required between the conduct of a case in court and other work performed in preparing and conducting the case. After *Giannarelli* and *D'Orta*, the application of the advocate's immunity hardened into a rule which treated the immunity as applying to 'work done out of court which leads to a decision affecting the conduct of the case in court': see *D'Orta* at [86]–[87]. The majority judgment in *Attwells*, while reaffirming the immunity for which *Giannarelli* and *D'Orta* stands, has restated the applicable rule in a manner which narrows the scope of the immunity significantly.

The facts in Attwells

The case was determined based on a statement of agreed facts which were prepared at first instance to resolve the question whether the respondent was immune from suit by virtue of the advocate's immunity.

Mr Attwells and another person guaranteed payment of advances made by the ANZ bank to a company. The company

defaulted on its obligations and the bank commenced proceedings against the guarantors in the Supreme Court of NSW. Mr Attwells, the other guarantor and the company retained Jackson Lalic Lawyers to act for them. The amount of the company's debt to the bank was $3.4 million but the guarantors' liability under the guarantee was limited to $1.5 million. The proceedings were settled on the opening day of the trial on terms that judgment would be entered against the guarantors and the company for almost $3.4 million but the bank would not seek to enforce payment of that amount if the guarantors paid to the bank the sum of $1.75 million before a specified date. The terms of the settlement were reflected in a consent order for judgment in the amount of $3.4 million and the court's noting of the conditional non-enforcement agreement between the parties.

The guarantors failed to meet their payment obligation under the settlement before the specified date. The appellants then brought proceedings in the Supreme Court against the respondent alleging that it was negligent in advising them to consent to judgment being entered in the terms of the consent orders and in failing to advise them as to the effect of the consent orders. The respondent asserted that it was immune from suit by virtue of the advocate's immunity. The immunity question was ordered to be determined separately from the negligence proceedings. The primary judge declined to answer the separate question on the basis that, without further evidence in relation to the respondent's alleged negligence, his Honour could only form a view about the application of the advocate's immunity on a hypothetical basis. The Court of Appeal granted leave to appeal and held that the primary judge erred in declining to answer the separate question. The Court of Appeal held that the respondent was immune from suit under the tests stated in *Giannarelli* and *D'Orta*.

The majority judgment

In summary, the majority:

- held that 'there is a clear basis in principle for the existence of the immunity' and declined to reconsider *Giannarelli* and *D'Orta*: at [36];
- held that the rule stated in *D'Orta* is 'limited by' the rationale for the immunity: at [30];
- restated the connection between out of court work and work done in court required to attract the immunity: at [5], [38], [49], [50];
- held that the immunity does not extend to negligence advice which leads to the settlement of a claim in civil proceedings: at [45];
- held that this conclusion is not altered by the circumstance that the parties' agreement settling the claim was embodied in consent orders: at [6], [54]–[62].

The evolution of the rationale for the immunity

The majority in *Attwells* considered the rationale for the immunity as explained by the majority in *D'Orta* and relied on the public policy rationale of the immunity to explain the scope of the immunity: at [37]. It is instructive therefore to see how the rationale for the immunity has evolved.

In *Rondel v Worsley* [1969] 1 AC 191, the House of Lords held that a barrister was immune from an action for negligence at the suit of a client in respect of his or her 'conduct and management of a case in court' and the connected preliminary work. The House of Lords rejected the argument that the immunity was based on the absence of contract between barrister and client and the consequence that a barrister was not able to sue for his or her fee. Rather, the immunity was based on the following public policy grounds:

- the administration of justice required that a barrister should be able to carry out his duty to the court fearlessly and independently;
- actions for negligence against barristers would make the retrying of the original actions inevitable and so prolong litigation, contrary to the public interest; and
- a barrister was obliged to accept any client, however difficult, who sought his services.

Rondel v Worsley considered the immunity of a member of the English bar in a country and at a time when the professions of barrister and solicitor were completely separate. It was also held that a solicitor while acting as an advocate has the same immunity from an action for negligence as a barrister.

In *Rees v Sinclair* [1974] 1 NZLR 180, the New Zealand Court of Appeal applied *Rondel v Worsley*. At that time most practitioners in New Zealand were both barristers and solicitors. The court considered whether the public policy justifications which had been accepted as applicable to the United Kingdom in *Rondel v Worsley* were also applicable in New Zealand. In *Rees v Sinclair* the immunity was based on the following grounds:

- the administration of justice requires that a barrister should be immune from an action for negligence so that he or she may perform his or her tasks fearlessly and independently in the interests of the client, but subject to an overriding duty to the court which may

conflict with the interest of the client: at 182, 189;

- actions for negligence against barristers would make the re-trial of the original action inevitable and so prolong litigation contrary to the public interest: at 183, 189;
- public policy necessitates that in litigation a barrister should be immune because he or she is bound to undertake litigation on behalf of any client who pays his fee: at 184;
- unless a barrister was immune he or she could not be expected to prune his or her case of irrelevancies and cases would be prolonged contrary to the public interest: at 185.

In relation to the drawing of the line between work done in court and work done out of court, the judgment of McCarthy P (part of which was extracted by Mason CJ in *Giannarelli*) noted that the line drawing exercise was more difficult in New Zealand than in England because 'the delineations between the work of a barrister on the one hand and a solicitor on the other are less clearly marked than they are in England' and noted that the court 'should not be controlled by the divisional lines adopted in England'. McCarthy P said that the protection should not be confined to what is done in court and went on as follows:

> Each piece of before-trial work should, however, be tested against the one rule; that the protection exists only where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing. The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice, and that is why I would not be prepared to include anything which does not come within the test I have stated.

In *Giannarelli*, Mason CJ after referring to *Rees v Sinclair* noted that the statement of the limits of the immunity in that case was endorsed by four members of the House of Lords in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 215, 224, 232 and 236. Mason CJ stated that the rationale for the immunity rests on considerations of public policy stating (at 555):

> Of the various public policy factors which have been put forward to justify the immunity, only two warrant serious examination. The first relates to the peculiar nature of the barrister's responsibility when he appears for his client in litigation. The second arises from the adverse consequences for the administration of justice which would flow from the re-litigation in collateral proceedings for negligence of issues determined in the principal proceedings.

In *Arthur J S Hall & Co v Simons* [2002] 1 AC 615, the House of Lords re-evaluated the public policy issues and concluded that the public interest in the administration of justice no longer required that advocates enjoy immunity from suit for negligence in the conduct of civil proceedings. This did not imply that *Rondel v Worsley* was wrongly decided. Rather, the decision no longer correctly reflected public policy so that the basis of the immunity as it applied both to barristers and solicitors had gone.

In *D'Orta*, the High Court declined to follow the decision of the House of Lords in *Arthur J S Hall & Co v Simons* but the rationale for the immunity was further refined. The majority stated at [25]:

> the decision in *Giannarelli* must be understood having principal regard to two matters:
>
> (a) the place of the judicial system as a part of the governmental structure; and
>
> (b) the place that an immunity from suit has in a series of rules all of which are designed to achieve finality in the quelling of disputes by the exercise of judicial power.

And at [31]:

> Of the various factors advanced to justify the immunity, 'the adverse consequences *for the administration of justice* which would flow from the re-litigation in collateral proceedings for negligence of issues determined in the principal proceedings' (emphasis added) was held to be determinative.

(footnotes omitted)

At [32] their Honours emphasised the binding nature of judicial decision-making as an aspect of the government of society and stated at [45]:

> … the central justification for the advocate's immunity is the principle that controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances. This is a fundamental and pervading tenet of the judicial system, reflecting the role played by the judicial process in the government of society.

In *Attwells*, the majority referred to these matters and concluded at [36] that 'there is a clear basis in principle for the existence of the immunity' and stated (also at [36]):

> The common law of Australia, as expounded in *D'Orta* and *Giannarelli*, reflects the priority accorded by this Court to the values of certainty and finality in the administration of justice as it affects the public life of the community.

In *Attwells*, the majority then relied on that discussion of the rationale to make the following statement about the scope of the immunity at [37]:

> … this review of the reasons of the majority in *D'Orta*, and the identification of the public policy on which the immunity is based, serve to show that the scope of the immunity for which *D'Orta* and *Giannarelli* stand is confined to conduct of the advocate which contributes to a judicial determination.

The immunity was abolished in New Zealand by the decision of the Supreme Court of New Zealand in *Lai v Chamberlains* [2006] NZSC 70; [2007] 2 NZLR 7. The High Court declined to follow that case in *Attwells* and noted (at [40]) that an expansive view of the scope of the immunity in cases concerning settlements (*Biggar v McLeod* [1978] 2 NZLR 9) strengthened the case for abolition in New Zealand. At [41], the majority referenced the judgment of McCarthy P in *Rees v Sinclair* suggesting that the scope of the immunity should not operate any wider than was 'absolutely necessary in the interests of the administration of justice'.

In *Attwells*, the majority confirmed expressly at [5] that 'the public policy, protective of finality, which justifies the immunity at the same time limits its scope so that its protection can only be invoked where the advocate's work has contributed to the judicial determination of the litigation'.

That is not the way that the rule articulated in *D'Orta* was applied prior to *Attwells*. For example, in *Attard v James Legal Pty Ltd* [2010] NSWCA 311; (2010) 80 ACSR 585, the NSW Court of Appeal considered a case of alleged negligence comprising a solicitors' failure to advise a company in administration that they were acting for in defending a cross-claim that the cross-claimant needed the leave of the court to proceed. The court held that the solicitors were immune from a claim for wasted expenses in respect of proceedings that were eventually settled with consequential orders made that they be dismissed with no order as to costs. Giles JA at [20] noted that there had not been a judicial determination and pondered what the offence to finality was if the solicitors' conduct of the proceedings had caused the incurrence of unnecessary costs. However, at [20]–[22] Giles JA explained his understanding of the law as expounded in *D'Orta* as being that 'offence to the finality principle in the particular case is not necessary'.

The requisite connection between work done in court and out of court work

In *Giannarelli v Wraith* (1988) 165 CLR 543, Mason CJ explained the scope of the advocate's immunity and the public policy underlying it. Mason CJ observed (at 559) that the grounds for denying liability 'have no application to work done out of court which is unconnected with work done in court'. In relation to the drawing of the line between 'in-court negligence' and 'work done out of court', Mason CJ stated (at 560):

> Preparation of a case out of court cannot be divorced from presentation in court. The two are inextricably interwoven so that the immunity must extend to work done out of court which leads to a decision affecting the conduct of the case in court. But to take the immunity any further would entail a risk of taking the protection beyond the boundaries of the public policy considerations which sustain the immunity. I would agree with McCarthy P in *Rees v Sinclair* ([1974] 1 NZLR 180 at 187) where his Honour said:
>
> > ... the protection exists only where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing.

In *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 the majority (Gleeson CJ, Gummow, Hayne and Heydon JJ) declined to depart from *Giannarelli* and stated at [86] that 'there is no reason to depart from the test described in *Giannarelli* as work done in court or "work done out of court which leads to a decision affecting the conduct of the case in court"'.

However, the majority in *Attwells* described the scope of the immunity in terms that differ from those used in *D'Orta* at [86]. In particular, the majority stated:

- that 'the intimate connection required to attract the immunity is a functional connection between the advocate's work and the judge's decision': at [5];
- the immunity 'can only be invoked where the advocate's work has contributed to the judicial determination of the litigation': at [5];
- the immunity 'does not extend to acts or advice of the advocate which do not move litigation towards a determination by a court': at [38];

- the notion of an 'intimate connection' between the work the subject of the claim by the disappointed client and the conduct of the case does not encompass any plausible historical connection between the advocate's work and the client's loss: at [46], [49];
- rather, the 'intimate connection' between the advocate's work and 'the conduct of the case in court' must be such that the work by the advocate affects the way the case is to be conducted so as to affect its outcome by judicial decision: at [46].

Under the *D'Orta* test ('work done out of court which leads to a decision affecting the conduct of the case in court') a court would proceed by first identifying a 'decision' by the advocate that affected the conduct of a case in court and then asking whether the work that was alleged to be negligent led to that decision: see, for example, *Attard v James Legal Pty Ltd* at [111]. The case would not turn upon an evaluation of the extent to which the justifying principle of finality was impacted by the particular case: see, for example, *Kendirjian v Lepore* [2015] NSWCA 132 at [54], [57]. Under the *Attwells* test, the focus of inquiry is the work of the advocate that is alleged to be negligent and the question is whether that work 'affects the way the case is to be conducted so as to affect its outcome by judicial decision': see at [46]. In order to attract the immunity, the work of the advocate 'must affect the conduct of the case in court and the resolution of the case by that court': at [6]. The principle of finality limits the scope of the immunity so that its protection can only be invoked where the advocate's work 'contributed to the judicial determination of the litigation': at [5].

Settlements embodied in consent orders

To resolve the case at hand, the majority applied the principles noted above to a settlement agreement, the terms of which were embodied in consent orders.

The majority reasoned at [38] that because the immunity does not extend to acts or advice which does not move litigation towards a determination by a court, it does not extend to negligent advice that leads to a settlement agreed between the parties.

The issue that divided the majority from the dissenting judges related to the consequence of the settlement being embodied in consent orders.

The majority considered that the result was not altered by the fact that the settlement was recorded in consent orders because the primary judge made no finding of fact or law which resolved the controversy between the parties: at [55]. According to the majority the 'substantive content' of the rights and obligations established by the settlement agreement was determined by the parties without any determination by the court: at [59]. Therefore, according to the majority, the public policy which sustains the immunity is not offended by recognising the fact that the terms of the settlement agreement were not the result of the exercise of judicial power.

Gordon J in dissent considered at [104] that there was a final quelling of a controversy between the parties by the making of an order, albeit a final outcome which was entered by consent. Nettle J agreed with Gordon J at [64]. In his Honour's view (at [67]) 'where a matter is settled out of court on terms providing for the court to make an order by consent that determines the rights and liabilities of the parties, the settlement plainly does move the litigation toward a determination by the court'.

Tom Hughes QC: A Cab on the Rank

On 29 June 2016 Federation Press launched a new biography of Tom Hughes QC. The Hon Murray Gleeson AC QC spoke to the guests in the Bar Common Room.

L to R: Senior Vice-President Arthur Moses SC, the author, Ian Hancock and Tom Hughes QC

The New South Wales Bar for several years has had, on the wall of its Common Room, a fine portrait of TEF Hughes QC, one of its former presidents. Now there is another fine portrait of the same subject, this time in book form, available to the bar and to the public.

The author, Ian Hancock, is to be congratulated. This book contains a skilfully written account of Tom's life and, as well, a measured and just assessment of his contribution to the law and to politics.

The Federation Press made an excellent decision that Tom's story should be available to the profession and the community, and followed through with a handsome publication.

In a substantial sense, Tom himself has been an active contributor to the work. This is not just an authorised biography written with the cooperation of the subject. At important times in his long life Tom kept a diary. He was also a prolific correspondent, and he took pains to keep a collection of letters covering much of his life. Ian Hancock had available to him extensive source material, which has been deployed to great advantage. Many diary entries and letters are quoted and, of course, speak in distinctive cadences. We not only have a large portrait of Tom; we have many miniature portraits by Tom of other people, including prominent figures in the legal profession and in public life. I should mention that some of the observations about lawyers and judges are unflattering. (The reason I should mention this is that it will promote sales of the book among barristers.)

This is a life that has been long, varied and full: in the words of the poet Vildrac, a life that has had nothing in common with death. Tom Hughes has lived at the height of his times. Over many years he was a leader of his profession and he played an important part in its corporate life. His time in politics is now sufficiently distant for it to be examined without that process affecting, or being affected by, current issues.

The care that Tom took, over a long period, to make and keep records seems to suggest a desire to create a legacy for his descendants and to discharge an obligation to his family and his profession; but the range of potential beneficiaries is much wider. This prompts a reflection. What will be the comparable source materials available to historians in the days of email and text messages?

A major part of what emerges from this book is the background – the context – against which Tom's records of his activities and impressions are made. A reader of his experiences as a young

L to R: The Hon Murray Gleeson AC QC, Tom Hughes QC and Ian Hancock

officer in the Air Force during World War II may be interested in what he did, but perhaps of even greater interest are his observations and descriptions of what was going on around him. Because he was such an astute and articulate observer, what he says conveys a powerful impression of past circumstances and events. He was operating close to Normandy at the time of the D-Day landings. His personal account of active service in wartime England is full of interest.

Being able to produce diary entries from World War II is, of course, a sign of a certain age. One of Tom's contemporaries, a very senior member of the New South Wales judiciary, was famously non-committal about his age. He told me that once, while speaking to a group of young women at the law school, he inadvertently mentioned that he was in the war. One of them said: 'Were you in Vietnam?' He wrestled with his conscience – or so he told me – and wondered whether he could get away with saying he had been in the Korean War. He realised that some of his audience would be unlikely to have heard of that conflict, so he replied: 'Yes, Vietnam.'

This biography includes an extensive description of Tom's personal and family life and makes a just acknowledgment of the importance of his family and his wife, Chrissie. Many lawyers will be surprised by the extent and intensiveness of his farming interests. (He now lives at 'Bannister', near Goulburn, which was selected originally by Saxe Bannister, the first attorney general of New South Wales.) Robyn and I, some years ago, spent a weekend with Tom and Chrissie in the country. During a walk on the Saturday morning, we came across a sheep with some kind of infestation. Robyn and Chrissie went on, and I stayed with Tom, who set about dealing with the sheep's problem. After he had been doing this for an hour, and being aware of how much it would have cost, say, Consolidated Press to engage his attention for that time, I asked him what the sheep was worth. He said 'About $8.50'. He evidently read my thoughts and added: 'With sheep, there are humanitarian considerations involved.'

The account of Tom's political career in the 1960s and early 1970s (before the Whitlam era, and hence, for some people, in a time of pre-history), its description of the contentious issues of the time, and its reporting of Tom's observations of leading political figures, will attract members of the political class and students of history. What is likely to be of greatest interest to lawyers will be Tom's professional career, from which the book takes its title: a reference to the 'cab-rank rule', which obliges barristers to accept work within their areas of practice even if the client is unpopular or the case uncongenial. Observance of this rule is part of the barrister's duty to the court, and in turn protects the barrister from being identified with the cause of his or her client.

Tom Hughes was one of the best and most successful advocates produced by the New South Wales Bar. The book conveys the enormous range of his experience and the extent of his achievements. Ian Hancock, no doubt assisted by Tom, has made an excellent selection of cases to bring this out, and his commentary on these cases is balanced and well-informed.

Some of the cases discussed are of obvious importance to legal history. An example is the *Concrete Pipes Case*, argued by Tom while he was Commonwealth attorney-general. Because of the importance of precedent, developments in the law tend to take on an appearance of inevitability. This is an example. How many lawyers, today, would expect that, under the Constitution, anti-trust legislation should be a matter for the states, rather than the federal parliament? Or, on another issue about which there was controversy at the time, who would expect that control of offshore oil and gas production should rest with the states rather than the Commonwealth? Tom Hughes had a clear appreciation of the centripetal forces at work in the federation by reason of a number of developments since 1901, including the importance now attached to the role of government in economic and financial management. This made him a 'centrist' at a time when powerful elements on his side of politics were distrustful of that tendency.

Legal developments may also be seen by reading between the lines. The author mentions that Tom's old friend, Antony Larkins, was appointed to the Supreme Court of New South Wales. It could have been added that he became a judge in Divorce. How many of today's lawyers think in terms of a divorce jurisdiction in the Supreme Court? The author refers to the appointment of Sir Harry Gibbs to the High Court while Tom was attorney-general. It could have been added that he was the federal judge in Bankruptcy and that, at the time, the federal judiciary, apart from industrial judges consisted substantially of the seven members of the High Court and the judge in Bankruptcy. While Tom Hughes was attorney-general, there was no Federal Court of Australia and no Family Court. One reason the federal judiciary was so small was that, at the time, the Constitution required that (as in the United States to this day) federal judges had life tenure. It would be interesting to know what was happening within government, while Tom was attorney-general, about the momentous changes affecting the federal judiciary that came fairly soon afterwards.

The bar has every reason to recognise Tom Hughes for his generous and unstinting contribution to its life as an institution. He was in the long tradition of barristers who accepted an obligation to repay their debt to their profession in that way.

He is a great barrister, and a great Australian.

The Hon Justice Stephen Burley

Stephen Burley SC was sworn in as a judge of the Federal Court of Australia on 23 May 2016. Chrissa Loukas SC spoke on behalf of the New South Wales Bar.

The Hon Justice Stephen Burley grew up primarily in Turramurra on Sydney's upper North Shore with a time in Boston where his late father, a research scientist with CSIRO, took his wife Nan and the young family while he was working at Harvard. His lifelong passion for music began within the family and developed at Turramurra High, renowned for its music programme and concert band, where he learned to play the euphonium under the gifted bandmaster Peter Walmsley OAM. During university he played in the acclaimed Willoughby concert band.

Justice Burley read arts and law at Sydney University where he met his wife Annabelle, a pharmacy student, and joined Hunt & Hunt as a solicitor. He and Annabelle enjoyed several years of study and work in London between 1988 and 1992, with his Honour first gaining the LLM from London School of economics then working as a solicitor with Farrer & Co, where he began a specialty in intellectual property which grew to be his primary area of practice on his return to Australia.

In 1993 his Honour returned to the bar in Sydney where he read with Steven Rares and David Yates, and began a continuous professional association with 5 Wentworth Chambers, first as a reader then as a member, being mentored by Dr Annabelle Bennett. His Honour succeeds Dr Annabelle Bennett on the court and will have Hon Justice Rares and Hon Justice Yates as fellow members of the court.

His Honour took silk in 2007. Under his skilled and personable mentoring of readers and junior barristers, 5 Wentworth developed a reputation as a centre for excellence in IP. His Honour's congenial collegiality contributed in large measure to the camaraderie of chambers.

His Honour's acute mind, capacity for thorough preparation, calm leadership, urbane professional demeanour and formidable advocacy earned him a place as one of the leading IP practitioners in Australia with whom other practitioners enjoyed working and felt appreciated as part of a team. He has appeared as leader in many of the foremost Australian IP and IT cases, some of which pioneered aspects of patent, copyright and trade mark law. He was lead Australian counsel for Apple in its litigation saga with Samsung between 2011 and 2014.

As both the Commonwealth attorney-general and the Law Council president noted among many encomiums, his Honour has made a distinguished contribution to the work of the Law Council in IP. His Honour also has served as a board member of Asthma Foundation New South Wales and Queensland.

Despite a very busy practice Justice Burley has enjoyed a close and active family life, in which he has encouraged, among other skills and interests, a love of travel and music in his children. Travel included a sabbatical extended camping holiday in 2004, introducing his then young children to the north and northwest of Australia. He is also a devotee of fly fishing and skiing and an excellent tennis player, competing in and on occasions winning in the annual bar competition.

His Honour attributed to music the formative influence of 'the joy of working in an ensemble with people who regard excellence as being the only standard to seek'. With characteristic humility he expressed his desire to try to emulate the example of his illustrious history of forebears on the court.

Her Honour Judge Brana Obradovic

Judge Brana Obradovic was sworn in as a judge of the Federal Circuit Court of Australia on 3 June 2016. Lynnette Judge spoke on behalf of the Australian and NSW bar associations.

Judge Obradovic was born in Serbia and on migrating to Australia initially lived in Wollongong, and later moved to Sydney. Although her Honour did not learn to speak English until she was 10 years old she excelled at school and studied at Sir Joseph Banks High before receiving a place at Hurlstone Agriculture High School. Her Honour graduated from the University of Technology, Sydney with a Bachelor of Laws and Bachelor of Science in 1997, then a Master of Laws, majoring in international law, from the University of New South Wales in 2005.

Her Honour was admitted to practise as a solicitor of the Supreme Court in February 1998, and practised first with Gordon Cavanagh Solicitors. Her Honour was called to the New South Wales Bar in August 1998 reading with Margaret Cleary, now the Hon Justice Cleary of the Family Court of Australia. Her Honour was a member of 5 Wentworth Chambers, and later purchased a room at Lachlan Macquarie Chambers Parramatta.

As a junior barrister, her Honour had a diverse practice, in areas including workplace law, family, licensing law, industrial law, commercial law and equity law as well as crime, wills and estates and common law / personal injury matters.

Soon after coming to the bar her Honour was led by George Palmer QC (as his Honour was then) as junior counsel for the second respondent in the significant High Court cross-vesting case, *Re: Wakim; Ex parte McNally*.

Ms Judge observed that:

> Your Honour brings with you to the Bench considerable experience in Family Law along with experience over many years in many other jurisdictions. I doubt that there is a jurisdiction in which Your Honour has not appeared.

Her Honour's courage and determination in forging a career at the bar in the early years was recognised by many who knew her. Ms Judge stated that Ian Neil SC was happy to be quoted directly saying:

> '[Her Honour] is a remarkably brave person. She is humble but determined; kind, generous, thoughtful and empathetic. She is just the sort of person the bar should have and she is an ideal appointment for the Federal Circuit Court'.

On moving to Lachlan Macquarie Chambers in Parramatta her Honour added to her already enviable practice and was appearing regularly in the Family Court and the Federal Circuit Court in Parramatta and Sydney, and enthusiastically embraced circuit work regularly in Dubbo and Orange.

Her Honour is popularly regarded as a fine lawyer, and a skilled and courteous advocate. Ms Judge observed:

> You are meticulous in your approach to your work which you undertake in a well organised fashion. It is inconceivable that Your Honour would ever walk into a Court room unprepared and I am sure that will not change. Your briefs and folders are kept in careful and precise order not a page out of place or out of alignment - your hole punching is of marksmanship quality.

Her Honour is known for her athletic ability, having a brown belt in karate.

It was noted that her Honour's emotional and intellectual awareness of the importance of family law would be fitting for the family law matters in the court and with which her Honour will start her judicial career.

Ms Judge observed:

> You are genuinely aware of the impact that sad outcomes in life can impose on people. A number of bereaved or troubled colleagues and employees have been made to feel a little stronger through you inviting them to join you in coffee or a meal. There is no doubt that you will have genuine and constant regard for the humanity of those who appear before you.

Commonwealth Attorney-General George Brandis, speaking on behalf of the Australian Government stated that the details of her Honour's life and career make her an exemplar of the migrant success story in Australia and hers is an inspiring story to others who have come from far away to make their lives in Australia.

Her Honour observed that one of the hardest skills to perfect in the profession is to listen, not just to the words being said, but also to what is actually being said. Her Honour stated that if, when practitioners ask, 'What is Her Honour like?' and the answer comes back, 'fair but firm,' she will know she is doing her job well.

Her Honour noted that:

> The cases that come before this Court, in particular family law cases, are hard. They are hard for a number of reasons. The facts are complicated, often very difficult to prove. The law is far from simple and involves all sorts of considerations, which those who do not practise in the area do not truly appreciate.

District Court appointments

On Monday, 11 April 2016 his Honour Judge John Pickering and her Honour Judge Siobhan Herbert were sworn in as judges of the District Court of New South Wales in a double ceremony. Presiding was Justice Derek Price AM, chief judge of the District Court. Attorney General Gabrielle Upton spoke on behalf of the New South Wales Bar. Mr Garry Ulman, president of The Law Society of New South Wales, spoke on behalf of the state's solicitors.

Her Honour Judge Herbert was born in London where she initially attended La Retraite Girl's School. In 1976 her Honour's family moved to Australia and settled in the Sydney suburb of Coogee and she attended Brigidine College Randwick.

Her Honour graduated from the University of Sydney in Law in 1983 and was admitted as a solicitor in 1984. For a short period, her Honour was a researcher in the Bureau of Crime Statistics in a unit studying sexual assault prosecutions, convictions and sentencing issues, foreshadowing the work and expertise for which she became known in subsequent years. Her Honour then became an employed solicitor at McCaw Johnson in 1984.

In 1986, her Honour commenced as a solicitor at what was then the solicitor for Public Prosecutions and clerk of the Peace, nowadays the Office of The Director of Public Prosecutions, where she stayed for close to 30 years.

Her Honour was one of the three original solicitor advocates to conduct jury trials in 1991.

Her Honour appeared continuously at the coalface of the justice system in this role, primarily in the Local Courts in summary and committal proceedings. The attorney observed that her Honour had earned a reputation as 'a skilful, considered advocate, possessing a fine legal mind' with a wealth of trial experience. As a trial advocate between 1994 and 2001 most of the trials in which her Honour appeared, including jury trials, were conducted in Western Sydney and many involved child sexual assault charges.

By 2002, her Honour had been appointed a Crown prosecutor and was acknowledged as one of the most experienced Crown prosecutors in the highly technical area of child sexual assault prosecutions.

Her Honour has also been author of the ODPP Sentencing Manual, the guide for all Crown prosecutors and lawyers in New South Wales, and co-author of 'Sentencing Law in New South Wales'.

Her Honour has appeared in many trials as prosecutor in the District Court, the Supreme Court and on appeal in the Court

of Criminal Appeal. Her Honour's courtroom manner has been described as 'composed and measured […].' As a cross-examiner David Ross QC has referred to her Honour's style in his book on advocacy as an example of 'sweet brevity'.

Her Honour has participated in many Professional Development Programs and continuing education for Crown prosecutors and has taught with the Australian Advocacy Institute.

Her Honour's interests outside of the law include her commitment to swimming regularly hundreds of laps at the local pool each week. Her Honour is also devoted to her family, her husband, Anton, and her son, Declan, who is also studying law.

Her Honour was known as a kind calming mentor, not only giving advice on matters of sentencing and procedure but also welcoming, and encouraging junior lawyers.

Her former colleagues anticipate Judge Herbert will be a 'knowledgeable, fair and compassionate judge'.

'District Court appointments'

His Honour Judge John Pickering was born in Sydney and grew up in Cheltenham. After completing the Higher School Certificate at Epping Boys High School his Honour enrolled at Macquarie University, where he graduated in Economics and Law in 1992. In 1993, he completed the College of Law and embarked on his career as a junior solicitor in the Office of the Director of Public Prosecutions.

In 1997, his Honour's services to the law were recognised by the government when he was a joint recipient of the New South Wales Government Award for Excellence in Government Legal Services.

As Mr Ulman observed, his Honour is known for a superb legal mind and brilliant advocacy. His Honour was swiftly appointed a trial advocate in 1998 and seconded to the Police Integrity Commission. In 1999 his Honour went on an exchange with the Department of Justice in Canada where he appeared in the provincial courts of Vancouver and instructed in matters before the Supreme Court of Canada.

In 2001 his Honour was called to the bar and became a New South Wales Crown prosecutor. In 2012, his Honour was appointed a deputy senior Crown prosecutor and took silk that year. His Honour then rose to the office of deputy director of public prosecutions.

Judge Pickering has had a lengthy and distinguished career as a prosecutor, gaining a wealth of experience in diverse proceedings ranging from the Local Court to the Court of Criminal Appeal and to the High Court of Australia, where he has appeared monthly for four years in special leave applications.

His Honour's depth of knowledge and skill as an advocate have seen him in important and lengthy trials when he was known to be '[…] always prepared to take on difficult points and be creative with the Law' and 'not frightened of an unpopular argument which [he] believed to be true.'

His Honour is a plain speaker not fond of legalese. Together with his concise manner of communication, he is blessed with a prodigious memory for varied topics but particularly in criminal procedure. These qualities have earned him the nickname 'The Oracle' both in and out of court.

Mr Ulman described Judge Pickering as 'a charismatic counsel with an entertaining style of advocacy which gets to the point and at times cuts through with a sarcastic edge – no doubt a style which is said to work particularly well with juries'.

Throughout his time at the ODPP, his Honour was considered a role model and was instrumental in creating a program to support junior practitioners appearing in their first trials.

His Honour paid tribute to his wife Georgia Turner, who is also a Crown prosecutor, and to their daughter Scarlett. In thanking all his friends and family, his Honour observed 'Like so many people the support of your family growing up shapes who you are as an adult.' Apart from a little known personal interest in American pop culture, his Honour is an avid watcher, player and aficionado of all sports but favouring especially Masters Golf, American football, NBA basketball and Major League baseball.

Mr Ulman observed 'On the bench, your colleagues and mentors predict that your Honour will excel in the same way you have in everything in which you have put your hand to thus far. … [Your] appointment will make for a powerful addition that will truly enhance the work of this court.'

The Hon Justice John Robson

John Robson SC was sworn in as a judge of the Land and Environment Court of New South Wales on 5 July 2016.

The Hon Justice Robson grew up in country towns in New South Wales and then Tasmania, followed by a move to Sydney's northern beaches. He graduated BA, LLB from the University of Sydney, with a short stint as associate to District Court Judge George Smith, and was admitted as a solicitor in 1982. At Gadens he became one of the firm's youngest-ever partners in 1983.

His Honour was called to the bar in 1989 and took silk in 2004. After reading for a time on 10 Wentworth Selborne he found his professional home on 12 Wentworth Selborne, where he has been described as one of the pillars on which the floor was built and was a highly effective and energetic head of chambers for a time. His Honour referred to the enormous support, friendship and encouragement that he had enjoyed from his colleagues and clerk, which had provided a workplace without compare.

With a practice in administrative law, commercial law and equity, his Honour developed a leading specialty in land and environment law and has appeared in leading cases in those fields, the most recent being for the victorious objecting parties in *Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc.*

The attorney general of New South Wales, Hon Dr Gabrielle Upton, speaking for the bar, said that in chambers his Honour had been 'a sounding board, a dispenser of sage advice, a peacemaker and a godfather in the very best sense of the word … approachable, razor smart and practical, … an exceptionally hard worker … easy to work for and with … a man of generous spirit – that extends to sharing your time and expertise with your colleagues'. These qualities he shared, not only with floor members, but also with the dozen or more readers he mentored during his time as junior counsel, with enduring impact from their own description, and more widely at the bar where he was popular and respected. To these encomiums Mr Gary Ulman, speaking for the solicitors of the state, added by reputation and from his personal experience 'debonair, urbane and witty', with a style of advocacy at once concise in presentation and forthright while courteous and tactful.

His Honour throughout his life has been an accomplished and versatile sportsman, in swimming including ocean swimming in many parts of the world, running, rugby, skiing and tennis. The Attorney reported that his fitness has merited the attribute from envious colleagues 'ageless and in glowing good health'.

Mr Ulman described the centrality to his Honour's life of his close family – 'not just a sanctuary but a point of outreach' extending kindness and hospitality to those around who were struggling.

Mr Ulman stated that his Honour's approach to life would be reflected on the bench and was expected 'to bring out the very best in counsel, an attribute that can only come from the true mastery of the area in which your Honour will adjudicate'.

His Honour, with his customary charm and modesty, paid tribute to his late parents, who had died while he was in his late teens, as the source of the values of kindness, hard work and respect for all, and to his wife Penelope, their children and his wider family.

His Honour concluded by quoting the late Sir Harry Gibbs on his swearing-in as chief justice of the Commonwealth of Australia in 1981, as 'sufficient guidance' for a new judicial officer: 'It is the proper role of the courts to apply and develop the law in a way that will lead to decisions which are humane, practical and just … But it would be destructive of the authority of the courts if they were to put social and political theories of their own in place of legal principle'.

Sarah McNaughton SC

Sarah McNaughton SC was recently appointed the Commonwealth Director of Public Prosecutions.

Sarah studied Arts and Law at the University of Sydney. Upon completing her degree, in 1988 she was associate to the Honourable Michael Kirby AC CMG, then president of the Court of Appeal, and later a judge of the High Court of Australia.

After being admitted as a solicitor in 1989, Sarah worked at Freehill Hollingdale & Page (now Herbert Smith Freehills) until 1990.

In 1990 Sarah became a legal officer at the Sydney office of the Commonwealth Director of Public Prosecutions, in due course rising to senior legal officer (1990–1991) and principal legal officer (1991–1995).

In 1996 Sarah was admitted as a barrister, practising initially as in-house counsel at the Sydney Office of the Commonwealth Director of Public Prosecutions.

In 1998 Sarah joined the private bar, moving to Forbes Chambers, where she remained until her recent appointment.

In 2011 Sarah was appointed senior counsel.

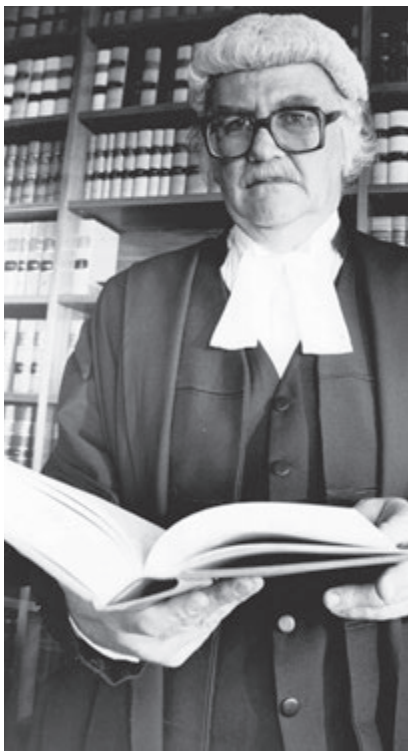
In 2015 Sarah was counsel assisting at the Royal Commission into Trade Union Governance and Corruption.

While at the private bar, Sarah McNaughton specialised in criminal and quasi-criminal matters, appearing for both prosecution and defence at trial and appellate level.

Sarah's practice at the bar featured among other things the conduct of large scale complex criminal trials, including multi-accused, multi-agency conspiracy matters, and in particular 'white collar' fraud, taxation offences, corporations offences, drug importation and terrorism offences.

Sarah's practice at the bar also included inquests, commissions of inquiry and professional disciplinary matters.

The Hon Philip Ernest Powell AM QC (1930–2016)



Powell acquired an encyclopaedic knowledge of law relating to procedure and to the history and evolution of equitable doctrines. His judgments show an authoritative erudition of the law rendered in beautiful prose.

Philip Ernest Powell died in Sydney aged 86. He was the son of a well-known piano tuner and the family lived at Vaucluse. He attended Sydney Boys High School (1942–1946) and was a brilliant scholar. He had a phenomenal memory. Powell graduated from the University of Sydney in Arts and in Law and was admitted as a solicitor of the Supreme Court in 1954 and practised at Dudley Westgarth & Co. After just one year as a solicitor, Powell was called to the New South Wales Bar in 1955.

Powell was in active practice in the 'Golden Years' of the Sydney Bar, the post-war years. He had a large room on 12th Floor Wentworth Chambers where he remained for almost the entirety of his career as a barrister. He had a vast practice, appearing in common law and in equity, in commercial cases, in industrial cases and in appeals. He practised alongside the greats of the day Rogers QC, Traill QC, Needham QC, Finlay QC, Hope QC, McLelland QC and Sully QC many of whom later became his judicial brethren.

Powell took silk in 1970 and became one of her Majesty's counsel. In April 1977 he was sworn in as a judge of the Supreme Court of NSW. At the time, he was senior vice-president of the New South Wales Bar to President Doug McGregor. Thence his commission would span a quarter of a century.

As a junior barrister, the Hon Michael Kirby remembers Powell for two things. First, Powell kept a Domesday Book in which he recorded the ages and dates of sitting superior court judges, in order to monitor judicial opportunities. Second Powell was well-known for dropping everything to advise and assist junior counsel. This old tradition of the bar was one which he assiduously maintained.

A third thing for which Powell is remembered is his meticulous attention to detail both of facts and of the law which stayed with him throughout his career.

Powell's generosity was legendary whether in court, in chambers or at his home in St Ives where he lived for 43 years. A very junior clerk who later became a judge, remembers his gentlemanly manner and bonhomie, whilst accompanying Powell on the Wage cases interstate in the 1970s.

Powell sat as the Probate judge for over a decade. And he was also the Protective judge. He is remembered for the humanity he showed on many occasions by stepping off the bench, taking off wig and gown and explaining to litigants, often children, the implications of the orders he would make. Though, on occasion, Powell could be robust.

Powell acquired an encyclopaedic knowledge of law relating to procedure and to the history and evolution of equitable doctrines. His judgments show an authoritative erudition of the law rendered in beautiful prose. He was published in authoritative texts on commercial law and the protective jurisdiction, including 'Origins and Development of the Protective Jurisdiction of the Supreme Court of New South Wales'. Powell's particular reverence for retaining the antique rules of practice and procedure is well-known.

Powell was appointed a Judge of Appeal in October 1993.

Justice Philip Hallen said at his own swearing-in:

> I have been lucky enough to have appeared before equity and probate judges who have mentored me. For a number of years when my career in the equity, probate and the protective areas was developing, the judge whom I appeared before most often was the Honourable Philip Ernest Powell.

Powell is remembered for any number of lives and persons he helped change for the better, and for the many and varied cases he heard. Of the latter, the *Spycatcher Case* is notorious. A

'The Hon Philip Ernest Powell AM QC (1930–2016)'

young Malcolm Turnbull appeared as counsel for Peter Wright of MI5. Powell took a dim view of the opposing English witnesses. In a letter to the Bar Association Michael Kirby noted that

A pantheon of dignitaries attended Powell's obsequies, befitting someone who did so much and who was truly learned in the law. The prime minister came to pay his respects ...

Powell was upheld in that case by both the Court of Appeal and by the High Court of Australia - only the tabloid newspapers in London dissented.

On the occasion of his retirement from the Court of Appeal in 2002, the then Chief Justice James Spigelman commented:

> Your Honour's predilection for precision is, you should know, much admired. You always stayed on the right side of that fine line between precision and pedantry. The clarity of your Honour's expression will mean that the judgments you delivered in your long period of service on this Court will stand the test of time. On behalf of all of the Judges of the Court I thank you for your contribution to the people of this State and to the law.

A pantheon of dignitaries attended Powell's obsequies, befitting someone who did so much and who was truly learned in the law. The prime minister came to pay his respects, as did many senior sitting and retired judges who had been Powell's colleagues over the last 30 years and who came to bid him farewell in St James' Church. Powell was a witness of his times. To begin a legal career may be easy, however to persevere with and to succeed to the extent that Powell did, with intellect, faith and patience, is sanctifying.

Justice Philip Hallen
Trish Hoff
Kevin Tang

Andrew James Lidden SC (1954–2016)

When asked for some personal reflections about Lidden SC for the preparation of his eulogy, the overwhelming theme from colleagues was that he was a formidable advocate. His almost photographic memory was, perhaps, his greatest strength. Over the course of his 35year career Lidden would have been briefed in - conservatively -15,000 cases.

The sentiment from the defendant bar was that one had to have complete mastery of their brief if Lidden was on the other side. He had an uncanny talent for turning a weak case into an unlosable one (usually by cross-examining a witness a defendant ought not have called).

Whilst he is remembered for his extensive common law personal injury practice, Lidden came to the bar at a time when barristers truly were 'general practitioners'. In the early years he had an extensive criminal, probate, matrimonial causes, equity and appellate practice. He even appeared for an insurance company (once).

Andrew James Lidden was born on 20 February 1954, a Southern Highlander

through and through. He read law at the Australian National University. His legendary passion for all things automotive was well entrenched by his early teens and started with motorcycles. He promptly became and remained a collector of cars and motorcycles.

Lidden was called to the bar in 1978. He became a member of Frederick Jordan Chambers. In those days a clerk of chambers would simply allocate cases to those available and keen which meant juniors had to be fast learners. Lidden was fearless and bright and as a result appeared in every jurisdiction. Even back then, he would hold his pink ribboned brief in one hand and a motorcycle magazine in the other.

In 1993 Frederick Jordan Chambers moved to its current location at 53 Martin Place and, shortly thereafter, Lidden became secretary of the board. He managed the enormous workload of administering the country's largest chambers and his huge practice right up until his passing.

In the course of his career performing plaintiff personal injury work vast reforms took place across motor vehicle, workplace and public liability accidents. Lidden was at the forefront of finding ways to get more for those whose common law entitlements were ever increasingly eroded by government. At times he sat on the Bar Association's Common Law Committee and was otherwise a consultant to it whose views were highly regarded.

His capacity for work was astounding. His practice was to dictate a memorandum of advice and pleadings during his first conference with a client. He had a rare and invaluable talent of cutting to the heart of an issue to determine the facts requiring proof. If he was unavailable for a hearing his juniors could virtually run the entirety of examination in chief from his initial memorandum of advice.

Lidden was fearless and bright and as a result appeared in every jurisdiction. Even back then, he would hold his pink ribboned brief in one hand and a motorcycle magazine in the other.

Lidden's memory for clients and their cases was so sharp that it was effortless for him to finish a case and walk into the next one or, if his skills were more urgently required, walk into and out of several cases to deal with a point or clinically dispatch an opponent's witness.

Mornings were always an interesting time in Lidden's room. He had on any given day new hearings, part-heard hearings, mediations and settlement conferences. A cavalcade of variously damaged and usually very nervous people and junior barristers would be ushered into his room for the morning pre-hearing conference. There Lidden would explain court process and answer any questions. He would often calm a nervous plaintiff with a joke usually at the junior's expense such as 'don't mind Bloggs there in the corner, she's more nervous than you ...' or 'don't mind Bloggs there in the corner, he's just here to fix the air-conditioning ...'.

If at court the client still looked nervous, he would open the courtroom door for them with his favourite reassuring words 'step into the revolving knives…'.

His direct style of advocacy and ability to distil facts provided the vehicle for a number of High Court judgments (*Water Board v Moustakas* (1994) 180 CLR 491, *Hollis v Vabu* (2001) 207 CLR 21, *New South Wales v Fahy* (2007) 81 ALJR 1021, *Zheng v Cai* [2009] HCA 52).

The introduction of the *Civil Liability Act 2002* provided a steady stream of cases which charted a new landscape. The boundaries of that legislation are marked out by many of Lidden's cases. Perhaps most impressive was his ability as an advocate to deal with facts and to address a judge on their significance without complicated legal argument. Judicial resistance to such an approach met with a typical response. When once asked by a District Court judge whether he had any authority for a proposition he was advancing the reply was immediate 'Yes Your Honour, Lidden on the bleeding obvious…'

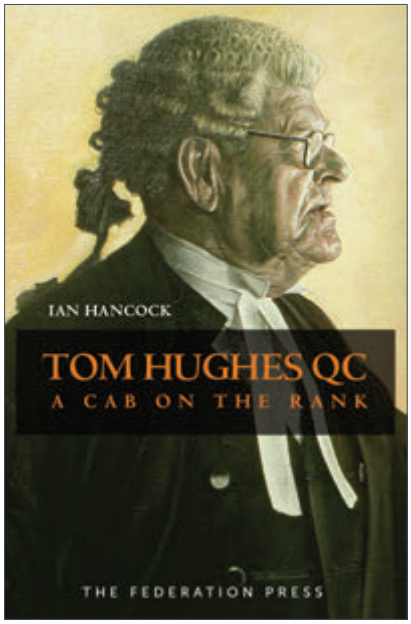
After taking silk in 2006 it was his intention to continue with his prolific practice until his children were settled into university. He looked forward to a time when he would take on fewer and more interesting cases perhaps returning to crime. His illness deprived him of that opportunity and deprived us the opportunity to see him become a great statesman of the Common Law Bar.

He was devoted to his family, his wife Elleanor and their children William and Zara.

By Paresh Khandhar

Tom Hughes QC: A Cab on the Rank

By Ian Hancock | The Federation Press | 2016



It is not uncommon for barristers to have a background in military service, politics or agricultural pursuits, and even to combine practice at the bar with one of these endeavours. However, Tom Hughes must be the only Australian barrister who can boast of all of the following: serving as a pilot in World War II, combining a political career with his practice at the bar and later serving as the Commonwealth attorney- general, being regarded as one of the best barristers of his time, contributing energetically to the running of a large farm in his spare time, and continuing practice at the bar to the age of 88, including winning a High Court case at the age of 86.

At over 350 pages, this is a thorough and well-researched biography. Ian Hancock introduces the life of his subject not by reference to Hughes' parents as many biographies do, but by reference to the arrival of his great-great-grandparents in New South Wales in 1840. The book draws on interviews with Hughes and members of his family, colleagues and friends, and voluminous primary material including many letters. It includes charming and amusing anecdotes of Hughes' early life, including descriptions of family holidays at Yaouk in the Snowy Mountains and Hughes' early experiences at school. A letter from Hughes' father to his grandparents in 1928 records of the then five year old, 'Tom is a most important person going off each morning to school'.

One of the strengths of this book is its detailed attention to all periods and aspects of Hughes' life, whether professional, personal or spiritual. It does not only address the good times – Hughes' sacking as attorney-general by Billy McMahon in 1971 and the breakdown of his first marriage are handled candidly yet carefully.

The book depicts the life of a man who achieved great success in the law, but not only that. It provides insight into the reflections of a young man serving as a RAAF pilot at the time of the Allied invasion of Normandy in 1944, and the chapters addressing Hughes' time as a member of parliament and federal attorney-general portray the political mood in Australia in the late 1960s and early 1970s. The infamous 'cricket bat' incident of August 1970, in which Hughes brandished a cricket bat at a group of anti-conscription protesters outside his home in Bellevue Hill, is recounted with considerable detail and colour. The book records a variety of responses: son Michael Hughes, then aged five, remembers seeing lots of 'hippies' outside the house and later drew a drawing of 'hippies in our garden'. Hughes received a number of expressions of support, including one from Jack Fingleton, a former opening batsman for Australia who wrote to Hughes: 'Footwork magnificent – cannot be faulted. Grip with bat just a little suspect. Perhaps hands should have been closer together although gap is permissible if stroke is improvised'. In the following weeks, students dressed in cricket gear greeted Hughes when he attended a university to address a Liberal Club meeting. Journalists were by and large, critical of Hughes. One protester brought a charge of assault against Hughes as a result of the incident, claiming that Hughes poked him in the ribs with the bat. At the hearing, Hughes was asked whether the people who came down his driveway did so with hostile intent, and Hughes replied, 'Well, I didn't think they were a friendly delegation of young Liberals come to admire me'. The charge was dismissed.

A number of Hughes' cases are featured, including the *Concrete Pipes Case*, the West Indian cricketer Clive Lloyd's action against David Syme & Co Ltd in which Hughes was victorious in the Privy Council, Rene Rivkin's defamation action against Fairfax in relation to articles linking him with the death of Caroline Byrne, and Gina Rinehart's action against Rose Porteous in 1999, in which Hughes acted for Rinehart. Entertaining snippets of Hughes' cross-examination of Porteous are included, where upon seemingly becoming frustrated with the long explanations Porteous gave by way of answers to Hughes' questions, he said, 'Do you mind if I interrupt you to ask a question?' Later, when Hughes asked whether Porteous had poor relations with Rinehart, Porteous answered, 'Yes, or we wouldn't be here and you wouldn't be earning so much money.'

Members of the New South Wales Bar will be interested in its evolution over the course of Hughes' time in practice and his observations of those changes. There were 335 barristers at the New South Wales Bar in 1949 when Hughes started practice, and all but one were male. He ran a lot of 'collision cases' and minor criminal cases in the Court of Petty

Tom Hughes QC: A Cab on the Rank

Sessions and District Court when he first started out and remembered having his ears 'boxed' a few times when appearing against senior juniors. He reflected that nowadays, junior barristers spend much less time on their feet whereas he had the benefit of learning by trial and error and being forced to live with his mistakes.

When Hughes returned to the bar after retiring from politics in 1971, a single room on 11th floor Selborne Chambers cost $8,500 (at a time when the average Australian male full-time earnings were approximately $5,000 per year). In 1973, when Hughes was president of the New South Wales Bar Association, there were 562 practising barristers in New South Wales, almost three-quarters of whom had chambers on Phillip St, compared with over 2000 today.

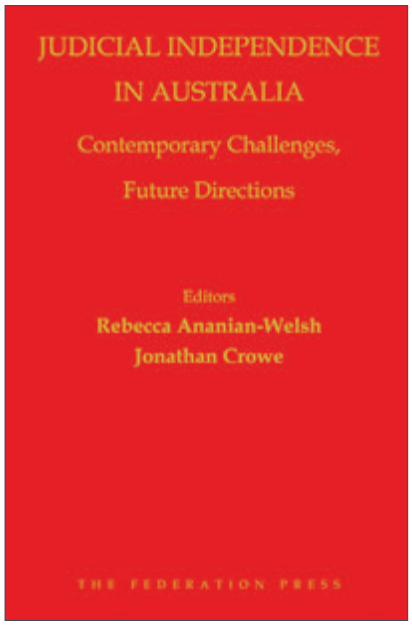
Hancock does not attempt to provide his own assessment of Hughes as a person, barrister or politician. He allows Hughes' diary entries, letters, interviews and the opinions of others to speak for themselves. One aspect of Hughes' personality which appears to be undisputed is that despite his abiding success at the bar, he never got over the (unfounded) fear that he would not have enough work, a fact which may both comfort and trouble members of the bar.

Ian Hancock is to be commended for an entertaining, thorough and well-researched portrait of one of the bar's greats.

Reviewed by Victoria Brigden

Judicial Independence in Australia: Contemporary Challenges, Future Directions

By Rebecca Ananian-Welsh and Jonathan Crowe (eds) | Federation Press | 2016



In the introduction, the editors Rebecca Ananian-Welsh and Jonathan Crowe, do a quick run-down on High Court cases dealing with judicial independence, from the not-so-recent *Huddart, Parker & Co Pty Ltd v Moorehead*,[1] through to *Brandy*,[2] *Kable*,[3] and *Re Wakim*.[4] These are some of the high profile cases of the last century. But there are other, less elucidated but equally important aspects of judicial independence that creep under the radar: court-funding, extra-judicial activities like vice-regal and academic posts, the use of social media by judges, lawyers and counsel, and diversity in the judiciary. This book tackles all of these subjects, and so it ranges from abstract, philosophical inquiry (see the chapters on 'Conceptualising Judicial Independence' in Part I and on *Kable* and 'Institutional Integrity' in Part III) to practical and empirical analysis of current social trends (see, for example, Part VI on 'Courts in Social Context').

The Centre for Public, International and Comparative Law at the T C Beirne School of Law at the University of Queensland hosted a conference in July 2015, and most of the essays spring from papers presented there. The content is fascinating; the breadth of subject matter all-encompassing. While none of the reading is light, some is more demanding, giving the book a flexible range, which allows the reader to pick and choose depending on mood or interest.

Sir Anthony Mason opens the book with a look at contemporary challenges to judicial independence in Australia. Amongst many topics, Sir Anthony considers the Hon Dyson Heydon's controversial article 'Threats to Judicial Independence', in which Heydon considered the negative impact an overbearing judge could have on judicial independence in a multi-member court, identifying Lord Diplock as one. Sir Anthony suggests Heydon had in mind at least one High Court colleague too.

Six parts then follow, each with two or three chapters conceptualising divergent aspects of judicial independence. Part I tackles the philosophy of the separation of powers. Emeritus Professor of Public Law at the University of Queensland, Suri Ratnapala provides an overview of two theses of the separation of powers – the diffusion and methodological theses – and concludes the principle of the separation of powers does not promote the rule of law and liberty of citizens without

Judicial Independence in Australia: Contemporary Challenges, Future Directions

further restraints concerning its manner of exercise. Professor Jonathan Crowe and Emeritus Professor HP Lee follow with chapters on human fallibility and the separation of powers, and international comparisons of judicial independence.

Part II of the book is concerned with 'Judicial Appointments and Tenure', and includes a chapter by Professor Heather Douglas and Francesca Bartlett titled 'Practice and Persuasion: Women, Feminism and Judicial Diversity', which explores the research findings of the Australian Feminist Judgments Project, in which 41 women decision makers identified as feminist were interviewed as to whether feminism influenced their decision making.

Part III of the book is dedicated to *Kable* and titled 'Institutional Integrity'. In a fascinating chapter titled 'Comparative Constitutional Law and the Kable Doctrine', Professor Rosalind Dixon and Melissa Vogt consider whether comparative constitutional experience may help to develop objective guideposts for the application of the *Kable* doctrine. The authors suggest that decisions since *Kable* have left courts to make considerable evaluative judgments on a case-by-case basis. For the authors, judges would be well-off in first pointing to some transnational comparative support – 'transnational anchoring' - before making open-ended evaluative judgments. The authors analyse how an application of transnational anchoring may have played out in *Momcilovic*,[5] *Pollentine*,[6] *Totani*,[7] and *Wainohau*.[8] PhD candidate Constance Youngwan Lee and Associate Professor Gabrielle Appleby round out this part of the book with chapters titled 'Constitutional Silences and Institutional Integrity' and 'Institutional Costs of Judicial Independence' respectively.

Part IV is concerned with judicial reasoning and rhetoric. It includes an illuminating chapter by David Tomkins and Katherine Lindsay titled 'The Judicial Scholar and the Scholarly judge: Extra-Curial Writing and Intellectual Independence on the High Court', in which the authors use case studies of the Honourable Dyson Heydon - a 'judicial scholar' - and Justice Stephen Gageler - the 'scholarly judge' – to consider how extra-curial writing can be a source for evaluating the intellectual landscape of judges.

The authors give a lengthy account of the contrast in academic and professional backgrounds reflecting the old and new world, or the Oxford/Harvard divide: Heydon's postgraduate study and academic post at Oxford, his Honour's 'Judicial Activism and Death of the Rule of Law' speech at the Quadrant Dinner in October 2002, his lone judgments in his last term on the High Court, and his praise for many characteristics of Windeyer J, including, amongst others, his 'considerable distinction of style' and familiarity with the words of Thomas Cranmer, the *Authorised Version of the Bible* and the classics of English literature. And with respect to Justice Gageler, his frequent forays into scholarly research and law journal publication, during his time as Frank Knox Memorial Scholar at Harvard and while on the teaching staff at ANU, his first sole authored article in the *Federal Law Review* in 1987 on the subject of Australian federalism and judicial review, and his return following his appointment as senior counsel to judicial review of administrative action in a presentation at a colloquium in honour of Sir Anthony Mason, and his recent co-authoring with Brendan Lim of a paper on decision making procedure in common law courts, the impetus for which was a 1947 publication by GW Paton and G Sawer on 'Ratio Decidendi and Obiter Dictum in Appellate Courts'. The authors conclude that the intellectual independence of High Court Justices such as Heydon and Gageler strengthens the institutional independence of the High Court.

Part V is dedicated to 'Extra-judicial Activities', with chapters by the Hon Justice Martin Daubney on 'Extra-Judicial Activities and Judicial Independence' and by Rebecca Ananian-Welsh and Professor George Williams on 'State Judges as Lieutenant Governors'.

Part VI relates to 'Courts in Social Contexts', and includes a chapter by Pro Vice-Chancellor John M Williams and another by Rebecca Ananian-Welsh. It also includes a chapter on 'Social Media and the Judiciary: A Challenge to Judicial Independence', by Alysia Blackham and Professor George Williams, which considers the effect on perceptions of judges' independence as a result of the use by courts of applications like Twitter and Facebook – applications that, unlike television and other historic forms of media, are different essentially because they facilitate participation and interaction.

The book is a nuanced and exciting treatise on the abundant issues relating to judicial independence in Australia: it would be well loved by practitioners.

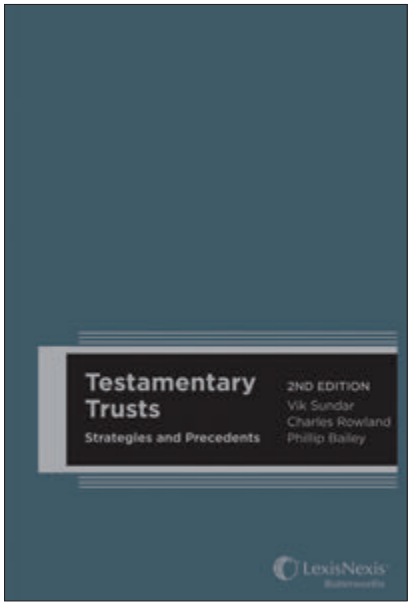
Reviewed by Charles Gregory

Endnotes

1. (1909) 8 CLR 330.
2. *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.
3. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
4. *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.
5. *Momcilovic v The Queen* (2011) 245 CLR 1
6. *Pollentine v Attorney-General (Qld)* (2014) 253 CLR 629.
7. *South Australia v Totani* (2010) 242 CLR 1
8. *Wainohau v New South Wales* (2011) 243 CLR 181.

Testamentary Trusts: Strategies and Precedents (2nd ed)

By V Sundar, C Rowland, P Bailey | LexisNexis Butterworths | 2016



The first edition title of this text was *Discretionary testamentary trusts: precedents and commentary*. The topic of the second edition is similar but with a perhaps more accurate naming. It complements a text with some similarities of structure in which one of the authors (Dr Rowland) was involved in some earlier editions, *Hutley's Australian wills precedents*.

The first six chapters introduce the place of discretionary testamentary trusts in estate planning and describe the use of discretionary testamentary trusts in relation to tax effectiveness, asset protection, social security and disability legislative tests, insurance, and superannuation.

Chapters 7 to 10 are designed to provide a universal framework base precedent text for testamentary discretionary trusts and then to adapt that text to specialised circumstances with precedential drafting variations that are designed to have been harmonised with the base precedent. As the authors say at [7.1]: 'The system is like a Lego set: because each block is self-contained, a block can be removed and replaced without compromising the integrity of the whole, and removing and replacing one block does not have implications for the rest of the structure. … The great merit of the system is that it saves the drafter the difficulty and danger inherent in laboriously considering each modification to a precedent, unsure all the time whether the change he or she is making will compromise other parts of the precedent.' However, the explicit disclaimer on the opening pages of the text reminds the reader that a precedent is the start of thought not a substitute for it. As is further recognised at [7.3] et seq, not every human situation will fit neatly within an existing block and changing the block will require checking for harmony with the rest of the precedent.

The text is clearly aimed at providing guidance for practitioners, primarily those who are required to draft and advise on the structures which it expounds and for which it provides precedents. The style is direct and practical and the language of drafting and commentary or explanation straightforward. Treatment of case law is directed to practical implications. An explanatory note to give to a testator or other client is provided, with a warning to review it if variations of drafting are used. Complete worked examples of specific factual variations are provided.

Chapters 11 and 12 provide strategies concerning the impact of family provision legislation (recognising that effectiveness may be diminished in New South Wales by the broad notional estate regime) and in respect of blended families (recognising the trade-offs and balances inherent in each strategy).

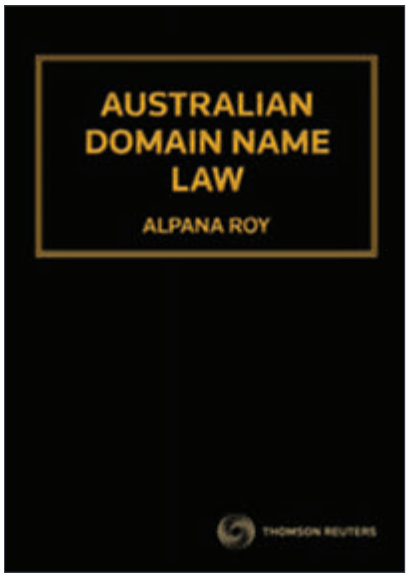
The index is comprehensively helpful.

Although primarily focussed on practitioner drafters and advisers, the text remains of interest to those dealing with the (perhaps litigious) aftermath of drafting, in elucidating the intended purpose and strategy that informs a particular choice of words.

Reviewed by Gregory Burton SC

Australian Domain Name Law (1st ed)

By A Roy | Thomson Reuters | 2016



This is the first published textbook on Australian domain name law. In July 2014 Andrew Christie, assisted by others, published via auDA (.au Domain Administration Ltd) the first edition of an online resource called the auDRP Overview (with a full title auDA Overview of Panel Views on Selected auDRP Questions) whose stated intention is to be regularly updated. This valuable document is in the nature of a digest of approximately 330 published domain name determinations between 1 August 2002 (the beginning of the Australian Dispute Resolution Policy or auDRP) and 15 July 2014 and a synthesis of interpretative principle drawn from those determinations. Its format is based on the UDRP Overview produced by WIPO in relation to the Uniform Dispute Resolution Policy administered by the Internet Corporation for Assigned Names and Numbers (ICANN). The Australian determinations draw on published UDRP determinations when there is similarity of text or principle.

The author of the current text acknowledges at [1.50] that the auDRP Overview was published halfway through the writing of the current text and 'has been incorporated fully in this book as it has been adopted by auDA as representing the consensus view on auDRP panel opinions.' The author points out that the auDRP Overview does not consider in detail the cited determinations and that the current text seeks to undertake that expanded treatment. Although both Overviews are not precedentially binding, the author cites international text writing that fairness and consistency will in practice conform determinations to consensus views, and also to previously-expressed majority views unless there is compelling reason to depart from a majority view. This approach is also consistent with the rationale of the auDRP Overview.

In Chapter 1 the author outlines the concept of domain names and their administration at international or country level depending on the level of the domain name. The genesis of the international and Australian dispute resolution policies, their rationale and operation, is briefly described. Chapter 2 provides detailed description of the auDRP with appropriate reference to the auDRP Overview and a discussion of the rationale for the elements of the auDRP. Chapter 3 does the same for the Rules that govern determination of a dispute.

The remaining chapters 4 to 6 provide detailed analysis of each component required to be demonstrated to entitle a complainant to relief in a determination, as found in auDRP Schedule 1 clause 4a–c: the domain name is identical or confusingly similar to a name or mark in which the complainant has rights; no rights or legitimate interests in respect of the domain name in the current registrant; registration or subsequent use of the domain name in bad faith. A similar format is followed, being a statement of the aspect of one of those components that is being analysed, the position stated in the auDRP Overview on that aspect (if there is a consensus position), and expansion of the cases mentioned in the Overview in conjunction with other authority and principle, including where appropriate from UDRP material and other parts of relevant IP law such as trademarks. The textual differences between auDRP and UDRP are stated and analysed. The approach is largely descriptive rather than critically evaluative, often letting the determinations speak in their own words in substantial extracts or paraphrase. There is a very useful compilation in appendices of the Policies and Rules that are discussed in the text.

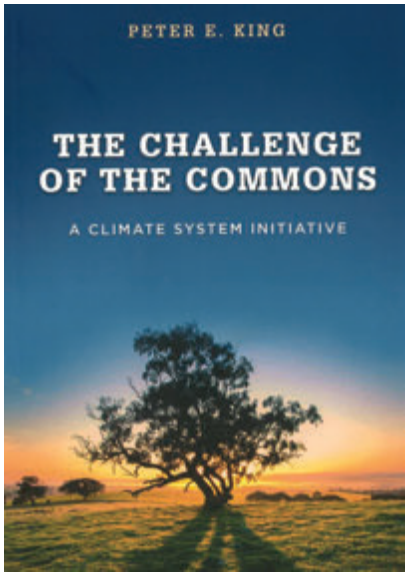
The text provides comprehensive treatment of its topic in a fluent and clear style, with detailed footnoting and a largely comprehensive index. It will be approachable for the early reader in the topic while being a valuable resource for detailed consideration and reference by experienced practitioners and determiners, complementary to the Overviews.

The author acknowledges that the text does not deal with Australian court decisions on domain names. If these increase, their impact on the extra-curial determination framework may require treatment in subsequent editions.

Reviewed by Gregory Burton SC

The Challenge of the Commons

By Peter King | Lyons Press | 2015



I confess that while I practise in public law and in the environmental area, and actively debate the climate change issue with one or two of my colleagues and my daughter, each of whom is far more erudite than me, I had not delved into the complex policies arising from 'climate justice' to any great extent.

Peter King's work is very readable, and makes sense of a difficult subject. Entitled 'The Challenge of the Commons' it is a discussion of the Rio Convention and the future of the Kyoto Protocol, and puts forward what Professor Paul Martin in his preface to the book, considers a well-informed personal discussion of the issues, containing ideas which require serious attention.

The book acknowledges the complexities of the climate change debate and proposes innovative ways forward.

The book reviews the legal and practical operation of the Kyoto Protocol and the Rio Convention, to each of which Australia is a party. The author then proposes reforms to the current version of the Protocol which are thoughtful and far reaching. In my view, they deserve consideration by policy makers and legislators at the highest level. It is, in addition, a compelling read for anyone concerned about climate change and what measures may practicably and equitably be taken to address it and its effects.

You may not agree with all of the arguments in the book, but they are worthy of consideration.

The book was launched in Sydney in June this year by Justice Tim Moore a respected authority on environmental law and policy. Moore J described the work as 'lucid, thoughtful and well-written' during his remarks at the launch at Berkelouw Bookshop Rose Bay.

The Kyoto Protocol was arguably all but abandoned after the Copenhagen Conference of the parties to the treaty in 2010. Its apparent failure was due in part to the concern of many nation states that the radical incursions on national sovereignty then proposed went too far, and were not sustained by the science.

The book discusses the attempt at COP 21 in Paris in December 2015 to review the world's commitment to addressing climate change, which was a more modest proposal, although still almost entirely focussed on a solution to carbon emissions founded upon vegetation retention and regrowth measures. King has proposed different solutions which although carbon retention friendly, are more supportive of working agriculture, and seem far more achievable and of greater practical relevance. This is demonstrated in a revised version of the proposed new Protocol, adapting its mechanisms.

King takes the view that the Australian Government has a woeful record on complying with its obligations under the UNFCCC and the Kyoto Protocol - that it has fudged the figures in its national carbon accounts, and discriminated in its processes against privately owned agriculture, which has no voice on this topic. He considers that there is little justification for the farming community having to bear the brunt of national compliance in the face of a large mining export industry which has continuously worsened the national carbon accounts and has benefitted from so-called government initiatives.

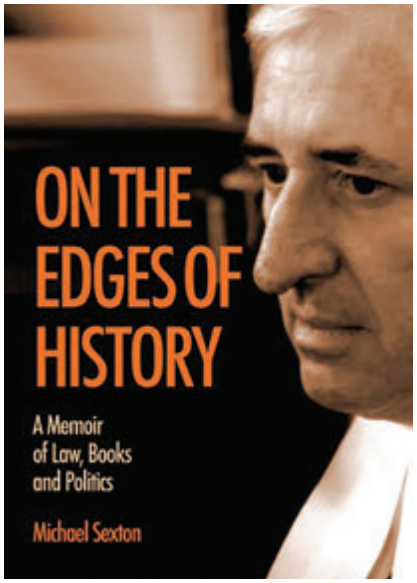
King makes the argument strongly in the book that green alone is not always good; that brown measures are now required, such as those proposed by Darwin at the end of his fruitful life - namely the re-fertilisation of soils depleted by desertification. He also sets out practical solutions for addressing other urgent natural resource challenges, such as balancing water usage and conservation in Australia and Africa the areas of greatest challenge, clean air measures especially in Asia, and harvesting of natural resources for powering the economies of the future, through winds, tides and sunlight.

The simplistic argument that man is the cause of all the new environmental problems in the world is not, according to King, a new one. The work illustrates the point by comparing the plot of the successful Australian film 'Fury Road', and its anti-hero Immortan Joe with what King considers to be the alarmist views of many environmental writers like Lord Stein and Dr Houghton. The film is about a chaotic and depleted world where the only currency is oil. Set in 2031, only some 15 years away, King suggests that it is clear that such a prediction, like the predictions of commentators like Stein and Houghton, have failed to materialise. He is proposing an appropriate and achievable conservative response to the challenge of the commons. Highly recommended.

Reviewed by Stephen Coleman

On the Edges of History: A Memoir of Law, Books and Politics

By Michael Sexton | Connor Court Publishing | 2015



In 1998 Michael Sexton was appointed as the Solicitor-General for NSW, a position he has now held for some eighteen years. In his latest book, *On the Edges of History*, Sexton offers an insight into many of the matters in which he has been involved whilst occupying the office, and provides accounts of some of his more challenging matters at the private Bar. Sexton also details key points in his professional career prior to being called to the Bar. The entire narrative is interspersed with an eclectic array of observations, ranging in subject matter from the failings of our criminal justice system, to the character traits of some of the leading figures in Australian political history. The book is part memoir, part reflection on the two spheres of Australian life in which Sexton is chiefly interested: our legal system and our politics.

Born in 1946, Sexton was one of the first of the post-war baby boomers. In the book's second chapter Sexton broadly outlines the details of his Catholic upbringing in 1950s Melbourne. His evident fascination with the forces at play within his community, as well as its central characters, suggests that Sexton could well have devoted more than a chapter to this part of his life. However, instead Sexton hurtles across the decades to provide an account of some of the more notorious criminal cases in which he has appeared for the Crown. These include the various High Court challenges to NSW's sentencing legislation (in *Baker v The Queen* (2004) 223 CLR 513, *Elliott v The Queen* (2007) 234 CLR 38 and *Crump v New South Wales* (2012) 286 ALR 658), the multiple appeals brought by Kathleen Folbigg in relation to her conviction for the murder of her four children and Bruce Burrell's appeals against his conviction for the kidnap and murder of Kerry Whelan.

Sexton then takes us back to where his legal career commenced, in 1965, at Melbourne University law school. We are assured that in spite of the times, Melbourne University was not a hotbed of revolutionary sentiment. This is easy enough to believe. The picture Sexton paints of his life as an undergraduate is of a carefree and more innocent time, filled with classics conferences, games of squash and tennis, and black-tie balls. After university, Sexton did a short stint in the office of the Commonwealth Crown Solicitor, before taking up a position as Associate to Sir Edward McTiernan in the High Court. Then follows a period of time in the United States completing a master's degree at the University of Virginia. Whilst Sexton appears to have seriously contemplated commencing practice in Philadelphia and settling in America, it was the prospect of being involved in Whitlam's government that, Sexton says, lured him home to Australia.

Sure enough, in 1974 Sexton moved to Canberra, joining the Attorney-General's Department, and then the office of Attorney-General Kep Enderby. Sexton chose the dismissal of the Whitlam Labor government as the topic of his first book, *Illusions of Power* (first published in 1979 and reissued in 2005), excerpts from which are included in this book. However, in this book, Sexton gives a more personal account of events, sharing his observations from within in the months and days leading up to the dismissal. Sexton also explains how it was that he came to write *Illusions of Power* (in his early years as an academic at UNSW), and reflects on its reception when first published. Insights are also offered into the writing of his second book, *War for the Asking*, on the subject of Australia's entry into the Vietnam war.

In the latter half of the book, Sexton describes his time at the Bar prior to becoming the Solicitor-General. It is these chapters, in which Sexton tells of his more difficult cases at the Bar, where his book is at its most intriguing. These cases include the prosecution of complaints by health authorities against Dr Geoffrey Edelsten, the "Mr Bubbles" defamation proceedings, and the Chelmsford Royal Commission.

Unquestionably, Sexton has been involved in some of the state's most fascinating matters. He is also not afraid to voice an opinion on some of the trickier questions that he believes confront our legal system. As a result, this memoir makes for an intriguing snapshot of Australian legal history, and a captivating read.

Reviewed by Juliet Curtin

Lawyers Cricket World Cup

By Lachlan Gyles

The 5th Lawyers Cricket World Cup, kindly sponsored by LexisNexis, was held in Brisbane over Christmas-New Year 2016. Previous tournaments had been held in Hyderabad, London, Barbados and Delhi.

There were twelve teams entered in the tournament, playing in two pools; A and B teams from each of Australia, India and Sri Lanka; single teams from Pakistan, Bangladesh, the England & Wales Bar and the English Solicitors; and two Commonwealth teams made up of players from a variety of countries including the West Indies and New Zealand. The Hon Ian Callinan AO QC was the tournament patron.

The majority of the teams stayed at Kings College at the University of Queensland, and a number of social functions were held there over the ten days or so of the tournament. There was also a sports law conference hosted by the university.

A number of supporters accompanied the teams, including judges from India and Sri Lanka, and from Pakistan including from the Lahore Court of Appeal and the Pakistan Supreme Court, the highest appellate court in Pakistan.

Each team played five pool matches, with the top two teams in each pool advancing to the semi-finals. The games were 35 overs per side, played on excellent grounds with 1st grade umpires.

Sam Sykes (9 Selborne) opened the bowling for the Australia A team, and Lachlan Gyles (10th Floor Chambers) captained Australia B. The other Australian players were primarily solicitors based in Brisbane, Melbourne, Sydney and country NSW, but also included barristers from South Australia, as well as other Australian lawyers practising in the UK.

Sam Sykes and Lachlan Gyles

Australia A finished 2nd in its pool, behind Pakistan, but was narrowly beaten by India A in a close semi-final. Australia B finished a credible 6th, beating Bangladesh and a Commonwealth team and going very close to beating the fancied Sri Lanka A team.

The final was a day/night match between India A and Pakistan. India had won two of the previous tournaments, but were beaten by Pakistan in the final in Delhi in 2013, so had plenty to play for. In the end however Pakistan overhauled the Indian score in the last over of the match, followed by a fireworks display at the ground which delighted the hundreds of spectators in attendance. Congratulations to Pakistan on retaining the trophy.

The tournament was a great success by any measure, with all of the visiting teams praising the organisers and commenting on the warmth and hospitality of their Australian hosts.

The motto of the tournament is 'Cricket for Friendship', and it certainly provided a wonderful opportunity to renew friendships and to compare notes about legal practice in the many diverse legal systems represented – and also to dissect and debate the ups and downs of that particular day's play over a drink, as would be expected when any teams of cricketing lawyers get together. The next tournament will be played in Sri Lanka in late 2017.

Bullfry ponders Brexit

By Lee Aitken

Bullfry thought back fondly to his bibulous days among the 'dreaming spires' – sadly now, he was, indeed, 'an Oxford scholar poor, grown tired of knocking at preferment's door'. (His 'Varsity stint had been cut short, due to the Principal's complaint about the loudhailer). Still, he had at least met there the mother of most of his children. She embodied the continuing social and class divisions which seemed to have provoked the Brexit, since she retained the dialectical ability to move seamlessly between a received BBC pronunciation, and broad Scouse.

And at least Brexit promised a possible return to normality in jurisprudence in Anglo-Australian jurisprudence which had been drifting further apart like the continents, for decades.

More than a century ago, Stanley Buckmaster KC had argued a case before the Privy Council indirectly on appeal from the High Court. A key question was the application of the ancient maxim: causa proxima, non remota, spectatur. In the High Court causa had been replaced by fons. With sad Latinity, Sir Samuel Griffith somehow omitted to change gender, from the feminine (causa) to the masculine (fons), to make the respective adjectives agree.

This solecism prompted a facetious question in the Privy Council during argument: 'How is it that fons has lost its gender on its journey to the Antipodes?' to which Buckmaster KC replied, 'In the same way as the common law has lost its meaning!'

Perhaps the rupture which occurred in 1963 after Parker would now be repaired. For a while, following Piro v Foster, there had been a forelock-tugging approach to the decisions of the English courts – but all that had changed once it was perceived that merely because a case had been decided in England was no voucher of its correctness.

There are large differences forensically between the mother country and the Commonwealth. Bullfry remembered attending in his youth a hearing in the House of Lords where Lord Keith of Kinkel professed never to have heard of *Salmond on Torts* (but the author of that work was, of course, only a New Zealander!)

And Bullfry, watching the Assange extradition hearing in London via video link, had noted a number of important differences between our own High Court and the UK Supreme Court.

The latter seems very genteel indeed. The 'Lords' all sit in lounge suits (or a party frock for Lady Hale) in a sort of horse-shoe arrangement. The newest recruits are not now, under the Blairite dispensation, 'Lords' at all since they no longer have a right to an immediate barony. But all receive some sort of courtesy title, similar to their Scottish counterparts in the Outer House – Lord Maxwell of the Ilk; Lord Braxfield ('you'll be nane the waur o' a hingin'!').

Assange's leading counsel, on opening, was heard without interruption at all from the bench for about 10 minutes, meandering along and reading from a prepared booklet on the lectern in front of her. What a contrast with our own tribunal. It is usually all that an advocate can do to get out his name, rank and serial number before the Assyrians descend like the wolf on the fold.

The important point at issue there was the scope of the 'European arrest warrant'. Under the regime which existed before Brexit any low level continental functionary could designate himself as a 'judicial authority' and have you quickly hauled out of bed in Birmingham to answer some allegation in Vaduz. Presumably, that sort of thing will no longer happen so easily.

And a purist might hope for a return to some commonality with respect to the rules of Equity and other aspects of received doctrine. In October 2010 Bullfry had attended a lecture by Lord Neuberger of Abbotsbury delivered in Hong Kong and entitled 'Has Equity had its day?'

Assange's leading counsel, on opening, was heard without interruption at all from the bench for about 10 minutes, meandering along and reading from a prepared booklet on the lectern in front of her. What a contrast with our own tribunal.

Within five minutes of opening, and after a deferential reference to the strength of Equity in the Antipodes, his Lordship divagated (for the next three quarters of an hour) to elucidate the mysteries of the European Convention on Human Rights, and the reach of the European Court of Justice. It seemed to a bemused Bullfry that the old Equity doctrines had been overreached, at least temporarily, by

a supranational statutory jurisprudence which relied on large and ill-defined judge-made norms.

So, Brexit might mean a return to a more autochthonous jurisprudence. And it might also be possible to look again to *Snell on Equity* (34th ed) as an authority.

Bullfry always rejoiced in his British passport, obtained via a direct descent from the coppersmith's labourer of Gorbals Cross. Thank goodness that man had had the sense to leave the Lowlands forever – without his foresight and boldness Bullfry would no doubt have been standing in the mild rain, uneducated and unemployed, waiting for his favourite bar to open.

Brexit voting had exposed the very large social and class divisions which still obtained in the Old Dart.

It was still true there, in a caste ridden society, that one could be socially stratified as soon as one spoke. Bullfry recalled his visit to chambers in the Inner Temple while working for Hong Kong solicitors many years ago at the height of an English summer.

All the junior counsel were dressed for the weather (which is to say most of them were in three piece suits and spats). Bullfry, ready for al fresco, was more relaxed in his dress. Those to whom he was introduced looked askance at his deshabille (perhaps he was driving a minicab), until the magic words: 'Large firm in Hong Kong' were said by his host – whereupon, shamelessly, Bullfry was inundated with business cards claiming expertise in every form of litigation, and forensic endeavour.

So, Brexit might mean a return to a more autochthonous jurisprudence. And it might also be possible to look again to Snell on Equity *(34th ed) as an authority.*

For happily, in Australia, the diphthongs are the same for the minicab driver as they are for counsel. And, indeed, there is no impediment to moving, via the BAB, from the former occupation to the latter.

Sotto voce

By Advocata

'Every woman at the bar should have voice lessons' one of my first leaders flung at me from across the room. 'It's no good if no one can hear you. You need gravitas, physical presence. Few women have that'. He swept past me with his hands tucked up high in his little bar jacket pockets, his buttons crying out to be eased and his jabot offsetting his ever-flushed face. My concern that being led by this man could be an early low point of brand definition was replaced with the niggle that I was cursed from the start by phrenology's ugly sister.

There are certain people who are marked out as contenders on the day they front the bar reader's course. Former judge's associates who have long forgotten that they aren't their judge; partners of law firms who you can only assume ate a lot of what they killed to get there; children of famous lawyers. For a while these people walk more tall. But at some point the yawning divide between wanting something from the judge and asking for it must be crossed by all. Not everyone saunters across that rubicon.

'The reason that I'm afraid' I once told a more senior male colleague, 'is not that I have a bad voice but I have a small voice'. He, generally untroubled by self doubt, revealed that for years he struggled to reliably make any sound at all. 'Randomly, usually in packed directions hearings, my breath would catch in my chest with such vigor that I could not form a word' he said. 'Nothing. I would stand there willing the noise to start soon. I'm lucky it didn't end in suffocation'. From a man who seemed able to construe all of life's ambiguities his way, this seemed an apparition of humility. 'Then I realised that people just assumed I was thinking before I spoke' he said. 'It actually made me look more considered than I am'.

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A floor colleague of abilities celebrated annually in all kinds of lists confessed to an early tendency towards a wavering voice. 'An uneven voice is fine' he said 'it can be interesting. Voices that turn husky with nerves, that's ok too. It's a little bit Keith Richards. But what is not acceptable, not ever,' he said looking slightly ashamed, 'is to sound scared'.

I was scared. Scared enough to see a voice coach. Famous because she worked with Cate Blanchett, or someone who sounded like her, she told me that I needed to exhale as I spoke. 'Let your words tumble forward from you,' she said, 'like hair falling from a bun'. Suspicious but hopeful, I test drove this advice before the registrar in Equity. Sounding alarmingly like a Benson and Hedges ad, I breathed out my request for an extra two weeks. 'I sympathise with you' the registrar said 'because I am recovering from the flu myself, but could you speak up just a little'?

I asked my clerk about the need for a commanding voice. 'It's a good start' he said. 'But not essential. Many of the greats were equity whisperers'. He rolled off a list of men of whom I had not yet heard but intuited that most had long been tucked in their graves. 'What does that even mean?' I asked. 'That you are a gun at submissions but you can't cross examine to save yourself' said one of the smug looking portly men who congregate in the common areas of the older floors and seem slightly bewildered about what to do after tort reform. 'No barrister wants to own to being an equity whisperer' said another of his kind 'not unless they are on the Court of Appeal or trying to get there'. Too early for that approach then.

A silk told me that he routinely vomited before the first day of a hearing. He said he felt better about it when he heard that Steve Waugh was often sick before he went in to bat. 'If I stop being sick, I'll have stopped caring' he said. I'd never really set much store by test cricketers' ideas before and I struggled to embrace the need for such a physical commitment. I was relieved to hear another silk drone on a little about how his effectiveness was inversely proportionate to his depth of belief in this case. This seemed a more attractive philosophy.

Shortly afterwards I watched a senior junior with a gigantic reputation appear in court. His advocacy was a kind of hero's journey. He started out for all the world a hesitant, humble and yet brave young man who had been tossed into

Gallipoli. Things looked dire for him – a slight stutter; a shaky hand; an obvious touch of fur mouth. He seemed vaguely flushed and the rest of the room seemed on tenterhooks. Opposing numbers exchanged worried glances, the tipstaff stared at the floor. We all wondered 'could this be happening to him?' Even the silk on the other side looked like he was willing a safe passage over a vulnerable start. Then about five minutes into the show my friend warmed up. His voice smoothed out; he took a sip of water; he cracked a little joke. And we all smiled with him. There was a discernible collective relief. The judge seemed visibly glad for the turn of events. In the cockles of my heart I knew this kind of Christmas Miracle only happened to people who had been captain of a private boys school. I needed a different tack.

'The main thing for a woman is to not sound like a school teacher,' one of the bar's famed aging lotharios advised me, 'no judge wants to be hectored'. Another barrister told me that the worst thing women did was have an upward inflection 'like Julia Gillard's'. As though it was perfectly logical that a voice could be sufficiently intelligible to secure election as the prime minister of Australia but not make the grade at the NSW bar. Another chap who got overly enthusiastic with the cheap wine at the Bench & Bar Dinner one year said to me that 'Women with American or UK accents are fine at the bar but otherwise I just don't think clients want a female voice'. That guy also thought it acceptable to try to seat the receptionist on his lap and that no one noticed he dyed his hair. So it wasn't possible to take offence.

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I was told by a reliable source that the greatest trial lawyer that NSW has ever produced was J W Smyth QC, who seems to have achieved this around the time my parents started high school. So I read Mr Smyth's article on cross examination which was reprinted in the Autumn 1988 *Bar News*. The references to women are sparse in that work: they include a Chinese lady who was revealed as a liar because she was so keen to clarify that her children were male; and another untruthful lady who, after being caught out fabricating which night she went to the pictures, looked like a 'startled rat'. Mr Smyth also highlighted the effectiveness of a particular approach by stating 'How much more successful, for instance, would you be at home if you could manoeuvre your wife into that situation'. Nevertheless, the substance of Mr Smyth's advice seems perfectly egalitarian and universally applicable. 'In most situations I would suggest that a pleasant manner is more effective than an unpleasant one' he writes. 'Courtesy will more often than not pay off better than rudeness'. Less easy to wholeheartedly embrace was his emphasis on cultivating your own style. This seemed more useful if your natural game resembled that of JW Smyth QC.

Eventually, like everyone, I gave up trying to renovate my voice. Graver concerns, for example negligence, caught my attention. I still can't pronounce mellifluous and I continue to startle myself with the voice of a trembling truckie. I try to follow the instructions of the man with a comforting military bearing who directed my bar reader's course pretendie equity application focus session that 'commercial barristers should speak slowly into the microphone for the transcript and not at a non-existent jury'.