THE JOURNAL OF THE NSW BAR ASSOCIATION | WINTER 2016

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NEW COURTHOUSE FOR NEWCASTLE

PLUS

The probative value of evidence

MH17: Safety in the air begins with safety on the ground

The 'misunderstood' doctor of Auschwitz

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Cover: Newcastle Courthouse

On 4 May 2016 the High Court delivered its decision in *Attwells v Jackson Lalic Lawyers Pty Ltd* [2016] HCA 16. *Attwells* concerned the scope of advocate's immunity, an issue of close interest to readers of this journal.

In *Attwells* a legal practitioner advised a client to settle on particular terms. The advice was given during an adjournment, and over the course of the evening, of the first day of a hearing. The client accepted the advice. Consent orders were handed up bringing the proceedings to an end. In due course the client alleged that the advice was negligent.

The NSW Court of Appeal held that the provision of this advice was within the scope of advocate's immunity, being work done out of court that was intimately connected with, and affected the conduct of, the case in court, such that the immunity was a complete answer to the claim.

The High Court allowed the appeal. The High Court declined to abolish the immunity. However it held that the provision of the advice was outside the protection of the immunity, because the immunity does not extend to negligent advice which leads to the settlement of a claim in civil proceedings. The court held further that the 'intimate connection' between the advocate's work and 'the conduct of the case in court' must be such that the work affects the way the case is to be conducted so as to affect its outcome by judicial decision (at [46]). No doubt the judgment of the High Court will be considered in more detail in a future edition of *Bar News*.

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Antonin Scalia died on 13 February 2016. He had been a justice of the United States Supreme Court for some thirty years, having been appointed in 1986. He was one of the most well-known of the Supreme Court justices, partly because of his vigorous judicial prose.

On the day following his death the remaining eight justices of the Supreme Court, and the three surviving retirees, each issued a statement. Justice Breyer said that Scalia was 'a legal titan'. Justice Kagan said: 'Nino Scalia will go down in history as one of the most transformational Supreme Court justices of our nation'. Justice Alito said: 'He was a towering figure who will be remembered as one of the most important figures in the history of the Supreme Court and a scholar who deeply influenced our legal culture.'

Justice Ginsburg's statement included the following:

> Toward the end of the opera Scalia/Ginsburg, tenor Scalia and soprano Ginsburg sing a duet: 'We are different, we are one,' different in our interpretation of written texts, one in our reverence for the Constitution and the institution we serve. From our years together at the D.C. Circuit, we were best buddies. We disagreed now and then, but when I wrote for the Court and received a Scalia dissent, the opinion ultimately released was notably better than my initial circulation. Justice Scalia nailed all the weak spots-the 'applesauce' and 'argle bargle'-and gave me just what I needed to strengthen the majority opinion. He was a jurist of captivating brilliance and wit, with a rare talent to make even the most sober judge laugh. The press referred to his 'energetic fervor,' 'astringent intellect,' 'peppery prose,' 'acumen,' and 'affability,' all apt descriptions. He was eminently quotable, his pungent opinions so clearly stated that his words never slipped from the reader's grasp.

One of the matters to which Justice Ginsburg makes reference – Scalia's propensity in dissent to excoriate the reasoning of his fellow judges – is worth looking at further: it can illuminate some fundamental differences in judicial approach.

A decision he handed down in June last year is one example. *King v Burwell* 576 US ___ (2015) related to the provision of health insurance, an important social issue in the United States. The legislation under challenge in the case had been enacted with the clear purpose of increasing the number of persons with health insurance.

In particular the legislation sought to increase insurance cover by: limiting the ability of insurance companies to decline cover or increase premiums, including by reason of an insured's pre-existing health condition; requiring or encouraging persons to maintain insurance cover; and giving tax credits to certain persons to make the insurance more affordable.

In addition, the legislation contemplated the creation of 'exchanges' – marketplaces where people can compare and purchase insurance plans, usually online. Tax credits were available to persons who purchased insurance on (to use the language of the relevant section of the legislation) an 'exchange established by a state'

The issue in the case was whether tax credits would also be available to person in states that had a federal exchange.

The opinion of the Supreme Court was delivered by Chief Justice Roberts. The chief justice acknowledged that the legislation suggested on its face that tax credits were available only to persons who had bought them on an 'exchange established by a state'. However he also observed that the legislation contained 'more than a few examples of inartful drafting'. He said that applying the law as written would imperil the viability of the entire legislation. He held that the words of the section needed to be considered in the context of the legislation as a whole and that, 'the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.' Thus the decision of the court was that tax credits were available to persons who bought insurance on either a state or a federal exchange.

Justice Scalia would have none of this. He filed a dissenting opinion, in which Justices Thomas and Alito joined. His reasoning was pithy as ever. The first paragraph was in the following terms:

> The Court holds that when the Patient Protection and Affordable Care Act says 'Exchange established by the State' it means 'Exchange established by the State or the Federal Government'. That is of course quite absurd, and the Court's 21 pages of explanation make it no less so.

Justice Scalia went on to savage the court's opinion as 'pure applesauce' (this was not the first time he had dismissed the majority's efforts at statutory interpretation as 'applesauce': see *Zuni Public School District No 89 v Department of Education* 550 US 81 (2007) at 113) and 'jiggery-pokery', as defending the indefensible, as suffering 'no shortage of flaws' and for performing 'somersaults of statutory interpretation'. The following passage gives some flavour of the whole:

> [The Court] accepts that the 'most natural sense' of the phrase 'Exchange established by the State' is an Exchange established by a State. Ante, at 11. (Understatement, thy name is an opinion on the Affordable Care Act!). Yet the opinion continues, with no semblance of shame, that 'it is also possible that the phrase refers to all Exchanges – both State and Federal.' Ante, at 13. (Impossible possibility, thy name is an opinion on the Affordable Care Act!).

Of course underpinning all this is an issue about judicial method. On the one hand, the court construed the legislation in a way that gave effect to what it perceived to be the legislative purpose. Scalia simply gave effect to the language of the legislation, come what may.

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In the present issue of *Bar News* Richard Herps considers the impact of a recent decision on the doctrine of constructive murder. The facts in that case read like an episode of *Breaking Bad* – but in Ryde, not Alburquerque. A man and a woman were cooking meth in a residential house. Some apparatus ignited. The man died of his burns. The woman was charged with murder.

At first glance the charge seems anomalous. The woman may have been involved in the preparation of methylamphetamine, but she didn't mean to kill anyone. No doubt the last thing she wanted was an explosion her meth lab, let alone one fatal to her accomplice. The fire had been inadvertent – the result of an accumulation of vapour from solvent used in the cooking process.

At trial she was acquitted of murder. But the Court of Criminal Appeal quashed the acquittal. It was sufficient for a charge of murder that the woman had been involved in a joint criminal enterprise, namely the manufacture of a commercial quantity of methylamphetamine, and that the explosion was within the scope of that enterprise. A new trial has been ordered.

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Elsewhere in this issue Stephen Odgers SC and Richard Lancaster SC consider the reasoning and implications of the recent decision of the *High Court in IMM v The Queen* [2016] HCA 14. David Chitty looks at potential issues arising from the shooting down of Malaysia Airlines flight MH17. Tony Cunneen looks at some important bar history from the First World War.

Jeremy Stoljar SC
Editor

SCPOs undermine basic tenets of our justice system

By Noel Hutley SC

At the time of writing the New South Wales Parliament has recently passed the *Crimes (Serious Crime Prevention Orders) Bill 2016* and its cognate, the *Criminal Legislation Amendment (Organised Crime and Public Safety) Bill 2016*. These bills constitute a substantial and unwarranted attack on individual freedoms. The Bar Association, along with other legal profession groups, has expressed serious concerns about this legislation on the basis of its potential for unwarranted interference in individuals' liberties and their day to day lives. It is worth noting that the Bar Association was not consulted by government before the introduction of this legislation.

In doing so, the Bar Association has been the subject of some criticism for its public stance against the bills. I do not for one moment resile from the position this organisation has taken in this regard. The association's position was based on advice from its specialist committees, in this case, the Criminal Law and Human Rights Committees, which are comprised of leading barristers in their fields.

The Bar Association's submissions on the legislation and other related materials can be found at www.nswbar.asn.au/the-bar-association/submissions and www.nswbar.asn.au/docs/mediareleasedocs/MR_13042016.pdf

The legislation undermines the rule of law and basic tenets of our justice system. Given that the Bar Association's constitutional objects include promotion of the administration of justice and making recommendations regarding law reform, this organisation has a duty to speak out against proposed laws which curtail individual rights and undermine the administration of justice. The association will continue to make itself heard in these circumstances.

The Bar Association has also finalised its submission to government in response to its recent CTP Options Paper. The paper sets out a number of options for reform to the CTP scheme ranging from retaining existing common law rights to a full blown no fault system. The association's Common Law Committee has spent a great deal of time and effort in reaching an appropriate policy position in this regard, which strikes a balance between the need to protect the entitlements of injured people while addressing issues of cost and inefficiency within the scheme. The Bar Association will continue to engage with government in an attempt to preserve the rights of those injured in motor vehicle accidents, and to ensure that the injured receive appropriate legal representation in suitable cases.

The Bar Association has also been working on a number of other submissions to government on a variety of law reform issues, ranging from a critique of the NSW Government's inclosed lands legislation to a proposal to the attorney general to reinstate the use of juries in civil trials. Further, the Bar Association is currently taking part in the Law Council of Australia's national campaign for additional federal legal aid funding. An event was recently held in the Common Room on 27 April and other events are planned for the future. A properly funded, workable legal aid system is essential to the proper operation of the justice system, and also provides legal practitioners with an important source of work.

The 2016–17 practising certificate process is now underway, and for the first time the Bar Association is trialling a system of online renewals. This is being done in concert with the traditional hard copy submission of renewal documentation, to provide members with a choice of formats in which to renew their practising certificates. I would encourage you to complete your renewals as soon as possible to assist in the orderly processing of documentation by the Bar Association's staff.

Finally, the Bar Association's 2016 program of regional CPD conferences has recently come to an end. Our annual conference program provides members, particularly those in regional and rural areas, with an opportunity to obtain the majority of their annual CPD points at the one event. Members are also encouraged to take advantage of the range of CPD options available through sessions in the Common Room or online through the association's website. The regional conferences also provides members of the Bar Council Executive the opportunity to interact with our members outside the Sydney metropolitan area and hear of their interests and concerns. It is one of the great strengths of the NSW Bar that a diverse organisation comprised of individual sole practitioners from across the state holds common values regarding the importance of the rule of law and the independence of the justice system.

High Court welcome for the new silks

Newly appointed silks from every state and territory took their bows before the High Court in Canberra on Monday, 1 Feburary 2016. That evening, the Australian Bar Association hosted its annual dinner in the Great Hall of the High Court.

Bottom left: The attorney-general for Australia, Senator the Hon George Brandis QC. Bottom centre: Tony McAvoy SC. Bottom right: the Hon Mark Dreyfus QC MP, shadow attorney-general. Photos by idphoto.com.au

A new courthouse for Newcastle

Peter Cummings SC spoke on behalf of the Newcastle and New South Wales bar associations at the 2016 Opening of Law Term in Newcastle. The ceremony was the final time the court convened prior to the opening of a new courthouse in Newcastle.

At the last two Opening of Term ceremonies for 2014 and 2015 I have on behalf of the bar suggested with some trepidation that it may be the last such occasion to be held in this courtroom… yet here we are again.

This time I can, with as much confidence as is prudent, predict that this *will* be the last time the court convenes in this building to mark the opening of Law Term.

The sadness borne of sentiment that such a prospect creates is quickly overshadowed by the recognition that an upgrading of this city's state court facilities is long overdue, is welcome and will hopefully be a significant advantage to the community.

The new court will be officially opened on 15 February 2016. It will commence operations as I understand shortly thereafter. That will be an occasion for acknowledging that governments both past and present have made a material step towards fulfilling their responsibility of providing better premises for the operation of the justice system. I appreciate that there are some who have in the past, and may well in the future, have reservations or concerns about the location and adequacy of those facilities but time will tell.

The considerable efforts of the courts administration staff in Newcastle in operating in these present premises particularly over the past probably 10–15 years should be acknowledged. I include in that group, with respect, judges and their associates, security personel sheriff's officers and members of the legal profession in particular staff of the DPP and Legal Aid.

The conditions under which this group has had to work have been difficult to say the least. Although there are probably other examples of woefully inadequate working conditions in the NSW public service I presently cannot think of any comparable situation in this region in recent times.

Many will have vivid recollections of the regular failure of the air conditioning system, the unmistakable smell of rising damp in particular in Court 6, the infamous dead rat in the late Judge Coolahan's Chambers, the conducting of sensitive conferences with witnesses and clients in corridors, in staircases or on the street and even the bee swarm in Court 3 which made the already seriously compromised acoustics impossible to deal with.

Throughout this period those who have worked in this building have shown enormous dedication to ensuring that the wheels of justice kept rolling as smoothly as they possibly could. The expression 'above and beyond the call of duty' comes to mind.

However here we are at the beginning of a new Law Term for 2016 and we look forward to moving to new premises.

Whilst the advent of such new premises marks an improvement in the community's facilities it must be said that governmental responsibility to properly resource the justice system does not begin and end with infrastructure no matter how new and shiny and impressive a building it may be.

It is the view of the bar, and has been for some time, and I believe with respect that view is shared by the solicitors of New South Wales, that courts at state and federal level are currently undergoing a resourcing crisis.

The burden of hardworking courts such as the District Court, the Local Court and the family courts, and by that I mean the Family Court of Australia and the Federal Circuit Court, has been increasing quite significantly over the past several years yet in that time there has not been a corresponding increase in resources to meet the community's demand.

Take the District Court for example. In New South Wales the number of criminal trials in the court had more than doubled from 1,019 in 2011 to 2,055 in September 2015. Increases in Police funding have resulted in a growth in the number of arrests and as a result an increase in serious offences proceeding to trial. In that time there was no equivalent increase in resources of the court, Crown prosecutors or public defenders, resulting in a crushing workload for judges, the director of public prosecutions, defence counsel and solicitors. In fact over this period the number of judges declined.

A recent report by the Bureau of Crime Statistics and Research revealed that the average time taken to finalise criminal cases where the defendant is on bail in New South Wales in 2014 was 369 days an increase of over a third since 2007. The report also found that the average delay where the accused was in custody was 300 days before their case is resolved in the District Court. Let me pause there to reflect upon the real significance of these stark statistics.

Lest there be any suggestion that the cry for more resources for the criminal justice system is something made by the legal profession out of self-interest, may I respectfully remind those present that delay in the processing and conclusion of a criminal trial is a matter which has profound and serious consequences not only for those working within the criminal justice system but also for those accused of criminal offences, some of whom are ultimately found not guilty, witnesses caught up in criminal

trials and, most importantly, victims of crime and their families. Despite the best efforts of all those involved delay in the processing of criminal trials necessarily has the potential to compromise the quality of justice. Witnesses' memories erode over time. The suffering of victims and their families is aggravated when cases drag on and closure is unable to be quickly achieved. There is an old and true saying 'Justice delayed is justice denied'. These statistics and their consequences are of great concern to the bar.

Recently the New South Wales Government announced a twenty million dollar package to assist in addressing the backlogs in the District Court.

When the NSW government announced this interim funding president of the New South Wales Bar Association Noel Hutley SC made these remarks with which I respectfully agree:

> The Government's package is a step in the right direction. It is an important interim message to reduce the backlog given the disproportionate funding for law enforcement measures and insufficient resourcing for the courts, the Director of Public Prosecutions and Legal Aid.

He went on to say:

> The Government's package will go some way towards alleviating these pressures on the court. The additional resources will help address these problems in the short term, however more significant funding is required to clear the disturbing backlog.
>
> The New South Wales Bar welcomes the indication from the attorney general that she will be seeking input from key stakeholders in the justice system in order to find a lasting resolution regarding District Court delays. The bar stands ready, willing and able to work with the government to find long term solutions to these systemic problems and develop a sustainable criminal justice system which fairly addresses the requirements of all persons concerned including victims and witnesses.

As yet it remains unclear as to how those funds will be spent and we look forward to clarification as to whether this region will see any of them. In saying that it must be acknowledged that the problems in some regions are currently greater than those experienced in Newcastle but these situations change quickly and the overall problem remains to be equitably addressed.

I should at this point happily acknowledge the presence in court today of my colleague Alister Henskens SC MP, now part of the state government and the member for Ku-ring-gai. Alister grew up and practiced for many years in Newcastle. It is nice to know that old Newcastle lawyers remember and acknowledge their roots and I am pleased that he is here to mark the last ceremonial sitting in this court and to hear, as I know he will, both praise and urging for the state government's ongoing resourcing support for the administration of justice.

A similar resourcing problem but in a different context is occurring in the area of family law. Families in turmoil are finding it increasingly difficult to have their cases determined in a timely fashion. In the Federal Circuit Court, the daily diet of which is difficult and entrenched family disputes invariably involving children whose lives and development are severely disrupted by family dysfunction and turmoil, in some regions parties can wait for years for their cases to be heard. A family in dispute in Wollongong recently had their case transferred to Brisbane for hearing as it was apparently the only registry that could offer them a reasonable trial date. Unsurprisingly, the parties were reported to be shocked and upset by the extra cost and inconvenience. There are enormous problems with a lack of resources in Sydney and in Parramatta also and the profession waits with great anticipation for the promised appointments to these registries.

We congratulate and thank the Commonwealth Government for the recent appointment of Judge Middleton to the Federal Circuit Court Newcastle registry. Judicial appointments of course require careful consideration, but there can be no doubt that the appointment was well overdue. Every member of the legal profession practising in that jurisdiction can recount numerous examples of problems arising from the delay in the replacement of Judge Coakes.

Having said that the FCC in Newcastle is to be commended, as is the profession, for the work that has gone into reducing waiting times which has been especially effective since the appointment of Judge Middleton. There are further measures being implemented and investigated by the court with a view to further streamlining the work of the court and the profession stands by to assist.

Barristers and I dare say solicitors in this state whether practising in crime or in family law or sometimes even in other areas of law are regularly confronted with despair and dismay from their clients and others involved in cases as a result entirely of the delay which places their lives on hold and cripples the efficient administration of justice. Lengthy delays in completion of court cases inevitably have the effect of increasing direct and indirect financial costs as well as the very real human cost. It is perhaps difficult for members of the community whose lives are not touched by court cases to appreciate these matters but be assured there are many who are profoundly affected.

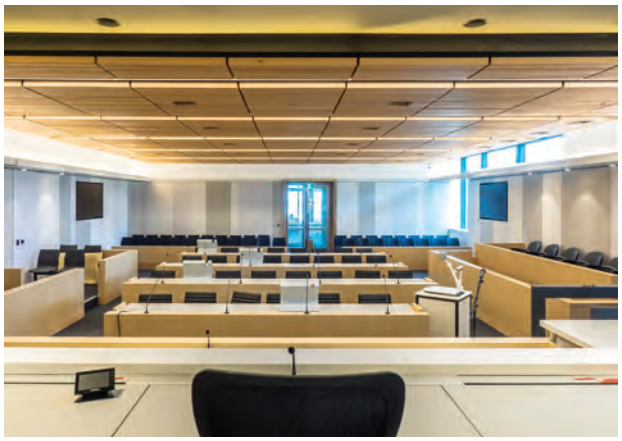
Peter Cummings SC, 'A new courthouse for Newcastle'

Photos: courtesy of the Department of Justice NSW

The simple point is that an increase in the workload and demands upon a justice system must be met by an increase in resources. It is exciting and positive that the state courts will soon head to a new building. It is trite, however, to say that buildings do not administer justice, it is the people within them who do that, and they must be properly resourced for their sometimes difficult and taxing task if the community's legitimate expectations are to be met and significant suffering, unnecessary costs and associated social problems are to be alleviated.

In concluding may I on behalf of the bar, wish your Honours, their staff, the hardworking administration staff of the court and our colleagues all the very best for 2016 and in particular a smooth and pleasant transition to the new court building! What a prospect…moving courts…what, as they say, could go wrong? Nothing we hope.

Whilst we will not be volunteering to help carry boxes to the new building, the court can be assured that the Bar will continue to advocate in the interests of the community which it serves and will, as always, do its very best to assist the courts in their important work in 2016.



50 years of the New South Wales Court of Appeal

On Monday 8 February 2016 the New South Wales Court of Appeal held a special ceremonial sitting to mark the 50th anniversary of its inaugural sitting. The president of the Court of Appeal, the Hon Justice Margaret Beazley AO spoke at the sitting. *Bar News* is pleased to publish her remarks.

Photo: Supreme Court of NSW

14 February 1966 ushered in a dramatic change in the coinage of our nation from pounds, shillings and pence to decimal currency. On the Monday before that, that well-known jingle, 14 February 1966 (I will not sing it, but you will all remember it), jangled across the airwaves for the last time, a similarly fundamental but less heralded change was made to the coinage of the New South Wales judicial system.

On 8 February 1966, seven judges: Justice Herron, the then chief justice, and Justices Wallace, Sugerman, McLelland, Walsh, Jacobs, Asprey and Holmes, filed onto the bench of the Banco Court in the old Supreme Court building in King Street, and in about 500 words, the chief justice announced the day as one of special significance, 'for it marks the first sitting of a new division of the Supreme Court, called the Court of Appeal.'

The chief justice announced that Justice Wallace was the President and that the assembled judges had been duly appointed by commission to be judges of appeal. The chief justice continued:

> We set about our new statutory tasks with enthusiasm and with determination, so far as practical, to dispose of the list with dispatch, with economy to the litigants and with a minimum of delay, keeping steadily in mind the importance of the matters entrusted to us.

The chief justice concluded by calling for the cooperation of the profession and he then declared the first term of 1966 open. The then chief justice having taken control of that ceremony, I acknowledge the graciousness of the present chief justice, The Honourable T F Bathurst AC in providing me with the opportunity to speak for the court on this occasion.

By happenchance, a young solicitor had a little time to spare in the week prior to his admission to the bar and wandered into the open courtroom, almost the sole observer of that momentous occasion.

Something else not shared by that historic occasion with today's ceremony is the presence of the profession. By happenchance, a young solicitor had a little time to spare in the week prior to his admission to the bar and wandered into the open courtroom, almost the sole observer of that momentous occasion. The Honourable John Bryson QC, judge of the Court of Appeal from 2004 to 2007, and a judge of the Equity Division from 1988, recalls that there was scarcely room for all judges on the

The Hon Justice Beazley AO, 'Fifty years of the New South Wales Court of Appeal'

The president of the Court of Appeal, the Hon Justice Margaret Beazley AO speaking at the ceremonial sitting. Photo: Supreme Court of NSW

bench of the Banco Court, in the then Supreme Court building in King Street, as they sat uncomfortably crowded together in long wigs and full ceremonial robes. He counts that poorly attended, slightly embarrassing occasion as part of his personal legal history. It is fitting that he is here today, this time sitting on the bench as a former judge of the Court of Appeal.

Following the chief justice's declaration of the opening of the law term, the court was reconstituted. The president and Justices Jacobs and Asprey proceeded to hear the court's first case, *Chirray v Christoforidis*, a damages claim arising from a motor vehicle. The Honourable Peter Young QC, then a junior of two years' standing, appeared for the respondent plaintiff, and Longsworth QC and Waddy for the appellant insurer. Whilst the young Mr Young had been stunningly successful before the jury, Longsworth QC prevailed before the new appellate court in a judgment delivered *ex tempore*. The jury verdict of 7,324 pounds and five shillings was reduced to 4,342 pounds and that ubiquitous five shillings. The court papers for both the trial at first instance and the Court of Appeal are here with us on the bench today [a slim folder comprising half a dozen pages]. I commend them to your reading [laughter].

Whether that experience prompted Mr Young to focus on the law of equity, where he pursued his illustrious career as a barrister, a judge of the Equity Division, chief judge in Equity and as a judge of appeal, is a story to be left to his telling.

... in a computerless age, fewer words were used in the administration of appellate justice in New South Wales than has occurred in later eras of the court.

The bound judgments for 1966 which we have on the bench this morning are as tactile as they are insightful, the cast of the typewriter clearly felt on every page, and only a rare overtyping of a spelling error to be found. In the 401 judgments delivered that year, there was a proliferation of *ex tempore* judgments and, in a computerless age, fewer words were used in the administration of appellate justice in New South Wales than has occurred in later eras of the court. There are, however, indications that the wheel is turning full circle.

Since the appointment of the first six judges of appeal, there have been 51 further appointments to the court, including a further eight presidents: Bernard Sugerman, Kenneth Jacobs,

whose wig I wear, Athol Moffitt, Michael Kirby, Dennis Mahoney, Keith Mason, James Allsop and myself. Four of us are on the bench this morning and another, Chief Justice Allsop, has just slipped in to the body of the court, having been detained by official duties. In that time, five Justices have followed Sir Leslie Herron, Sir John Kerr, Sir Laurence Street, Murray Gleeson, James Spigelman, who sits with us today, and our present chief justice.

As we have heard today and as is well chronicled, the relations between the new court and the trial judges of the Supreme Court were severely affected by the judicial supersession that invariably occurs with the creation of a new appellate court. Our sister court in New Zealand, now presided over by President Justice Ellen France, also present today (as are presidents McMurdo and Maxwell from Queensland and Victoria), experienced the same birthing pains nearly a decade earlier, when it established its Court of Appeal. The deeply felt wounds in that court are revealed in correspondence between Justice North, one of the appointed judges, and Justice Adams, who was not accorded the honour.

As Justice Adams wrote to Justice North, in sentiments which I think would have been reflected in this court, he said:

> I regard it as an insult that a junior judge and an outsider should have been appointed without even inquiring whether I was prepared to act. And this is the thing that hurts, not one of my brethren took the trouble to inquire what my wishes or desires might be.

Despite those sad words, the correspondence between those judges was nonetheless polite and even gentle. Not so in New South Wales, a robust jurisdiction at any time. It is said, for example, of Justice Else-Mitchell, and I quote, 'That he resented the court's creation and opposed it with vigour'.

Although Chief Justice Herron pronounced the court to be a division of the Supreme Court, later commentators, by reference to s 38 of the Supreme Court Act, have described the Court of Appeal as 'A court within a court'. That interpretation invokes for me an image of the cathedral which sits inside the mosque building in Cordoba in Spain. The analogy is totally visual, not an accurate representation of the history of those amazing structures, but nonetheless I think it says it well.

Whatever be the proper construction of s 38, the reality is that through successful chief justices the Supreme Court as a whole has developed as a cohesive, collegiate body, with all

Bar Association President Noel Hutley SC speaking on behalf of the NSW Bar. Photo: Supreme Court of NSW

judges committed to the mutual goal of administering justice according to law in accordance with our judicial oaths.

It is a truism that changes in legislation can have an impact upon the workload of the court, as can the exigencies occurring in jurisdictions from which appeals lie to the court. Recent changes in motor accident legislation are the classic example.

Likewise changes in dispute resolution processes have had their impact. The result, either appropriately or contrarily, depending upon one's point of view, is that the work of the court has become increasingly complex and the workload consequentially more onerous, albeit of huge interest and often of great public importance. The challenges to planning approvals for major infrastructure works, the proper construction of the preference provisions of the Corporations Act, and the meaning of the many important contracts that fall to be construed by the court are a miniscule sampling of the court's daily fare.

The constant theme throughout the history of the court has been the reduction of delays and the need for efficiency and economy, not only on the part of the court but on the part of the profession as well. The court throughout its history has striven to ensure that matters are heard and determined as

It is said, for example, of Justice Else-Mitchell, and I quote, 'That he resented the court's creation and opposed it with vigour'.

The Hon Justice Beazley AO, 'Fifty years of the New South Wales Court of Appeal'

L to R: The Hon Keith Mason AC QC, the Hon Dennis Mahoney AO QC, The Hon James Allsop AO, the Hon Justice Margaret Beazley AO.
Photo: Supreme Court of NSW

L to R: the Hon Michael McHugh AC QC, the Hon Anthony Whealy QC, the Hon Joseph Campbell QC, the Hon Reginald Barrett, the Hon Michael Kirby AC CMG, the Hon Terrence Cole AO QC, the Hon Dennis Mahoney AO, the Hon Kenneth Handley AO QC, the Hon Paul Stein AM QC, the Hon Keith Mason AC QC, the Hon John Bryson QC. Photo: Supreme Court of NSW

L to R: the Hon Tom Bathurst AC, the Hon Justice Anthony Meagher, the Hon Keith Mason AC QC, the Hon Justice Fabian Gleeson, the Hon Kenneth Handley AO QC, the Hon Justice Julie Ward, the Hon J Allsop, the Hon Justice Arthur Emmett, the Hon Justice Robert Macfarlan, the Hon Justice Carolyn Simpson, the Hon Dennis Mahoney AO QC, the Hon Peter Young AO, the Hon Murray Tobias AM QC, the Hon Margaret Beazley, the Hon Reginald Barrett, the Hon Justice Patricia Bergin, the Hon Justice V Bell AC, the Hon Joseph Campbell QC, the Hon John Bryson QC, the Hon Justice Leeming, the Hon J Spigelman QC,the Hon Justice John Basten, Sir Anthony Mason, the Hon Anthony Whealy QC, the Hon Terrence Cole AO QC, the Hon L J Priestley QC, the Hon Justice Peter McClellan, the Hon AM Gleeson AC QC. Photo: Supreme Court of NSW

expeditiously as possible. We are greatly assisted in our work by the registrar of the court and our small registry, today represented by Harry Jones, Karla Worboys and Jane Yesma, and by legally qualified research staff. They deserve recognition and praise for the work they do.

The words of Chief Justice Herron on 8 February 1966, and the sentiments therein expressed at that first ceremonial sitting of the court, were not only historically significant but were prophetic. The judges of the court for the past 50 years have been, and are, as enthusiastic and as determined as the first judges of appeal, which has given this court its reputation as a highly accomplished intermediate Court of Appeal. Likewise, the cooperation of the profession is as essential and integral today to the efficiency of the court as it was then. As to the future, there are some who predict that our judgments will be written by robots. All that can be said if that should occur, is we wish them the best of luck [much laughter].

Safety in the air begins with safety on the ground

David Chitty reports on Malaysian Airlines Flight MH17 and potential WHS breaches.

Introduction

When the Boeing 777-200 airliner of Malaysian Airlines Systems (MAS, as it was then called) with the flight number MH17 was shot down over the Ukraine at 1320 UTC on July 17 2014 the passengers and crew were supposed to be protected by various statutory regimes or regulatory frameworks. These included domestic operational safety of flight Acts, associated regulations (which incorporate various international safety standards or Annexes) and workplace/occupational safety laws which protect, via criminal sanctions, a person (applies to both crew and passengers) from being *placed at risk* of death or injury through numerous workplace activities or undertakings.

Sunflowers surround the downed MH17 crash site on the outskirts of the village of Rassyypnoye. Photo: Kate Geraghty / Fairfaxphotos

There has been much outrage and anger directed towards the separatists on the ground who 'pulled the trigger' on the BUK missile system and the Russian Federation who allegedly supplied the weapon. But there has been a conspicuous silence towards the aircraft operator and its 'accountable personnel' (sometimes called 'post-holders' on the applicable Air Operators Certificate (AOC) issued by the relevant state authority) and the Malaysian Department of Civil Aviation whose apparent omissions and passive approach to flight safety and risk/hazard identification allowed the aircraft to be placed into the path of a material risk.

Of interest, is the following extract from the Malaysian Department of Civil Aviation AIC 17/2005 which states, the *function and purpose* of the operator and the department as:

> The safe conduct of air operations is achieved by an operator and DCA working in harmony towards a common aim. The functions of the two bodies are different, well defined, but complementary. In essence, the operator complies with the standards set through putting in place a sound and competent management structure. The DCA working within a framework of law (statutes) sets and monitors the standards expected from the operator.

This paper is an opinion piece and is not intended to treat exhaustively the operation of Malaysian law, nor to express any concluded view in respect of the possible liability of any person under that law. It does however, provide a topic for discussion as to whether any negligence of the operator could be classified as gross negligence or recklessness, and therefore in some jurisdictions, lead to a possible 'corporate manslaughter' type prosecution.

To quote Cummins J in *DPP v Esso Australia Pty Ltd* '…The provision by employers of a safe workplace and safe systems of work is a serious matter'.

The incident

298 people were killed (including 27 Australians) and the aircraft (registration 9M-MRD) was destroyed by a single missile fired from the ground by a Russian built BUK surface to air missile system operated by Russian backed separatists who were engaged in a *known* armed conflict within the Eastern Ukraine. This type of missile system can reportedly engage targets at maximum altitudes of 70,000 to 80,000ft .

The aircraft (MH17) was in level-flight at an altitude of Flight Level 330 (33,000ft) and was flying 1000ft above the upper limit (FL320) of a significant restricted area (NOTAM A1383/14 and A1492/14 applied) which was issued by the Ukraine authorities due to the armed conflict and the shooting down by missile of an Antonov An-26 aircraft with the loss of 49 lives on 14 July 2014. It should be noted that between 22 April 2014 and 17 July 2014 there had been a confirmed number of 15 downed military aircraft (not including MH17) above the Eastern part of the Ukraine.

Foreseeable exposure to risk

While the risk(s) to which the crew and passengers were exposed manifested itself with the shooting down of MH17,

it should be noted that other carriers who also exposed their employees and passengers to the 'real and not trivial or fanciful' risks associated with overflying a known war zone would also no doubt be potentially liable to conviction from similar WHS legislation within their own state jurisdictions. This aspect of other carriers' liability will not be explored further in this paper.

Malaysian workplace safety legislation

Accidents within the public transport sector (particularly buses, trains and ferries) within Malaysia have prompted calls for a comparative study looking at both the UK and Australian legislation which can impose criminal liability to corporations for significant workplace accidents.

The principal Act in Malaysia dealing with workplace health and safety is the *Occupational Safety and Health Act 1994* (Act) which makes provision for securing the safety, health and welfare of persons at work and for protecting others against risks to safety or health in connection with the activities of persons at work. The Act also establishes the National Council for occupational safety and health and associated connected matters.

The industries that the Act applies to are tabled at the First Schedule, and at para 6 of the Schedule include transport and at para 10, public services.

It should be noted that the Act at section 3(1)(b) specifically includes aircraft as work premises.

The objects of the Act are stated as:

(a) to secure the safety, health and welfare of persons at work against risks to safety or health arising out of the activities of persons at work;

(b) to protect persons at a place of work other than persons at work against risks to safety or health arising out of the activities of persons at work; (c) to promote an occupational environment for persons at work which is adapted to their physiological and psychological needs;

(d) to provide the means whereby the associated occupational safety and health legislations may be progressively replaced by a system of regulations and approved industry codes of practice operating in combination with the provisions of this Act designed to maintain or improve the standards of safety and health.

The objects of the Act are quite clearly to secure the safety, health and welfare of both the employees (for example the flight crew of MH17, however, there could have been other staff on board the aircraft who could have been on duty for example

The Final Report of the Dutch Safety Board makes it quite clear that Malaysian Airlines did not conduct an additional risk assessment to identify the hazards associated with flying over the known war zone of the Eastern Ukraine.

travelling engineers or 'paxing' flight crew) and other persons against risks to safety or health arising out of the activities of persons at work.

The risk does not need to manifest itself (ie being shot down over a known war zone). Just to have been exposed to the risk would be sufficient for the purposes of the Act.

The general duty of employers to their employees is provided at s 16 of the Act and it states that the duty of every employer is to ensure, so far as is practicable the safety, health and welfare of all his (sic) employees, which includes in particular:

(a) the provision and maintenance of plant and systems of work that are, so far as is practicable, safe and without risks to health;

(b) the making of arrangements for ensuring, so far as is practicable, safety and absence of risks to health in connection with the use or operation, handling, storage and transport of plant and substances;

(c) the provision of such information, instruction training and supervision as is necessary to ensure, so far as is practicable, the safety and health at work of his employees;

(d) so far as is practicable, as regards any place of work under the control of the employer or self-employed person, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of the means of access to and egress from it that are safe and without such risks;

(e) the provision and maintenance of a working environment for his employees that is, so far as is practicable, safe, without risks to health, and adequate as regards facilities for their welfare at work.

S17 of the Act provides for the general duties to of employers to persons other than their employees and states:

(1) It shall be the duty of every employer and every self-employed person to conduct his undertaking in such a

manner as to ensure, so far as is practicable, that he and other persons, not being his employees, who may be affected thereby are **not thereby exposed to risks** to their safety or health.

(2) It shall be the duty of every employer and every self-employed person, in the prescribed circumstances and in the prescribed manner, to give to persons, not being his employees, **who may be affected by the manner in which he conducts his undertaking, the prescribed information on such aspects of the manner in which he conducts his undertaking as might affect their safety or health.**

The qualification 'so far as practicable' must be considered having regard to the severity of the risk, the knowledge of the risk and the availability of alternative means of removing or mitigating the risk. Therefore, the requirement to properly assess the risk is present in both Malaysian aviation legislation and the Act. The Final Report of the Dutch Safety Board makes it quite clear that Malaysian Airlines did not conduct an additional risk assessment to identify the hazards associated with flying over the known war zone of the Eastern Ukraine:

> Malaysia airlines relied on aeronautical information and **did not perform any additional risk assessment**.

A person who contravenes s 15 to s 18 is guilty of an offence and shall, on conviction be liable to fine and/or imprisonment for a term not exceeding two years. However, of note is the Malaysian Penal Code (Act 574) at s 304 (punishment for culpable homicide not amounting to murder – i.e., essentially amounting to recklessness) and s 304A (causing death by negligence) provide for maximum penalties of imprisonment for 10 years or 2 years respectively. The Penal Code however, relates to individuals and not corporations.

Forlin QC states that there are very few reported cases dealing with the concept of corporate criminal liability, and therefore, it is unclear how the doctrine could be viewed or seen unfolding in a contemporary nature but the majority of cases incorporate a 'directing mind' theory which means the identification of key personnel who can be said to be the embodiment of the corporation. Malaysian Airlines, for example, could have deemed as the accountable personnel for safe flight operations those who are named on the Air Operators Certificate.

The operator must have nominated an Accountable Manager acceptable to the DCA who has *corporate authority* for ensuring that all operations and maintenance activities can be financed and carried out to the standard required by the DCA and any other requirements defined by the operator.

It is therefore essential that additional risks, which are not of the everyday nature and familiarity to high capacity air travel, are proactively identified and mitigated against.

The operator must also have nominated post holders, acceptable to the DCA, who are responsible for the management and supervision of the following areas:

(a) Flight operations;

(b) The engineering maintenance systems;

(c) Crew training; and

(d) Others (as required)

For an example of this 'directing mind' approach see *Public Prosecutor v Kedah & Perlis Ferry Service Sdn Bhd* where Barakbah J said:

> '…a limited company…could not be found guilty of the offence without proof of mens rea of its agents or officers. The persons whose knowledge would be imputed to the company would be those who were entrusted with the exercise of the powers of the company'.

It is, on balance, arguable that the accountable manager and the various post-holders could be deemed to have the 'directing mind' for operational decisions and were entrusted with the safety of flight responsibilities of Malaysian Airlines, being the corporate entity.

Mitigation of risk

Before risk can be mitigated to as low as reasonably practicable (ALARP) the risks and hazards must be identified. This is the golden thread or key principle for safe operations within any high risk industry. The identified risks however, must be real and not trivial or fanciful and would be what any reasonable person would appreciate and take steps to guard against . A risk assessment, as a concept, is an exercise in foresight.

The nature of aviation and the associated risks are always present within the industry but the safety management systems and structures that have been developed over many decades makes airline travel incredibly safe and passengers therefore become generally complacent of the inherent risks involved.

These day-to-day risks are high speed, high altitude flight in ever more congested airspace heavily reliant on human performance

(pilots, ATC and engineers) operating sophisticated machinery in all weathers. It is therefore essential that additional risks, which are not of the everyday nature and familiarity to high capacity air travel, are proactively identified and mitigated against.

These additional risks, which are real and certainly not fanciful, that require proactive assessment by airline operational employees, utilising approved risk assessment procedures, with the necessary application of open or in some cases closed source information which would then conclude with a subsequent decision (safe to operate or not safe to operate and mitigation actions taken) by the accountable manager or post-holders named on the AOC. These additional risk assessments would include considerations in relation to such recent events as:

1. Flight in the vicinity of the Fukushima nuclear reactor;
2. Volcanic activity (e.g. the Icelandic volcanic eruption of 2010);
3. Shoulder launched missiles in the Afghanistan mountains or the Sinai Peninsular;
4. Armed conflict in the Eastern Ukraine;
5. Russian missiles being fired from the Caspian Sea into Syria;
6. Missile tests/launches on the Korean peninsula;
7. Space debris returning to Earth's atmosphere;
8. Solar flare activity exposure to excessive cosmic radiation (certain NASA forecasts may limit aircraft altitude in polar regions).

The Final Report of the Dutch Safety Board (at 4.3.1) expected the parties (including states, operators and international organisations) to *proactively identify risks* and if necessary adapt their approach to safety and limit these risks to as low as reasonably practicable. The risks that manifested themselves with MH17 were readily identifiable via open source information (for example: ICAO State letter dated 2 April 2014; EASA Safety Information Bulletin; the FAA warning (SFAR113 dated 23 April 2014); in various NOTAMs. It should be noted that eight operators (unnamed in the Dutch Final Report) had reportedly ceased to fly over the area due to uncertainty of the situation in the Crimean region i.e., the known risk.

It is the view of this author that the risks associated with flying over the Eastern Ukraine in mid-July 2014 were real, not trivial or fanciful and were known and foreseeable to airline operators and the various state authorities who had *proactively risk assessed* the deteriorating situation.

Finally, it must always be remembered that one of the fundamental and universal purposes of occupational safety and health legislation is to protect those who otherwise cannot protect themselves, namely the 283 passengers of MH17 who entrusted their lives to Malaysian Airlines.

Endnotes

1. Malaysian Airlines was rebirthed with a new Air Operators Certificate as Malaysian Airlines Berhad (MAB) on 1 September 2015
2. As concluded by the independent Dutch Safety Board Investigation which released its Final Report on 14 October 2015
3. An AIC for Air Operators Certification and Supervision issued 21 July at paragraph 2.6.5.1
4. 124 A Crim R 200 at 201.
5. 283 passengers and 15 crew-members. For a breakdown of nationalities see section 2.2 of the Dutch Final Report.
6. See pp134 of the Dutch Final Report.
7. The term Flight Level is used globally to allow aircraft to coordinate their atmospheric setting of altimeters above a level called the transition altitude and this altitude varies from state to state, for example in Australia it is 10,000ft.
8. This in itself created risks to the safety of flight due to potential technical malfunctions which may have required the aircraft to descend into the restricted /closed airspace. This aspect was raised in the Dutch Final Report with Malaysian Airlines. However, their response was vague and unsatisfactory (see pp 219 Dutch Final Report).
9. Annex 11 to the Chicago Convention defines NOTAM as 'a notice distributed by means of telecommunication containing flight information concerning the establishment, condition or change in any aeronautical facility, service, procedure or hazard, the timely knowledge of which is essential to personnel concerned with flight operations'.
10. See fig 77 of the Dutch Final Report at pp182.
11. See for example *R v Merlin Attractions Operations Ltd* [2012] EWCA Crim 2670 where prosecution succeeded despite twenty million visitors having previously visited a site before a fatal accident.
12. Corporate Liability work related deaths and criminal prosecutions Gerard Forlin QC, 3rd Edition 2014 Bloomsbury at para 14.160.
13. Dutch Final Report at section 7.9 (1)
14. My emphasis.
15. Corporate Liability work related deaths and criminal prosecutions Gerard Forlin QC, 3rd Edition 2014 Bloomsbury at para 14.166.
16. [1978] 2 MLJ 221.
17. per Lord Justice Moses in *R v Porter (James Godfrey)* [2008] EWCA Crim 1271.
18. *R v Chargot Ltd* [2009] 1 WLR 1 per Lord Hope at para 27.
19. These procedures would be part of the individual operator's approved Safety Management System (SMS)
20. MET/H TF3 – IP/2 – ICAO Termination of radioactive cloud SIGMET on Fukushima incident.
21. EASA Safety Information 2014–30R1 (Egypt Sinai Peninsular Airspace)
22. Dutch Final Report at pp225.

Validity of Migration Act provisions for regional processing on Nauru

Tarik Abdulhak reports on *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1.

In *Plaintiff M68/2015 v Minister for Immigration*, a majority of the High Court[1] upheld the validity of s 198AHA of the *Migration Act 1958* (Cth), which authorises the Commonwealth to give effect to arrangements for the offshore processing and detention of unlawful maritime arrivals. The majority held that s 198AHA was a law with respect to aliens and was thus authorised by s 51(xix) of the Australian Constitution.

1. The plaintiff's detention on Nauru and her application to the High Court

The plaintiff is a Bangladeshi asylum seeker who sought unauthorised maritime entry into Australia. In January 2014 she was transferred to the Republic of Nauru, where she was detained. Her transfer was effected under s198AD(2) of the Migration Act, which requires officers of the Department of Immigration to remove unauthorised maritime arrivals to a regional processing country.[2] Nauru was designated a regional processing country on 10 September 2012.[3]

The purpose of the plaintiff's transfer to Nauru was to enable her claim for protection to be assessed by the Nauruan authorities. Under the arrangements discussed in Section 2 below, if the plaintiff is assessed as being entitled to protection under the Refugee Convention,[4] she may be offered settlement in Nauru or in a third country. She would not be entitled to settle in Australia.

In August 2014 the plaintiff was temporarily transferred to Australia for medical treatment. She subsequently commenced proceedings in the High Court's original jurisdiction, seeking, *inter alia*: a writ of prohibition directed to the minister to prevent her return to Nauru; and a declaration that the Commonwealth's actions in procuring her prior detention in Nauru were unlawful because they were not authorised by a valid law of the Commonwealth.

On 30 June 2015, the Commonwealth Parliament enacted amendments to the Migration Act, inserting s 198AHA with retrospective effect to 18 August 2012. The section purports to authorise the Commonwealth to take any 'action' in relation to the processing functions of a regional processing country,[5] including exercising restraint over a person's liberty in such a country.[6] A key question which the court had to determine was whether the Commonwealth's actions in taking part in the implementation of the regional processing arrangements at Nauru were authorised by s 198AHA and / or s 61 of the Commonwealth Constitution.

2. The regional processing arrangements

The regional processing arrangements were operated under a Memorandum of Understanding ('MoU') between the Commonwealth and the Republic of Nauru, and a number of associated agreements. Features of the arrangements which were relevant to the plaintiff's case included the following:

- While Nauru agreed to accept transferees from Australia, the Commonwealth agreed to bear all costs of the arrangement.
- Nauruan visas for transferees can only be issued on application by Australian officials. The officials make the applications on behalf of, and without the consent of, the transferees.
- All transferees reside at, and until recently were detained in, a Regional Processing Centre ('RPC') in Nauru. Australia is responsible for the provision of security infrastructure at the RPC, and for all service contracts to enable the RPC's operation.
- Australia is directly involved in the oversight and management of the RPC.
- Security services at the RPC are provided by private agencies contracted and supervised by Australia. Employees of these agencies have authority to permit detainees to leave the RPC at specified times (see below).

The detention of the transferees was effected under Nauruan law. Starting from February 2015 the transferees were able to obtain permission to leave the RPC for specified periods. In October, shortly before the hearing of this case before the High Court, the Nauruan government indicated its intention to allow unrestricted freedom of movement for the transferees. It therefore appeared that, if the plaintiff were to be returned to Nauru, she would no longer be detained, albeit that she would still be required to reside at the RPC.[7]

3. Judgments of the majority

All seven justices found that the plaintiff had standing to seek a declaration as to the lawfulness of the Commonwealth's conduct. Her application did not involve a hypothetical question. A declaration would not only determine the lawfulness of the plaintiff's past detention but would also address the question of whether the Commonwealth could engage in similar conduct in the future.[8]

Six of the seven justices held that the Commonwealth's participation in the plaintiff's detention on Nauru was authorised by s 198AHA of the Migration Act, which their Honours held to be a valid law of the Commonwealth. The validity of s 198AHA was also addressed through the prism of the principle enunciated in *Chu Kheng Lim v Minister for Immigration*, that the detention of an alien by the Executive, without judicial authority, is only valid to the extent that it is authorised by statute.[9]

French CJ, Kiefel and Nettle JJ found that the Commonwealth had not detained the plaintiff on Nauru, but had nevertheless participated in the plaintiff's detention.[10] It was necessary for such an action to be authorised by Australian law,[11] and s 198AHA provided the requisite authorisation.[12] The plurality held that s 198AHA is, in turn, supported by the aliens power in s 51(xix) of the Constitution because it concerns the functions of the place to which an alien is removed for the purpose of the determination of his or her refugee status.[13] The Commonwealth's exercise of physical restraint over the plaintiff in Nauru is, however, only valid to the extent that it is within the scope and purpose of s 198AHA, namely the processing of the plaintiff's claim to refugee status.[14] Their Honours also held that the Commonwealth's entry into the MoU with Nauru was authorised by s 61 of the Constitution.[15]

Bell J took a different view of the actual extent of the Commonwealth's participation in the plaintiff's detention on Nauru, finding that the Commonwealth had brought about, and exercised effective control over, that detention.[16] Her Honour held that these actions were authorised by s 198AHA because they were closely connected to the processing of protection claims of an individual who was removed from Australia to a regional processing country. This also provided a sufficient connection between s 198AHA and s 51(xix) of the Constitution.[17] Furthermore, s 198AHA did not offend the principle in *Lim* because: a) in accordance with *Lim*, the parliament is authorised to confer power on the Executive to detain aliens without judicial warrant for the purposes of deportation or investigation of an application for entry;[18] and b) s 198AHA did not offend this principle.[19] Bell J agreed with the plurality's conclusions with respect to s 61 and the scope of validity of the exercise of physical restraint over an alien under s 198AHA.[20]

Gageler J found that security officers who detained the plaintiff acted as *de facto* agents of the Executive Government.[21] However, the Commonwealth's procurement of the plaintiff's detention fell within the statutory authority retrospectively conferred by s 198AHA.[22] His Honour held that s 198AHA was authorised by both the aliens power in s 51(xix) and the external affairs power in s 51(xxix) of the Constitution.[23] The section was not punitive in character because, *inter alia*, it authorised detention only for as long as it was reasonably necessary to effectuate a specific statutory purpose (regional processing). Section 198AHA therefore did not offend Chapter III of the Constitution.[24]

Gordon J accepted that s 198AHA authorises the Commonwealth to detain the plaintiff on Nauru. However, in her Honour's view, the section is constitutionally invalid.

Similarly to the other members of the majority, Keane J found that s 198AHA seeks to ensure the reasonable practicability of the removal of aliens to another country for offshore processing. His Honour held that the provision is therefore a valid law under s 51(xix) of the Constitution.[25] In his Honour's view, the authority under s 198AHA to cause the detention of an alien exists only if it is a necessary condition of the willingness and ability of the processing country (e.g. Nauru) to receive the alien for processing.[26] His Honour held that because the plaintiff was detained by Nauru and not by the Commonwealth, the principles in *Lim* were not engaged.[27]

4. Justice Gordon's dissenting judgment

Unlike the majority, Gordon J held that the plaintiff was in fact detained by the Commonwealth on Nauru.[28] In coming to this conclusion, her Honour reviewed various indicia of the Commonwealth's extensive involvement in the detention regime.[29]

Gordon J accepted that s 198AHA authorises the Commonwealth to detain the plaintiff on Nauru.[30] However, in her Honour's view, the section is constitutionally invalid. By providing for the Commonwealth to detain aliens in a foreign country after their removal from Australia, s 198AHA goes beyond regulating the entry and removal of aliens, and thus exceeds the aliens power in s 51(xix) of the Constitution.[31] Her Honour held that 'the aliens power does not provide the power to detain *after* removal is completed.'[32] Furthermore, by exceeding the specific categories of detention which are authorised by the judgment in *Lim* (i.e. deportation and excluding the admission of aliens),[33] s 198AHA contravenes Chapter III of the Constitution.[34]

Gordon J further held that, like the aliens power, the external affairs power (s 51(xxix) of the Constitution) is subject to the limitations and prohibitions in the Constitution, including the *Lim* principle.[35] The external affairs power therefore does not extend to making laws authorising the Executive to detain persons contrary to Chapter III, a limitation which s 198AHA exceeded.[36] For similar reasons, s 198AHA is not supported by the power to pass laws with respect to relations with the islands of the Pacific (s 51(xxx)), or the immigration power (s51(xxvii).[37]

Finally, Gordon J held that, while the Commonwealth's entry into the MoU with Nauru was an act within the non-statutory power of the Commonwealth, s 61 of the Constitution could not provide a constitutional basis for the right to detain in s 198AHA.[38] This is because the executive power of the Commonwealth does not provide authority for an officer of the Commonwealth to detain a person.

Endnotes

1. *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1 ('Judgment in plaintiff M68'), French CJ, Kiefel and Nettle JJ, Bell J, Gageler J, Keane J (Gordon J dissenting).
2. The term 'unauthorised maritime arrival' is defined in s 5AA of the *Migration Act 1958* (Cth).
3. This designation was made by the Minister for Immigration under s 198AB(1) of the Migration Act.
4. Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967).
5. This term is defined in s 198AHA(5) to include the implementation of any law or policy by a country in connection with its role as a regional processing country.
6. s 198AHA(5) of the Migration Act.
7. Gordon J points to this fact at [345].
8. Judgment in *Plaintiff M68*: French CJ, Kiefel and Nettle JJ at [23]; Bell J at [64]; Gageler J [112] (although not referring to the issue of future legality); Keane J at [235] (stating also that a person who has been detained has standing to question the lawfulness of that detention even though he / she is not seeking damages); and Gordon J at [349]–[350] (describing the question of whether the plaintiff's detention at Nauru was unlawful under Australian law as a 'live issue' which has foreseeable consequences).
9. *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, at 19.
10. Their Honours held it was 'very much to the point' that Nauru detained the plaintiff in the exercise of its sovereign legislative and executive power and that the Commonwealth could not compel Nauru to make laws requiring detention of transferees: at [34]–[37].
11. Judgment in *Plaintiff M68*, French CJ, Kiefel and Nettle JJ at [41].
12. Ibid at [41], [46].
13. Ibid at [42].
14. Ibid at [46].
15. Ibid at [54].
16. Judgment in *Plaintiff M68*, Bell J at [83], [92]–[93].
17. Ibid at [77].
18. *Chu Keng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, Brennan, Deane and Dawson JJ, at 33; Re *Woolley*; Ex parte Applicants M276/2003 (2004) 225 CLR 1, Gleeson CJ at 12–13; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, Crennan, Bell and Gageler JJ at 369.
19. Judgment in *Plaintiff M68*, Bell J at [98]–[99].
20. Ibid at [101], [103].
21. Judgment in *Plaintiff M68*, Gageler J at [172]–[173].
22. Ibid at [180].
23. Ibid at [182]. His Honour also held, at [178], that the entry by the Commonwealth into the Memorandum of Understanding with Nauru was an exercise of the Executive's non-statutory prerogative capacity to conduct relations with other countries.
24. Judgment in *Plaintiff M68*, Gageler J at [184]–[185].
25. Judgment in *Plaintiff M68*, Keane J at [259], [264]–[265].
26. Ibid at [260]–[262].
27. In his Honour's view, while the Commonwealth may have procured or funded restraints upon the plaintiff's liberty, this did not alter the fact that the plaintiff was detained by the exercise of the governmental power of Nauru: Judgment in *Plaintiff M68*, Keane J at [239].
28. Judgment in *Plaintiff M68*, Gordon J at [276], [352]–[355].
29. See, for example, her Honour's analysis at [299], [323], [332], [354] (the service provider contracted by the Commonwealth was required to and did restrict the plaintiff's liberty; the Commonwealth can, at any time, take over the operation of the regional processing centre ('RPC') from the service provider); [330] (the service provider maintains security in accordance with the policies of the Commonwealth Department of Immigration); [287] (the Commonwealth bears all the costs of the arrangement); [288] (Nauru is required to accept transferees from Australia); [292], [300] (the Commonwealth engages contractors to assist in the refugee determination process, and maintains a significant involvement in the ultimate outcome for each transferee); [300]; [304]–[306] (the Commonwealth participates in the management of the RPC through a committee and working group, and occupies an office at the RPC); [315] (the 'Operational Manager' of the RPC is described as a person who is given responsibility either by Nauru or by the Commonwealth of Australia); [297] (the program coordinator, who manages all service provider contracts at the RPC, is an officer of the Department of Immigration); [308] (a visa for a transferee can only be issued on application by a Commonwealth officer); [310] (it is a condition of the visa that the transferee must remain at the RPC); and [313] (in applying for the visas, the Commonwealth did not seek or obtain the transferees' consent).
30. Judgment in *Plaintiff M68*, Gordon J at [360].
31. Ibid at [376]–[377], [394].
32. Ibid at [393].
33. Ibid at [380], [386], [389], [400].
34. Ibid at [388]–[389]. Her Honour recognised that the exceptional categories may not be closed, but expressed the view that an exception should not be created for the kind of detention considered in this case: at [382], [389], [401].
35. Judgment in *Plaintiff M68*, Gordon J at [408].
36. Ibid at [409]–[411].
37. Ibid at [403].
38. Ibid at [369]–[372].

When foreign state immunities and foreign judgments collide

Nicolas Kirby reports on *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43; 90 ALJR 228; 326 ALR 396.

This case deals with the collision of the *Foreign States Immunities Act 1985* (Cth) and the *Foreign Judgments Act 1991* (Cth).

The Republic of Nauru Finance Corporation issued bonds. The appellant, Firebird Global Master Fund II Ltd, held most of those bonds. The Republic of Nauru guaranteed the bonds and then refused to pay Firebird.

Firebird sued Nauru in the Tokyo District Court and obtained judgment for the sum of ¥1,300 million. Firebird then registered that judgment in the NSW Supreme Court – without notice to Nauru – under the Foreign Judgments Act. The registration of the Japanese judgment gave Firebird the same rights to enforce the judgment as if it was a judgment of the Supreme Court. Firebird sought to execute its judgment against certain accounts Nauru held with Westpac.

First Instance and Court of Appeal

Nauru applied to set aside the registration of the foreign judgment on the basis of its immunity under the *Foreign States Immunities Act 1985* (the Immunities Act) and, further, because it was not properly served with the proceedings under that Act.

Young AJ found for Nauru on both points. The Court of Appeal (Bathurst CJ, Beazley P, Basten JA) agreed. Firebird appealed to the High Court.

The immunities and exceptions

The Immunities Act relevantly provides for two kinds of immunity. Section 9 provides an immunity from the jurisdiction of Australian courts in a proceeding. Section 30 provides for an immunity from execution of an order or judgment against a foreign state's property in Australia. The Immunities Act then provides for certain exceptions to those immunities.

The exceptions under scrutiny in this case were the exception to the jurisdictional immunity for commercial transactions (section 11) and the exception to the immunity from execution for property which is commercial property (defined as property used for substantially commercial purposes) (section 32).

Nauru maintained that its general immunity from jurisdiction applied in proceedings for the registration of a foreign judgment and that the immunity from execution applied in relation to the garnishee order made against its Westpac accounts.

Firebird argued, first that the jurisdictional immunity did not apply because the registration of a foreign judgment was not a relevant 'proceeding'. The High Court rejected this argument.[1] It held that wide meaning should be given to 'proceeding' in order to give effect to the immunity conferred by the statute as well as giving effect to the immunity recognised in international law.[2]

Firebird alternatively argued that the registration of the foreign judgment came under the commercial transactions exception because the underlying, Japanese judgment concerned a commercial transaction. The High Court upheld Firebird's alternative argument, holding that a wide construction should be accorded to the commercial transaction exception, in order to give effect to the object of the commercial exception immunity.[3]

Service

Nettle and Gordon JJ held that registration of a foreign judgment is not an action *in personam* and the Foreign Judgments Act contemplates an *ex parte* procedure which the judgment debtor may later apply to set aside.[4]

French CJ and Kiefel J held that the Immunities Act only dictated how a foreign state is to be served but not when it must be served.[5] They held that the Foreign Judgments Act permitted the *ex parte* registration of the Japanese judgment but that Nauru could then apply for the registration to be set aside by asserting its immunity.[6]

Gaegeler J agreed with Basten JA's analysis and upheld the finding of Young JA and the Court of Appeal that the registration of the foreign judgment should be set aside for failure to serve Nauru in accordance with the Immunities Act. His Honour based his decision on his opinion that:

> the Immunities Act is structured on the assumption that an exercise of judicial power against a foreign State will occur only in a proceeding to which the foreign State is a party.

Of course, the Republic of Nauru was a party to the registration proceedings. But Firebird registered the foreign judgment *ex parte*, leaving Nauru to apply to set it aside once it was notified of the judgment and the ensuing garnishee order. Gaegeler J's reference should be understood to refer to a foreign state who is a party *who has appeared* in the proceedings.

Execution against the Westpac accounts

So, up to this point, Firebird's appeal was travelling pretty well. All five judges accepted that Nauru was not here protected by the jurisdictional immunity and four of the judges had found that there was no invalidity for failure to serve Nauru prior to registering the foreign judgment. The only issue that remained

to be determined concerned Nauru's claimed immunity against execution against its Westpac accounts. This is where Firebird's success ended.

The High Court found that the Westpac accounts were not commercial property.[7] Some of the funds were used for purposes which, *prima facie*, had a commercial character (such as operating an airline, selling residents fuel, providing electricity and water and lending to small businesses). But the court took into account that Nauru is a small, remote nation of small population. It has no central bank (and seemed to be using Westpac as a *de facto* treasury). Most of the ostensibly commercial transactions were, in fact, conducted on a non-profit basis. Each of these was, in fact, a government providing goods and services to a small population which would not otherwise receive them due to the remote location and tiny population.

In a separate judgment, Firebird, despite some measure of success with respect to the jurisdictional immunity and service points, was ordered to pay the respondents' costs.[8]

Endnotes

1. French CJ and Kiefel J at [36] and [49]; Gaegeler (who agreed with the judgment and reasons of French CJ and Kiefel J in all matters except as to service) at [131]; Nettle and Gordon JJ at [187].
2. French CJ and Kiefel J at [44].
3. French CJ and Kiefel J at [70], [71.]
4. Nettle and Gordon JJ at [213].
5. French CJ and Kiefel J at [94].
6. French CJ and Kiefel J at [96].
7. French CJ and Kiefel J at [118]ff; Nettle and Gordon JJ at [226]ff.
8. *Firebird Global Master Fund II Ltd v Republic of Nauru [No 2]* [2015] HCA 53; 90 ALJR 270; 327 ALR 192.

Identification of privies in interest for the purpose of issue estoppel

Tarik Abdulhak reports on *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28.

In this case, the High Court clarified the circumstances in which a person may be subject to an issue estoppel by virtue of being a privy in interest with a party to prior court proceedings. In summary, where the person's legal interests were represented by a party to the prior proceedings, he or she will be treated as a privy in interest with that party if he or she had an opportunity to control the conduct of the previous proceedings, and the potential detriment to him or her from creating such an estoppel was taken into account in the conduct of those proceedings.[1]

The first and second proceedings

In 2010, the Fair Work Ombudsman (the 'Ombudsman') took enforcement action in the Federal Court of Australia against Ramsey Food Processing Pty Ltd ('Ramsey'). The Ombudsman alleged that, as an employer, Ramsey had breached an applicable award[2] by failing to pay a number of its employees, including Mr Tomlinson, certain amounts to which they were entitled. Mr Tomlinson was not a party to, but did give evidence in, the proceedings. The Federal Court determined that Ramsey (and not Tempus, a labour services company) was the employer. The Court ordered Ramsey to pay Mr Tomlinson and the other employees the outstanding amounts.

Mr Tomlinson subsequently brought an action against Ramsey in the District Court of New South Wales, seeking damages at common law for injuries alleged to be the result of Ramsey's negligence. In this action, Mr Tomlinson alleged that Tempus, and not Ramsey, was his employer, and that Ramsey was liable as the entity in control of the workplace.[3] Following a trial on the merits, the District Court held that Tempus was indeed the employer. The court found that Mr Tomlinson established his cause of action, and awarded damages against Ramsey. It rejected Ramsey's argument that the Federal Court judgment gave rise to an issue estoppel which would bar Mr Tomlinson from alleging that Ramsey had not been his employer.

Court of Appeal Judgment

The New South Wales Court of Appeal upheld an appeal by Ramsey from the judgment of the District Court, holding that the Federal Court's declaration and orders gave rise to an issue estoppel as to who was Mr Tomlinson's employer.[4] The Court of Appeal found that there was privity of interest between Mr Tomlinson and the Ombudsman because the latter had made the claim in the Federal Court 'under or through', or on behalf of, Mr Tomlinson.[5]

Tarik Abdulhak, 'Identification of privies in interest for the purpose of issue estoppel'

High Court Judgment

The High Court unanimously upheld Mr Tomlinson's appeal (French CJ, Bell, Gageler and Keane JJ in a joint judgment; Nettle J in separate reasons). The court held that Mr Tomlinson was not a privy in interest with the Ombudsman in the Federal Court proceedings, and that an issue estoppel could therefore not operate against him.

Applying Barwick CJ's analysis of the privity principle in *Ramsay v Pigram*,[6] the plurality explained that a privity of interests may arise in, *inter alia*, the following circumstances:[7]

> Where a party to later proceedings ('A') had a legal interest[8] in the outcome of the earlier proceedings, which interest was represented by B, or B has a legal interest in the outcome of the later proceedings, which is represented by A (the 'representation scenario'); and
>
> Where A may have acquired some legal interest from B, which is affected by an estoppel, and which interest A then relies on in later proceedings (the 'derivation of interest scenario').

In *Tomlinson*, the court was primarily concerned with the representation scenario. Both the plurality and Nettle J recognised that there are a number of traditional forms of representation which bind those represented to an estoppel.[9] But outside those relationships, the issue estoppel will not arise in a *representation scenario* unless:

- A had an opportunity to exercise control over the presentation of evidence and the making of arguments in the earlier proceedings; and
- The potential detriment to A from creating an estoppel was fairly taken into account in the decision to make / defend the earlier proceedings, or in the conduct of the earlier proceedings.[10]

The restriction of the concept of privies in interest in these terms represents the balancing of two sets of considerations: the principle that a party who claims the existence of a right or obligation should have an opportunity to present its arguments and evidence; and the considerations of finality and fairness, including maintaining the certainty of adjudicated outcomes.[11]

In the instant case, the Ombudsman had instituted the Federal Court proceedings in the exercise of his powers to seek enforcement of awards under the *Workplace Relations Act 1996*.[12] He was not acting under, through or on behalf of Mr Tomlinson. He was therefore not representing Mr Tomlinson's legal interests in the sense which gives rise to an estoppel. Nor was his power derived from Mr Tomlinson. The fact that the proceedings resulted from a complaint by Mr Tomlinson was of no consequence.[13]

The court further observed that, unlike the traditional forms of representation, an enforcement action by a statutory entity does not usually entail a consideration of the wider interests of the person whose entitlements may be advanced by the action.[14] In such circumstances, allowing the conduct of the statutory authority to give rise to an estoppel against the affected person would have the real potential to occasion injustice.[15]

Nettle J came to the same ultimate conclusion on the bases that there was no identity of legal interest between the Ombudsman and Mr Tomlinson,[16] and the Ombudsman did not act as a representative / on behalf of Mr Tomlinson.[17]

The same privity principle applies to all forms of 'issue estoppel'

The principles explained in *Tomlinson* govern the identification of privies in interest for the purposes of all forms of estoppel resulting from a final judgment.[18] Those forms of estoppel are:[19]

- The cause of action estoppel, which precludes, *inter alia*, the assertion of a right or obligation which was determined by a prior final judgment;[20]
- The issue estoppel, which precludes the raising of an ultimate issue which was necessarily resolved in the reaching of the prior final judgment; and
- The *Anshun* estoppel, which precludes the assertion of a claim that was so connected with the prior proceeding to have made it unreasonable for the claim not to have been made in that proceeding.

Comments on the Doctrine of Abuse of Process

The Court's judgment in *Tomlinson* is also of interest to the extent that it discusses the difference between issue estoppel and abuse of process. While the same circumstances can give rise to the application of both principles, abuse of process is inherently broader and more flexible. It may apply in any circumstances in which the use of the court's procedures would be 'unjustifiably oppressive to a party or would bring the administration of justice into disrepute.'[21] It may thus prevent the making of a claim or the raising of an issue (for example, where the issue should have been raised in prior proceedings), even where the elements of issue estoppel are not satisfied.[22]

Conclusion

The case is significant because it clarifies the circumstances in which the fact that a person's legal interests were represented in

a prior proceeding can give rise to an issue estoppel by operation of the privity principle. While the case dealt with a situation in which the earlier proceedings were conducted by a statutory authority exercising its enforcement powers, the principles set out above are of broader application.

The judgment explains that a person may also be subject to issue estoppel in the derivation of interest scenario, which was not explored in detail as it was not applicable on the facts.

Endnotes

1. *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28 ('Tomlinson Judgment'), at para 39.
2. Under the *Workplace Relations Act 1996* (Cth).
3. As the High Court explained, if Ramsey was found to be Mr Tomlinson's employer, the claim against it would have failed due to the plaintiff's non-compliance with the requirements of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) and the *Workers Compensation Act 1987* (NSW): see Tomlinson Judgment, paras 10 and 65–69.
4. *Ramsey Food Processing Pty Ltd v Tomlinson* [2014] NSWCA 237.
5. Ibid, per Meagher JA at [19], Emmett JA at [83], [90]–[91], Ward JA concurring at [22].
6. (1968) 118 CLR 271, at 279: 'The basic requirement of a privy in interest is that the *privy must claim under or through the person* of whom he is said to be a privy. Here it is quite clear that the Government [a party to the later proceedings] had no interest in the action between the respondent and the police officer [parties to the earlier action]: nor can it be said that the action brought by the police officer was brought by him in any sense on behalf of the Government or that…the respondent could have been treating the Government as the real 'defendant'… In every respect the action between the respondent and the police officer was personal to each of them, neither being in any sense…representative of another. Nor can it be said that the Government in any sense claims under or in virtue of the police officer or of any right of his, or that it derives any relevant interest through him' (emphasis added).
7. Tomlinson judgment, para 32–34. The court did not suggest that the categories are closed.
8. The court stressed that the interest must be a legal one: paras 35 and 105.
9. Those include representation by trustee, agent, tutor, guardian, a person representing others under rules of court where multiple persons have the same interest in the outcome, and the modern class action: see paras 40 and 95.
10. Tomlinson judgment, para 39. The plurality also approved of a formulation in these terms: A will be considered a privy in interest with B if he / she authorised the claim by B, or if the representation of A's legal interests by B was of such a nature as to have protected A from a subsequent unfair application of the issue estoppel: Tomlinson judgment, para 37, citing with approval *Young v Public Service Board* [1982] 2 NSWLR 456. Nettle J approached the matter by analogy to established forms of representation (having the elements of control by the principal and imposition of fiduciary duties on the representative) - see para 98.
11. Tomlinson Judgment, para 38. See also the comments at [28]: The concept of privies in interest is based on the 'higher-level principle' *qui sentit commodum sentire debet et onus* ('who takes the benefit ought also to bear the burden').
12. Relevantly, the Ombudsman had not proceeded under an alternative provision, which empowered him to represent employees who 'are or may become parties to proceedings:' Tomlinson Judgment, paras 44–45, 102.
13. Tomlinson Judgment, paras 44–46.
14. Ibid, paras 41 and 42. This was also true in the instant case: see para 45.
15. Ibid, para 43.
16. Ibid, paras 99–100, 106 and 109.
17. Ibid, paras 112, 114–116, 119.
18. Ibid, para 23.
19. Ibid, para 22.
20. This is largely redundant where the final judgment was rendered in a judicial proceeding and where res judicata in the strict sense operates (i.e., where the rights and obligations have merged in the final judgment). See Tomlinson Judgment, paras 20 and 22.
21. Tomlinson Judgment, para 24-25.
22. Ibid, para 26.

Regulators' submissions on penalties

Vanessa Bosnjak reports on *Commonwealth v Director, Fair Work Industry Inspectorate* [2015] HCA 46.

The practice of the regulator and respondents in civil penalty proceedings making submissions to the court, jointly or otherwise, on the appropriate penalty amount to be imposed in civil penalty proceedings came to an abrupt halt in May 2015.

The Full Federal Court decision and its impact

On 1 May 2015, the Full Federal Court held in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2015) 229 FCR 331 (*Fair Work v CFMEU*) that a court was not to have regard to any submissions on penalties provided by the parties, joint or otherwise.[1] The Full Federal Court applied the decision of the *High Court in Barbaro v The Queen* (2014) 253 CLR 58 (*Barbaro*).

The High Court had held in *Barbaro*, by majority, that the practice of prosecutors in Victoria during criminal sentencing hearings of making submissions on the available sentencing range for an offence was to cease. The High Court held that submissions on the bounds of the available sentencing range was a statement of opinion that advanced no proposition of law or fact that a sentencing judge could properly take into account, and would ultimately not assist the judge in carrying out the sentencing task.[2]

The Full Federal Court in *Fair Work v CFMEU* considered that the court, when determining the appropriate penalty to be imposed in civil penalty proceedings, was required to undertake the same instinctive synthesis that a sentencing court undertook when determining a sentence. The Full Federal Court in *Fair Work v CFMEU* applied *Barbaro* and held that submissions by a regulator on penalty were an impermissible expression of opinion and irrelevant to the role of the court in determining the appropriate penalty.

After the Full Federal Court's decision on 1 May 2015, the regulator and respondents in civil penalty proceedings could lead evidence on matters relevant to determining an appropriate penalty, such as the facts giving rise to the contravening conduct; whether the conduct was deliberate or inadvertent; the seniority of those involved in or having knowledge of the conduct; the culture of compliance; and whether and the extent to which the contravener had assisted the regulator once the contravening conduct had been discovered. However, where previously the regulator and respondents could submit, jointly or otherwise, a proposed penalty or range of penalties having regard to the evidence before the court, no such course was available after 1 May 2015, as no such submissions would be received by the court.

The inability to make submissions affected the ability of the regulators and respondents to agree terms on which civil penalty proceedings could be compromised, as there was no scope for the parties to be heard on an important term of any agreement to compromise civil penalty provision, namely what the parties would seek as the appropriate penalty or range of penalties.

The High Court's decision

On 9 December 2015, the High Court overturned the Full Federal Court's decision in *Fair Work v CFMEU: Commonwealth v Director, Fair Work Industry Inspectorate* [2015] HCA 46. The High Court held that the principles set out in *Barbaro* concerning the sentencing process in criminal proceedings did not apply in civil penalty proceedings. The High Court affirmed the previous practice and approach of the courts when imposing civil penalties established in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 (*NW Frozen*) and *Ministry for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72 (*Mobil Oil*).[3]

NW Frozen was an appeal from a decision to impose a penalty of $1,200,000.[4] At first instance, the parties jointly sought a penalty of $900,000, and it was the first time that a court had rejected a penalty jointly put forward by the parties.[5] On appeal, the court held that while it was the responsibility of the court to determine an appropriate penalty having regard to all of the circumstances, the fixing of a penalty is not an exact science. The question to be determined is whether the amount proposed can be accepted as fixing an appropriate amount, and the court 'will not depart from an agreed figure merely because it might have been disposed to select some other figure, or except in a clear case'.[6]

Mobil Oil affirmed the approach adopted in *NW Frozen*. The court in *Mobil Oil* noted that *NW Frozen* did not require the court to accept the penalty proposed by the parties, nor did it require the court to start with the penalty proposed by the parties and then determine whether the proposed penalty could be said to fix an appropriate penalty. The court could commence with an independent assessment of what is an appropriate penalty and then compare that with the penalty proposed by the parties. It was for the court to scrutinise the submissions and supporting facts to ensure that they were accurate and the contravener's will had not been overborne. A court may seek the assistance of an amicus curiae or intervener where the court formed the view that the absence of a contravener inhibited the court's ability to impose the appropriate penalty. If, when dealing with an application to compromise a civil penalty proceeding, the court is minded to depart from the penalties

or range of penalties proposed by the parties, it could allow the parties to withdraw their consent to compromise on the agreed terms and proceed to a final hearing on the matter.

In affirming the approach adopted in *NW Frozen* and *Mobil Oil*, the High Court noted that a court determining an appropriate penalty was not bound to accept the penalty proposed by the parties. Rather, it was for the court to determine whether the proposed penalty could be accepted as fixing an appropriate amount.[7] The High Court considered that, subject to the court being sufficiently persuaded of the accuracy of the facts and consequences put forward by the parties, and that the penalty proposed by the parties is an appropriate remedy in the circumstances, it was consistent with principle and highly desirable in practice for the court to impose the proposed penalty.[8]

The High Court recognised that there were relevant distinctions between criminal prosecutions and civil penalty provisions, and that *Barbaro* did not apply to civil penalty proceedings in the circumstances.[9] Those distinctions included that, unlike criminal proceedings, civil penalty proceedings are adversarial and the issues raised and the relief sought are largely determined by the parties.[10] Further, civil penalty proceedings do not involve notions of criminality and are primarily if not wholly protective in promoting the public interest in compliance.[11]

The High Court acknowledged that there is a public interest in imposing civil penalties. However it considered that that public interest was such as to distinguish it from other civil proceedings in which there is a public interest, for example custody disputes, schemes of arrangements, taxation matters. In those types of matters courts may accept agreed submissions on the nature of relief, provided the court is ultimately persuaded that the settlement proposed by the parties is appropriate. The same applies to civil penalty proceedings.[12]

The High Court made observations about the role of the regulator in enforcing regulatory regimes, including that:

- unlike a criminal prosecutor, the regulator is not dispassionate. The regulator may advocate for a particular outcome considered to be in the public interest and within the objects of the relevant regulatory regime;[13]
- it is for the regulator to choose the enforcement mechanism considered to be most conducive to securing compliance. In making that choice, a regulator balances the competing considerations of compensation, prevention and deterrence;[14]
- where a discount on the penalty is sought, the regulator should explain to the court the regulator's reasoning that justifies the discount.[15] Discounts may be sought in circumstances where, for example, the contravener has assisted the regulator following discovery of the contravening conduct; and
- having regard to its functions as a regulator of a relevant industry or activity, there is an expectation that the regulator will be able to provide informed submissions as to the effects of the contraventions on the relevant industry and the level of penalty necessary to achieve compliance.[16]

Civil penalty provisions are found in various areas of law, including industrial, taxation, corporations, and competition and consumer protection. Those responsible for enforcing civil penalty provisions under those various laws have specified powers and may deal with different industries and activities. While the High Court's decision concerned the *Building and Construction Industry Improvements Act 2005* (Cth) (BCII Act), there can be no doubt that it has broader implications for regulatory regimes more generally. However, it is clear that the High Court's decision was based on the relevant regulatory regime under the BCII Act. As noted by French CJ, Kiefel, Bell, Nettle and Gordon JJ, there was nothing in the purpose or text of the BCII Act that indicated the court should be less willing to receive submissions on the appropriate penalty to be imposed.[17] Justice Keane, who agreed with the reasons of the joint judgment, detailed why the Full Federal Court's decision in *Fair Work v CFMEU* had failed to give effect to the BCII Act.[18] Regard must always be had to the purpose and text of the particular legislative regime.

Endnotes

1. *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2015) 229 FCR 331 at [192].
2. *Barbaro* at [7], [38], [42].
3. French CJ, Kiefel, Bell, Nettle and Gordon JJ at [31], [32], [46] – [48]; Gageler J at [68]; Keane J [79].
4. *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at 287.
5. *Australian Competition and Consumer Commission v NW Frozen Foods Pty Ltd* [1996] FCA 1680.
6. *NW Frozen v ACCC* at 290–291.
7. At [47], [48].
8. At [56].
9. At [50]–[58].
10. At [52]–[53], [57].
11. At [54]–[55].
12. At [59].
13. Gageler J at [78]; Keane J at [105].
14. French CJ, Kiefel, Bell, Nettle and Gordon JJ at [24]; Keane J at [108].
15. At [32].
16. At [60].
17. At [61].
18. At [101]–[108].

Revisiting the law of joint enterprise

Michael Gleeson reports on a significant UK criminal justice decision of *R v Jogee* [2015] UKSC XX and considers the possible ramifications for Australian criminal law in the areas of complicity and extended joint criminal enterprise.

In *R v Jogee; Ruddock v The Queen*[1] the UK Supreme Court delivered a joint ruling with the Judicial Committee of the Privy Council. This was the third time in six years that the UK's highest court has had to consider the law of joint enterprise; but it was the first time it had been asked to examine the history of the law in detail and the first time it was shown that a basic error in a Privy Council decision arising from a Hong Kong murder case decided in 1984[2] had taken the law in this area in the wrong direction.

The appellants' lawyers performed a feat of forensic archaeology,[3] digging through the layers of decisions over five centuries, to reveal the origins and development of the law of secondary liability, whereby those indirectly involved in crime can be found guilty along with the principal offenders. The cases referred to included duelists, apple thieves killing watchmen and poachers shooting gamekeepers.

The 1984–2016 common law position had been characterised as a fishing expedition: 'drop your drift net into the ocean and you pull up all sorts of fish, big and small, and you hope someone's going to drop the small fish back in before its too late but you can never be sure that's going to happen'.[4]

The rule as it applied during that period was that the prosecution had to prove that the defendant did intend their actions but for accomplices it was enough to show that they should reasonably have foreseen the likely consequences. Intention was held to follow automatically from knowledge in a way not true of the principal defendant.

The particular point at issue in *Jogee* was a subtle one. If a group of criminals set out deliberately to commit one crime, all are guilty under the doctrine of joint enterprise. However, what happens if in the course of the first offence, another crime is committed by one of the gang? Do the others share his guilt under the doctrine of common purpose?

The physical acts of complicity can take two forms. In the first, the accessory assists to provide physical aid to the principal in the commission of the crime, by providing a weapon, information or acting as a lookout. This contribution could be very small. In the second, the accessory encourages, supports, lends courage to or tells someone to commit a crime.

The 1984 case of *Chan Wing-Siu* created another tier of complicity where the accused agrees to one crime but another crime comes out of it. Two rules made it easier to convict there. First, the law did not require the accessory to make a clear contribution to the second crime; and secondly, the accessory

The appellants' lawyers performed a feat of forensic archaeology ...

no longer had to intend the principal to commit the second crime, but merely foresees the chance that the principal might commit it.[5] From there the test of mere foresight of a possibility was applied in all complicity cases, not just ones with multiple crimes arising from a first (this form of complicity is commonly referred to as 'parasitic' in that the defendant was being made liable for a second crime parasitically on the first).[6]

The Supreme Court in *Jogee* held that the authorities relied on by the Privy Council in *Chan Wing-Siu* did not support the proposition that foresight was sufficient to engage accessory liability in cases of joint criminal enterprise, and that the Privy Council wrongly equated foresight with authorisation in formulating the principle in the way that it did.[7]

Following *Jogee* it must be established that the accessory intended to assist the principal defendant to act with the intent required to establish the crime.[8] It is no longer to be taken as automatically true that if a defendant had in law foreseen a second crime arising as a result of their intent to commit or assist with the first one, they therefore intended both. Reasonable foresight, in this sense, is no longer proof of the defendant's intention but one indication, which the jury must weigh up among others.

In its judgment, the court declared that 'there does not appear to have been any objective evidence that the law prior to *Chan Wing-Siu* failed to provide the public with adequate protection'. With those words it knocked away the spurious public policy defence of the rule, which held that there was a pressing social need to treat group violence with a broad legal brush.[9]

What will the impact of the case of *Jogee* be on Australian state and territory criminal laws?[10]

The *Jogee* decision will undoubtedly affect many others who have been convicted as accomplices.[11] Since *Ruddock* was a Privy Council decision the impact could be felt around the world in all countries that still apply the common law as set out in *Chan Wing-Siu*.

However any hopes that the floodgates in this area were about to be flung open were quickly extinguished by the UK Supreme Court which made it clear that the effect of putting the law right was not to render invalid all convictions which were arrived at

over many years faithfully applying the law in *Chan Wing-Siu*.[12]

Almost 500 people are thought to have been convicted of murder in the United Kingdom between 2005 and 2013 as secondary parties in joint-enterprise cases. Many of those were recorded as gang-related attacks. The UK Court of Criminal Appeal is now expecting those who believe that they have been wrongly convicted under the old foresight rules to apply for their cases to be reviewed.

Thus it seems after correcting the test for culpability and complicity in joint enterprise cases, the change in the UK law is predominantly one for the future and will only be of consequence in the past in cases of review to correct cases of 'substantial injustice,'[13] not to undo every case. That injustice will be more likely to arise in cases where the defendant had a peripheral role and was only convicted because the jury thought he must have foreseen what might happen rather than the accomplice intending it to happen.

Many lawyers and organisations that had campaigned to change the law welcomed the Supreme Court's judgment. Francis FitzGibbon QC commented 'the effect of the decision is that a member of a group cannot be found guilty of an offence unless there is proof that he or she positively intended that it should be committed. Mere foresight of what someone else might do is not enough'.[14]

In Australia the principle of extended joint criminal enterprise operates where there was a joint criminal enterprise to commit a crime, and during the commission of that crime, one of the offenders committed a different crime instead of or in addition to the crime that was agreed upon. The High Court in *McAuliffe v The Queen*[15] confirmed the *Chan Wing-Siu* position that joint criminal enterprise liability should arise from everything agreed upon and all foreseeable consequences of that agreement. Therefore the Crown must prove that the secondary offender foresaw that the principal might form the requisite intent for the further crime, for example the intent to kill or inflict really serious bodily injury in the case of murder. If the secondary offender did possess such foresight and despite this continued to participate in the enterprise, then he or she will be liable for the further offence.[16]

The Australian courts have heavily criticised the doctrine of extended joint criminal enterprise. The most common criticism of the doctrine is that it contravenes the basic principles of criminal law because an individual can be convicted without possessing either the *actus reus* or *mens rea* for the offence.

In *Clayton*[17] Kirby J (in dissent) pointed out the inconsistency in the law when the test for the secondary offender (foresight of possibility) is less onerous than the test for the primary offender (elements of the crime): 'the unreasonable expectation placed upon Australian trial judges … to explain the idiosyncrasies of differential notions of secondary liability to a jury is something that should concern this court. The law should not be as unjust, obscure, disparate and asymmetrical as it is'.

Mere foresight of what someone else might do is not enough.

It is inevitable that in the near future the ripples emanating from the decision in *Jogee* will be felt in Australia. Not being bound by decisions of the Privy Council, it will be necessary for the common law rule to be modified by the High Court, departing from *R v McAuliffe*. The UK decision will have considerable impact and is likely to provide the occasion for Australian courts to reconsider the principles of accessory liability so as to ensure better fairness for those who get caught up in crimes they did not intend. The operation of the *Jogee* principle is likely to better protect young accused or those with learning difficulties who may have been convicted on an assumption of what was in fact their immature lack of foresight.

The author recently spoke to Felicity Gerry QC, the barrister who led the *Jogee* legal team that ultimately persuaded the UK Supreme Court to change the law[18]. Ms Gerry stated that the law ought to be corrected across the Commonwealth where it sits at common law and where the error has infected statutes and criminal codes. In Ms Gerry's view, the ultimate consequence of the old principle is injustice based on class-ridden assumptions on crowd behaviour concocted in the Privy Council and rolled out illogically and on flawed policy reasoning. In Australia, there is scope for legal change.

In a recent decision, *R v John Paul Spilios*,[19] it was argued by a defence team including Ms Gerry QC that *R v McAuliffe* was wrongly decided, the South Australian Court of Criminal Appeal holding that it was bound by that decision until disturbed by the High Court.[20] Should there be an application for special leave to the High Court, the occasion may arise for reconsideration of the Australian position.

Endnotes

1. Full case name *R v Jogee (Appellant); Ruddock (Appellant) v The Queen (Respondent) (Jamaica)* [2016] UKSC 8 Argued 27-29 October 2015. Decided 18 February 2016. Hilary Term [2016] UKSC 8 [2016] UKPC 7. On appeal from: [2013] EWCA Crim 1433 and JCPC 0020 of 2015.
2. *Chan Wing-Siu v The Queen* [1985] AC 168; *Hui Chi-Ming v The Queen* [1992] 1 AC 34.
3. Francis Fitzgibbon is a QC at Doughty Street Chambers in London and vice-

chair of the Criminal Bar Association.
4. Francis FitzGibbon QC, 'Joint Enterprise' – 3 March 2016, London Review of Books.
5. Chan Wing-Siu [1985] AC 168 at 175 per Sir Robin Cooke.
6. See *R v Jogee* at [2].
7. *R v Jogee* at [62]-[75].
8. *R v Jogee* at [90].
9. *R v Powell* [1997] 4 All ER 545.
10. The common law doctrine of joint criminal enterprise does not apply to offences prosecuted under the Criminal Code Act 1995 (Commonwealth) confirmed in *R v Salcedo* [2004] NSWCCA 430 at [26]–[27].
11. The High Court followed *Chan Wing-Sui* in *McAuliffe v The Queen* (1995) 183 CLR 108; *Gillard v The Queen* (2003) 219 CLR 1 and *Clayton v The Queen* (2006) 231 ALR 500.
12. *R v Jogee* at [100].
13. *R v Hawkins* [1997] 1 Cr App R 234.
14. 'Joint enterprise law wrongly interpreted for 30 years court rules' – *The Guardian*, 18 February 2016.
15. *McAuliffe v The Queen* (1995) 183 CLR 108.
16. *Clayton v The Queen* (2006) 231 ALR 500 at [17].
17. *Clayton v The Queen* (2006) 231 ALR 500 at [102].
18. Felicity Gerry QC. Admitted to the Supreme Court of the Northern Territory, Appointed Queen's Counsel 2014, Admitted to the Bar of England and Wales 1994. William Forster Chambers, Darwin, Northern Territory.
19. [2016] SASCFC 6.
20. Spilios at [69].

What's in an oath? Jury treatment of unsworn evidence under the Uniform Evidence legislation

Chris Parkin reports on *The Queen v GW* [2016] HCA 6.

In *The Queen v GW* [2016] HCA 6, the High Court considered the proper approach to be taken to a tribunal of fact's assessment of unsworn evidence given by a witness under the *Evidence Act 2012* (ACT) (The Evidence Act).

The Evidence Act permits both sworn and unsworn evidence to be received by a tribunal of fact.[1] Unsworn evidence may only be given by a person 'who does not have the capacity to understand that, in giving evidence, the person is under an obligation to give truthful evidence'.[2] The provisions of the Evidence Act considered by the High Court are identical across the uniform evidence legislation jurisdictions, including New South Wales.

Typical classes of witnesses who might give unsworn evidence include those with intellectual disabilities and children.

Procedural history

GW was convicted of committing an act of indecency in the presence of his daughter (complainant), who was five years old at the time. The complainant gave unsworn evidence at a pre-trial hearing which was recorded and played to the jury in accordance with the ACT's legislative arrangements for the giving of evidence by children.

In the course of the trial, defence counsel twice requested (unsuccessfully) that the jury be directed that the complainant's evidence was unsworn because she lacked the capacity to understand the obligation to give truthful evidence.

One of the two successful grounds of appeal to the Court of Appeal contended that the trial judge erred 'in failing to properly direct the jury regarding the unsworn evidence of [the complainant]'. The other successful ground held that the evidence was inadmissible because the statutory presumption of competence (see s 13(6)) had been misapplied.

The Court of Appeal had held that it was the policy of the Evidence Act (based on an analysis of ss 12, 13, 21 of the Evidence Act) to give primacy to sworn evidence because of the solemnity which attaches to sworn evidence and the threat of sanction for giving false evidence under oath.[3] Accordingly, a direction to that effect was said to be required because the complainant was the key witness in the prosecution case.[4]

Appeal to the High Court

The Crown appealed to the High Court in respect of both successful grounds in the Court of Appeal. The Crown succeeded in arguing that the Court of Appeal erred in determining the complainant's evidence should not have been admitted.

In addressing the Crown's appeal concerning the adequacy

of the directions given, the High Court, in a unanimous judgment[5], made two key findings.

First, the Evidence Act was neutral in its treatment of the weight of sworn and unsworn evidence.[6] The court considered the provisions of the Evidence Act relied upon by the Court of Appeal to determine that the Evidence Act gave primacy to sworn evidence as a bolster to the reliability of evidence.[7] Their Honours concluded that the only textual basis for the Court of Appeal's conclusion was the presumption that all persons are presumed competent to give sworn evidence (s 13(6)) and remarked:

> In either case, the evidence of the witness is before the court. The assessment of the reliability of the evidence is for the trier of fact.[8]

Second, the High Court held that the common law principle requiring jury directions where the jury may fail to take into account a consideration that was material to the assessment of evidence to avoid a miscarriage of justice (see *Bromley v The Queen*,[9] *Crofts v The Queen*,[10] and *Longman v The Queen*[11]) was not engaged by the Evidence Act. Accordingly, there was no legal basis for requiring a direction to the effect suggested by the Court of Appeal.

In so finding, their Honours noted that the jury saw witnesses taking oaths or making affirmations as well as observing that the complainant did neither. In the court's view it strained credulity 'to suggest that in order to avoid the risk of a miscarriage of justice it was necessary to instruct the jury that [the complainant's] evidence had been received without the solemnity of an oath or affirmation or the possibility of sanction should it be intentionally false'. Some weight was given to the suggestion that it was unlikely that any jury member would consider it likely that a child would be prosecuted for perjury.[12]

Nonetheless, the High Court left open the possibility that a direction might be required in circumstances where a person other than a young child was giving unsworn evidence.[13]

Unsworn evidence and s 165 of the Evidence Act

The appeal to the High Court dealt with the adequacy of directions given solely by reference to whether an obligation to give directions of the kind sought existed by reason of s 13 of the Evidence Act.[14]

Section 165 of the Evidence Act requires a judge, upon the request of a party, to warn the jury that particular evidence is unreliable, why it is considered unreliable and that there is a need for caution in deciding whether to accept the evidence and the weight to be given to it. Subsection 165(2) sets out a non-exhaustive list of the types of evidence considered to be unreliable. That subsection makes no reference to unsworn evidence.

No warning under s 165 was sought by GW.[15] Although it was argued before the Court of Appeal that a warning under that provision had been sought, the Court of Appeal rejected the submission.[16] GW did not seek to rely upon s 165 in the High Court.[17]

The High Court nevertheless remarked:

> The Evidence Act does not treat unsworn evidence as of a kind that may be unreliable. Had a direction been requested under s 165(2), there was no requirement to warn the jury that [the complainant's] evidence may be unreliable because it was unsworn. …[18]

Although not part of the ratio of the decision, the unanimous view of the High Court on this point is likely to remove considerable scope for future debate about the status of unsworn evidence.

Endnotes

1. *Evidence Act 2012* (ACT) s 13(4).
2. *Evidence Act 2012* (ACT) s 13(3).
3. [2016] HCA 6, [40].
4. [2016] HCA 6,[48].
5. French CJ, Bell, Gageler, Keane and Nettle JJ.
6. [2016] HCA 6,[46].
7. [2016] HCA 6,[43].
8. [2016] HCA 6,[43].
9. (1986) 161 CLR 315.
10. (1996) 186 CLR 427, 451.
11. (1989) 168 CLR 79, 86.
12. [2016] HCA 6,[51].
13. [2016] HCA 6,[57].
14. See [2016] HCA 6, [47] and [49].
15. [2016] HCA 6,[56].
16. [2016] HCA 6, [40]
17. [2016] HCA 6, [42].
18. [2016] HCA 6,[56].

Tests for the implication of terms in fact

John Eldridge reports on *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited* [2015] UKSC 72.

Introduction

In *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited* ('*Marks and Spencer v BNP*'),[1] the Supreme Court of the United Kingdom squarely addressed an ongoing controversy as to the proper test for the implication of contractual terms in fact. Their Lordships were unanimously of the view that the comments of Lord Hoffmann in *Attorney General of Belize v Belize Telecom* ('*Belize Telecom*')[2] should not be taken to have diluted the traditional strict approach to the implication of terms in this setting.

Factual background

Shorn of a number of presently immaterial complexities, *Marks and Spencer v BNP* concerned the consequences of the exercise of a tenant's break clause in a commercial lease under which rent was payable quarterly in advance.[3] The tenant, exercising the right conferred by the break clause, determined the lease on 24 January 2012, having already paid the quarter's rent which fell due on 25 December 2011.[4] The tenant sought to recover the rent payable in respect of the period from 24 January 2012 to 24 March 2012, and contended that a term entitling it to recover such a sum ought to be implied in fact.[5]

The proper test – the parties' competing contentions

The parties were at odds as to the proper test to apply in determining whether a term should be implied. In order to understand the different positions adopted by the parties, it is helpful briefly to trace the course of developments in this area of the law.

Such an overview is provided in the judgment of Lord Neuberger (with whom Lord Sumption and Lord Hodge agreed). His Lordship commenced his analysis by surveying what his Lordship described as 'three classic statements' of the law relating to the implication of terms in fact.[6] Quoting from the well-known expositions of principle in *The Moorcock*,[7] *Reigate v Union Manufacturing Co (Ramsbottom) Ltd*,[8] and *Shirlaw v Southern Foundries (1926) Ltd*,[9] his Lordship then set out Lord Simon's famous passage in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* ('*BP Refinery*'):[10]

> [F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.[11]

The controversy engendered by Belize Telecom stems from Lord Hoffmann's expressed view that the implication of terms is in truth merely an aspect of the process of construction.

This statement encapsulates the key features of the orthodox approach to the implication of terms in fact. Its correctness, however, was cast into doubt by the comments of Lord Hoffmann in *Belize Telecom*. The controversy engendered by *Belize Telecom* stems from Lord Hoffmann's expressed view that the implication of terms is in truth merely an aspect of the process of construction.[12] This led his Lordship to opine that '[t]here is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?'[13]

The difficulty, as Lord Neuberger acknowledged, is that 'Lord Hoffmann's formulation may be interpreted as suggesting that reasonableness is a sufficient ground for implying a term'.[14] Indeed, this was precisely the argument advanced by the tenant. It was submitted that:

> [T]hose courts which purport to follow *Belize*, but in so doing apply the tests of business efficacy, absolute necessity and the officious bystander, are departing from the test decided by the Privy Council. The issue, therefore, is whether the type of necessity that is required for the implication of a term is what may be termed (a) absolute necessity (ie the contract simply will not operate without the term); or (b) reasonable necessity (ie the contract will not operate as it must reasonably have been intended by the parties to operate).[15]

The proper test – the resolution of the competing contentions

Lord Neuberger was clear in his view that 'there has been no dilution of the requirements which have to be satisfied before a term will be implied'.[16] His Lordship felt it necessary to express this view unequivocally, as he observed that 'it is apparent that *Belize Telecom* has been interpreted by both academic lawyers and judges as having changed the law'.[17]

In analyzing *Belize Telecom*, Lord Neuberger engaged at some length with the proposition that the implication of terms is simply a facet of the process of construction. His Lordship commenced by observing that 'both (i) construing the words which the parties have used in their contract and (ii) implying terms into the contract, involve determining the scope and

meaning of the contract',[18] before going on to note the danger that 'Lord Hoffmann's analysis … could obscure the fact that construing the words used and implying additional words are different processes governed by different rules'.[19] His Lordship explained:

> [I]t is fair to say that the factors to be taken into account on an issue of construction, namely the words used in the contract, the surrounding circumstances known to both parties at the time of the contract, commercial common sense, and the reasonable reader or reasonable parties, are also taken into account on an issue of implication. However, that does not mean that the exercise of implication should be properly classified as part of the exercise of interpretation, let alone that it should be carried out at the same time as interpretation. When one is implying a term or a phrase, one is not construing words, as the words to be implied are *ex hypothesi* not there to be construed; and to speak of construing the contract as a whole, including the implied terms, is not helpful, not least because it begs the question as to what construction actually means in this context … In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term … Further, given that it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would seem logically to follow that, until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied.[20]

Lord Neuberger thus concluded that 'Lord Hoffmann's observations in *Belize Telecom*, paras 17-27 are open to more than one interpretation … and that some of those interpretations are wrong in law'.[21] In his Lordship's opinion, 'the right course … is to say that those observations should henceforth be treated as a characteristically inspired discussion rather than authoritative guidance on the law of implied terms'.[22] Proceeding on this footing, his Lordship declined to find the implied term for which the tenant contended.[23]

Lord Carnwath agreed with Lord Neuberger as to the outcome of the appeal, and also agreed that *Belize Telecom* should not be understood to have diluted the conventional tests for the implication of terms.[24] Lord Carnwath, however, was of the view that Lord Hoffmann's comments in *Belize Telecom* were in truth consonant with the traditional tests set out in *BP Refinery*.[25] In this connection his Lordship quoted a passage from the judgment of Lord Clarke MR (as his Lordship then was) in *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc*:[26]

> It is thus clear that the various formulations of the test identified by Lord Simon are to be treated as different ways of saying much the same thing. Moreover, as I read Lord Hoffmann's analysis, although he is emphasising that the process of implication is part of the process of construction of the contract, he is not in any way resiling from the often stated proposition that it must be necessary to imply the proposed term. It is never sufficient that it should be reasonable.[27]

Lord Clarke delivered a short judgment in which he affirmed his adherence to the view quoted above.[28] His Lordship agreed with Lord Neuberger as to the disposition of the appeal.

Conclusion

Though Lord Hoffmann's comments in *Belize Telecom* have been taken in some quarters to represent a change in the law in this area, *Marks and Spencer v BNP* represents a clear endorsement of the traditional tests for the implication of terms in fact.

Endnotes

1. [2015] UKSC 72.
2. [2009] 1 WLR 1988.
3. *Marks and Spencer v BNP*, [1].
4. *Marks and Spencer v BNP*, [1].
5. *Marks and Spencer v BNP*, [1].
6. *Marks and Spencer v BNP*, [16].
7. (1889) 14 PD 64.
8. [1918] 1 KB 592.
9. [1939] 2 KB 206.
10. (1977) 52 ALJR 20.
11. *BP Refinery*, 26.
12. *Belize Telecom*, [21].
13. *Belize Telecom*, [21].
14. *Marks and Spencer v BNP*, [23].
15. Appellants' Submissions, [59].
16. *Marks and Spencer v BNP*, [24].
17. *Marks and Spencer v BNP*, [24].
18. *Marks and Spencer v BNP*, [26].
19. *Marks and Spencer v BNP*, [26].
20. *Marks and Spencer v BNP*, [27] – [28].
21. *Marks and Spencer v BNP*, [31].
22. *Marks and Spencer v BNP*, [31].
23. *Marks and Spencer v BNP*, [49] – [56].
24. *Marks and Spencer v BNP*, [57] – [60].
25. *Marks and Spencer v BNP*, [62].
26. [2010] 1 All ER (Comm) 1.
27. *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc* [2010] 1 All ER (Comm) 1, [15]. Lord Carnwath further cited a number of further Court of Appeal authorities in which the approach of Clarke MR was not departed from: eg *Crema v Cenkos Securities plc* [2011] 1 WLR 2066.
28. *Marks and Spencer v BNP*, [62].

Verbatim

United States Court of Appeals for the Fourth Circuit
United States of America, Plaintiff - Appellee
v
Nicholas Ragin, Defendant - Appellant

GREGORY, Circuit Judge: This appeal presents an issue of first impression in this Circuit: whether a defendant's right to effective assistance of counsel is violated when his counsel sleeps during trial.

We hold that a defendant is deprived of his Sixth Amendment right to counsel when counsel sleeps during a substantial portion of the defendant's trial. The Sixth Amendment guarantees a criminal defendant the assistance of counsel for his defense. U.S. Const. amend. VI. Although generally a defendant must show that his counsel's performance was deficient and prejudicial to prevail on a claim of ineffective assistance of counsel, see *Strickland v. Washington*, 466 U.S. 668 (1984), in *United States v. Cronic*, 466 U.S. 648 (1984), the Supreme Court held that there are certain situations where the reliability of a trial becomes so questionable that the defendant need not show that he was actually prejudiced. Instead, prejudice is presumed. We believe that when counsel for a criminal defendant sleeps through a substantial portion of the trial, such conduct compromises the reliability of the trial, and thus no separate showing of prejudice is necessary.

This case presents such a situation. Nicholas Ragin's Sixth Amendment right to counsel was violated not because of specific legal errors or omissions indicating incompetence in 3 counsel's representation but because Ragin effectively had *no* legal assistance during a substantial portion of his trial. The evidence is not disputed; it demonstrates that counsel was asleep for much of Ragin's trial. As one witness testified, counsel was asleep '[f]requently . . . almost every day . . . morning and evening' for '30 minutes at least' at a time. These circumstances suggest "a breakdown in the adversarial process that our system counts on to produce just results," Strickland, 466 U.S. at 696, and from which we must presume prejudice to Ragin. We therefore conclude that Ragin was deprived of effective assistance of counsel during his trial, in violation of the Sixth Amendment.

The 'misunderstood' doctor of Auschwitz

By Geoffrey Watson SC

Cases about costs are, as a general rule, rather ordinary – but if you bear with me I think you will agree that the reported costs decision in *Dering v Uris* is a clear exception to that general rule.

The background

In 1959 the American author Leon Uris published his international blockbuster, *Exodus*. Like many of Uris' novels, it was a fictionalised account based upon historical events.

In setting the scene for the mass post-war translation of Jews to Palestine, Uris recounted the horrors the Jewish people had suffered under the Nazis. This involved a description of the death camps, which included a brief reference to the activities of a 'Dr Dehring'. Uris recounted the shocking story of what went on in the diabolical medical unit at Auschwitz, under the infamous Dr Josef Mengele. Uris described how 'Dr Dehring' had performed surgical 'experiments', including sterilisations, and how if the 'patient' happened to be Jewish they were carried out without anaesthesia. Perhaps it is enough to say that, following the legal proceedings described below, the legal correspondent of *The Times* claimed that 'an English jury has never had to listen to such horrifying evidence'.

One claim made by Uris was that 'Dr Dehring' was involved in 17,000 such procedures.

In fact, there was a real person involved, but Uris had misspelt his name as 'Dr Dehring'. The real person was Dr Wladyslaw Dering. Before the war Dering was an obstetrician and gynaecologist in Warsaw. He had worked in the medical clinic at Auschwitz. He fled Poland after the war in fear of Communist retribution. Dering settled in the UK, where he successfully fought attempts to extradite him as a war criminal. His defence to extradition was that his identity had been mixed up with someone else.

Dr Dering wins his case - half penny damages Photo: Keystone Pictures USA / Alamy Stock Photo.

In 1951 Dering went to the British Protectorate of Somaliland where he served for ten years as a director of a hospital working among the severely underprivileged. His service led to the Colonial Office recommending him for an OBE – which he was awarded in 1960.

In 1960 Dering returned to London. By the time *Exodus* was published Dr Dering OBE was a respected figure in the UK.

Dering was readily recognisable as the 'Dr Dehring' in *Exodus*. Dering sued each of the author, Uris, the publisher, Peter Kimber, and the printer for defamation. The printer quickly settled by making a payment of £500.

Each of Uris and Kimber defended the proceedings on the grounds that the matters were *substantially* true, but they faced real problems with this because it had to be conceded that the reference to 17,000 procedures was a gross exaggeration.

The trial

The matter came on for trial in 1964 before Mr Justice Lawton[1] and a jury of 12. The trial ran for 19 days. It was a sensational event attracting wide publicity. Uris created a fictionalised version in yet another hugely successful novel, *QB VII*. In real life Uris was represented by Lord Gerald Gardiner QC[2] (in the television miniseries Uris's character was ably represented by Sir John Gielgud).

In opening for Dering, Colin Duncan QC told the jury of the 'indescribable hell' of Auschwitz, and how, 'under the most ghastly conditions', Dering had 'performed the most heroic acts of humanity'.

Dering then took the witness box[3]. He described his life before September 1939 and claimed to have fought with the Polish underground until he was captured by the Gestapo and sent to Auschwitz, where he became a 'prisoner-doctor'. Dering admitted undertaking the operations, but claimed that he had done so under extreme duress, and that if he had failed to do so he would have been killed by the Nazis. Dering claimed to be a misunderstood hero, describing how he had saved some 30 or 40 prisoners from being sent to the gas chambers.

Gardiner, a tall and severe figure, rose to cross-examine. Much of his close questioning dwelt on the details of needless and unjustifiable experimental surgery; Dering fumbled for excuses. Gardiner then turned to the records which had been compiled against Dering at the time his extradition was sought. In reference to one, Gardiner asked:

> Q. They were right, were they, to describe you as an admitted anti-Semite?
>
> A. I was called by some people – rather a small group – anti-Semitic, but I can say I still have today very sincerely Jewish friends.

I don't know about you, but I think the short answer would be 'Yes'.

Next Dering called a few former inmates at Auschwitz. They described Dering's kindliness toward them. Then he called two of his fellow doctors at Auschwitz, who confirmed the duress under which they were compelled to work. There was also evidence of his undoubtedly excellent work in Somaliland.

The defendants then opened their own case. Now the construction of a defence in a case like this was extremely difficult – the events were 20 years old, and collecting eye witnesses was made more difficult because so many of them had died in Auschwitz (some, no doubt, on Dering's operating table). But the defendants had a key document upon which they could rely – the Nazis had carefully destroyed nearly all of the documentary evidence of their activities at Auschwitz, but one particular document – the Auschwitz Surgical Register – survived, and it documented these awful procedures. The Surgical Register included 130 cases in which Dering was directly involved.

A number of former prisoners were called, who described the most appalling abuse. They remembered Dr Dering. One described how, while Dering was castrating him without anaesthesia, he was told to 'Stop barking like a dog. You will die anyway'.

The defence also called other Auschwitz doctors who had refused to participate in the experimental surgery without suffering consequences.

It is here important to bear in mind the weakness in the defence case – ie the gross exaggeration in relation to Dering's involvement. Uris had written that there were 17,000 cases; in truth it was 130. But if you pause to think about that for a moment, it is a pretty poor argument from Dering's perspective – imagine telling a jury that you had been defamed because you had, in fact, only committed 130 atrocities.

The evidence finished. The parties addressed. Justice Lawton charged the jury. The jury was given the exhibits, one of which was the Auschwitz Surgical Register: the jury was instructed to take great care with it – 'what an awful thing it would be' said Justice Lawton 'if a tea stain or cigarette burn [was] inflicted on this register in London'.

The result

The jury returned with its verdict. The associate asked the customary question: 'Do you find for the plaintiff or for the defendants?'. The Foreman replied: 'For the plaintiff'.

Apparently there was an audible sigh of disappointment in the courtroom.

Then came the second question: 'What sum do you award the plaintiff against the defendants?'. And the foreman replied 'One halfpenny'.

The trial was a disaster for Dering; his reputation was destroyed. But that was only part of it.

The costs

At the conclusion of the trial Justice Lawton had to deal with the huge costs which had been generated by the proceedings – they would be over a million dollars in our terms. His decision is reported: *Dering v Uris* [1964] 2 QB 669.

Even though he won, and even though costs would ordinarily follow, Dering faced two fairly obvious problems in relation to recovering costs. The first was that, even though the jury had awarded him a halfpenny, he could not levy execution because he had already accepted the £500 from the printer.

The other problem was more curly.

Shortly after the proceedings commenced the publisher, Kimber, recognised the weakness of his position in respect of the claim that Dering was involved in 17,000 procedures. So he admitted the libel, and paid into Court the sum which he suggested reflected the true value of Dering's reputation – £2. No doubt that £2 offer was made by Kimber with a view to insult Dering, but, a little ironically, it ended up being a gross overestimate of the true value of Dering's reputation.

Justice Lawton ordered Dering to pay Uris' and Kimber's costs.

Endnotes

1. Sir Frederick Horace Lawton, b 1911; d 2001. Called 1935; silk 1957. Chancery Division 1961-1972; Court of Appeal 1972-1986. Fun facts: In 1936 he was the candidate for the seat of Hammersmith North for the British Union of Fascists. He once remarked that 'wife beating may be socially acceptable in Sheffield, but it is a different matter in Cheltenham'. One of his pupils was Margaret Thatcher.
2. Gerald Austin Gardiner, b 1900; d 1990. Called 1925; silk 1948; Lord Chancellor 1964–1970. Appeared in many great cases, including defending the publishers in the *Lady Chatterley's Lover* trial in 1960. He was the moving force behind the abolition of the death penalty in the UK.
3. Strange events unfolded. Dering took the oath in the then conventional method in Waspish old England – he swore on the New Testament. Justice Lawton – apparently under the misapprehension that Dering was Jewish – suggested that Dering should have taken the oath on the Old Testament. When Dering responded by saying that he was Catholic, Lawton insisted that in those circumstances 'You must take the oath on the Vulgate'. And instructed his tipstaff 'Fetch a Douai Bible'.

The probative value of evidence

The High Court handed down its decision in *IMM v The Queen* [2016] HCA 14 on 14 April 2016. The appellant was seeking to overturn his conviction for indecent dealing and sexual intercourse with a child under the age of 16. At trial the prosecution was permitted, over objection, to adduce both complaint and tendency evidence. The trial judge determined the probative value of this evidence for the purposes of ss 97(1) and 137 of the Evidence Act on the assumption that the jury would accept the evidence and without taking into account factors such as reliability and credibility. The High Court held by majority that this was the correct approach.However the High Court further held that the tendency evidence had been wrongly admitted because it did not have 'significant probative value' within the meaning of s 97(1)(b) of the Evidence Act. Accordingly the appeal was allowed and a new trial ordered. In what follows, Stephen Odgers SC and Richard Lancaster SC each give their views on the implications and consequences of this important case.

Stephen Odgers SC on probative evidence after *IMM v The Queen*

The High Court has determined (by a 4:3 majority) that a trial judge, in assessing the 'probative value' of evidence for the purposes of a number of provisions in the *Evidence Act* (including s 97 and s 137), must proceed on the assumption that the evidence 'is accepted' (and thus is to be regarded as both credible and reliable) – just as is required when assessing relevance under s 55. However, close analysis of the majority judgment of French CJ, Kiefel, Bell and Keane JJ reveals that the making of such an assumption does *not* necessarily undercut the practical operation of those provisions.

First, it was noted that all evidence must pass the relevance threshold in s 55. The relevance test imports notions of rationality as the definition requires the evidence to be capable of 'rationally affecting of the assessment of the probability of the existence of a fact in issue'. French CJ, Kiefel, Bell and Keane JJ stated at [39] that evidence may be so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury. In such a case its effect on the probability of the existence of a fact in issue would be nil and it would not meet the criterion of relevance.

Second, as regards s 137, it is of critical importance to appreciate the (limited) consequences of an assumption that the evidence of a witness is to be accepted as credible and reliable. Take the example of a witness who gives identification evidence. French CJ, Kiefel, Bell and Keane JJ stated at [50]:

> It must also be understood that the basis upon which a trial judge proceeds, that the jury will accept the evidence taken at its highest, does not distort a finding as to the real probative value of the evidence. The circumstances surrounding the evidence may indicate that its highest level is not very high at all. The example given by J D Heydon QC was of an identification made very briefly in foggy conditions and in bad light by a witness who did not know the person identified. As he points out, on one approach it is possible to say that taken at its highest it is as high as any other identification, and then look for particular weaknesses in the evidence (which would include reliability). On another approach, it is an identification, but a weak one because it is simply unconvincing. The former is the approach undertaken by the Victorian Court of Appeal; the latter by the New South Wales Court of Criminal Appeal. The point presently to be made is that it is the latter approach which the statute requires. This is the assessment undertaken by the trial judge of the probative value of the evidence.

As Heydon put it in his article, 'Is the Weight of Evidence Material to Its Admissibility?' (2014) 26 *Current Issues in Criminal Justice* 219 at 234, the evidence is 'inherently unconvincing', with the consequence that, even 'taken at its highest', the probative value of the evidence is low.

It is possible to explain the approach taken in the majority judgment as follows. Assume the witness testifies: 'I identify [the accused] as the offender'. For the purposes of determining the probative value of that evidence in the context of s 137, the evidence of the witness is to be accepted as credible and reliable. However, the evidence may be seen as evidence of an opinion ('in my opinion, the accused person is the offender'). Accordingly, it is to be assumed that the witness is being truthful when he or she testifies that this opinion is held and is reliably recounting the content of the opinion (thus, probative value may not be assessed on the basis that the witness actually holds a different opinion). This does *not* mean that the opinion itself must be assumed to be reliable. Other evidence, including 'the circumstances surrounding the evidence' of the witness, may indicate that it has low probative value.

The example given by Heydon is one where the probative value of the identification evidence is low because the circumstances in which the observation of the offender was made show that the subsequent identification (the opinion itself) is 'weak' and 'unconvincing' and, accordingly, of low probative value. It would necessarily follow that another example would be where

the circumstances in which the (first) identification of the accused as the offender also render that identification 'weak' and 'unconvincing' and, accordingly, of low probative value (for example, where there was a high level of 'suggestion' that the accused was the offender).

The logic of this analysis would carry through to consideration of expert evidence in the context of s 137 (and, indeed, s 135). When an expert asserts an opinion, the assessment of the probative value of that evidence requires an assumption that the expert is being truthful regarding the content of the opinion and is reliably recounting the content of the opinion. However, it does not require an assumption that the opinion itself is 'reliable', in the sense that the opinion may be relied upon as correct. When assessing the probative value of evidence from an expert that the accused 'matched' an offender seen in a surveillance video, there is no requirement that it be assumed that the expert is correct (that is, that the accused and the offender are the same person). The court is permitted to consider factors bearing on the cogency of that opinion in determining the extent to which a rational fact-finder could regard the evidence as affecting the probability of the existence of a fact in issue.

Thus, in particular, a court may take into account whether or not the validity of the propositions upon which the opinion is based has been demonstrated. Where an expert asserts a match between certain evidence and a particular individual or source, a court applying s 137 may consider such matters as the validity of the methods by which data was obtained and compared, the nature of the expert's qualifications, and the extent to which the process of reasoning involved in forming the opinion has been disclosed. Of course, a conclusion that evidence of an expert opinion has low probative value does not mean that it must be excluded pursuant to s 137. That will only be required where that probative value is 'outweighed by [a] danger of unfair prejudice to the defendant'.

As regards hearsay evidence, the approach taken in the majority judgment supports a similar analysis. Thus, it may be concluded that the requirement that it be assumed that the evidence will be accepted, that it is both credible and reliable, applies to the evidence of the out-of-court representation, not to the out-of-court representation itself. This conclusion is supported by the actual holding of the majority judgment in respect of hearsay complaint evidence. The High Court was required to address the question of whether evidence given by the complainant's relatives of complaints made by the complainant in August 2011 (of sexual abuse committed on her by the appellant) should be excluded pursuant to s 137. One of the arguments advanced on behalf of the appellant was that the probative value of the evidence was low because the complaints were not spontaneous and were made in response to leading questions, in circumstances where the complainant may have been motivated to distract attention from her own bad behaviour. The majority judgment held at [73]:

> The complaint evidence was tendered for the purpose of proving the acts charged. Given the content of the evidence, the evident distress of the complainant in making the complaint and the timing of the earlier complaint, it cannot be said that its probative value was low. It was potentially significant.

The reference to an earlier complaint was a complaint made to a friend of the complainant. In regarding as material to the assessment of the probative value of the evidence of the complaints made to the relatives the 'evident distress of the complainant' and the timing of the earlier complaint, it is apparent that the majority were not proceeding on the assumption that the content of the complaints made to the complainant's relatives were credible and reliable. The presence of evident distress was seen to increase the probative value of the complaints, according to the reasoning that it would be rationally open to regard them as more credible and reliable by reason of that evident distress (or, to put it more accurately, the distress increased the extent to which the evidence of complaint could rationally affect the jury's assessment of the probability that the appellant had committed sexual offences against the complainant). The timing of the earlier complaint tended to undercut the argument that the complaints to the relatives were less credible because they were the result of leading questions, given that they were consistent with the earlier complaint made to the friend. While the evidence of the relatives regarding the making of the complaints to them was assumed to be accepted as both credible and reliable, the assessment of the probative value of the complaints themselves did not involve any such assumption.

Third, in respect of the admissibility of tendency (and coincidence) evidence, it is important to focus carefully on the nature of the fact(s) in issue to which the evidence is relevant and whether the evidence may have significance or importance in establishing that fact or those facts.

Section 97(1)(b) provides that 'tendency evidence' is not admissible unless 'the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value'. The tendency evidence in *IMM v The Queen,* was evidence from the complainant of an incident

where the appellant 'ran his hand up my leg', relevant to show a sexual interest in the complainant and thus a tendency to commit the offences charged (French CJ, Kiefel, Bell and Keane JJ at [61]). Presumably, the prosecution would contend that, as the evidence must be assumed to be accepted as credible and reliable for the purposes of assessing probative value under s 97(1)(b), it must be assumed that the appellant did in fact run his hand up the complainant's leg and thereby show a sexual interest in the complainant, which would be 'significant' for the purposes of determining whether the appellant committed the offences charged. However, the majority judgment stated at [46]:

> The significance of the probative value of the tendency evidence under s 97(1)(b) must depend on the nature of the facts in issue to which the evidence is relevant and the significance or importance which that evidence may have in establishing those facts. So understood, the evidence must be influential in the context of fact-finding.

Then the majority judgment concluded at [62]-[63]:

> 62 In a case of this kind, the probative value of this evidence lies in its capacity to support the credibility of a complainant's account. In cases where there is evidence from a source independent of the complainant, the requisite degree of probative value is more likely to be met. That is not to say that a complainant's unsupported evidence can never meet that test. It is possible that there may be some special features of a complainant's account of an uncharged incident which give it significant probative value. But without more, it is difficult to see how a complainant's evidence of conduct of a sexual kind from an occasion other than the charged acts can be regarded as having the requisite degree of probative value.
>
> 63 Evidence from a complainant adduced to show an accused's sexual interest can generally have limited, if any, capacity to rationally affect the probability that the complainant's account of the charged offences is true. It is difficult to see that one might reason rationally to conclude that X's account of charged acts of sexual misconduct is truthful because X gives an account that on another occasion the accused exhibited sexual interest in him or her.

Thus, French CJ, Kiefel, Bell and Keane JJ considered that the applicable 'fact in issue' was not whether or not the charged offences were committed but whether the complainant's account of the commission of those charged offences was both truthful and reliable. When assessing the capacity of the tendency evidence to increase the probability that this account was credible, the fact that it came from the complainant was of critical importance in determining whether the evidence had significant probative value. Notwithstanding the assumptions required when assessing probative value, the evidence lacked significance or importance in establishing that her account of the charged acts was true because it came from the complainant, was unsupported by a source independent of her and there was no feature of her account which gave it 'significant probative value'.

As regards the operation of s 98 and s 101, these were discussed in the majority judgment at [59]:

> Before turning to the application of ss 97(1) and 137 to the facts in this case, there should be reference to the appellant's submission concerning the risk of joint concoction to the determination of admissibility of coincidence evidence. The premise for the appellant's submission – that it is 'well-established' that under the identical test in s 98(1)(b) the possibility of joint concoction may deprive evidence of probative value consistently with the approach to similar fact evidence stated in *Hoch v The Queen*[44] – should not be accepted.[45] Section 101(2) places a further restriction on the admission of tendency and coincidence evidence. That restriction does not import the 'rational view ... inconsistent with the guilt of the accused' test found in *Hoch v The Queen*.[46] The significance of the risk of joint concoction to the application of the s 101(2) test should be left to an occasion when it is raised in a concrete factual setting. [footnotes not included]

Footnote 45 reads: 'See the discussion in *McIntosh v The Queen* [2015] NSWCCA 184 at [42]-[48] per Basten JA, [172] per Hidden J agreeing, [176] per Wilson J agreeing'.

In *Hoch v The Queen* [1988] HCA 50, 165 CLR 292, the High Court held in respect of the common law that similar fact evidence whose probative value 'lies in the improbability of the witnesses giving accounts of happenings having the requisite degree of similarity unless the happenings occurred' will not be admissible if there is 'a possibility of joint concoction' because there will in consequence be 'a rational view of the evidence that is inconsistent with the guilt of the accused' (Mason CJ, Wilson and Gaudron JJ at 296). Subsequent authority has extended that analysis beyond the possibility of joint concoction to the possibility of contamination. As Basten JA stated in McIntosh at [36], such an analysis 'is not consistent with the language of the *Evidence Act*'.

As regards what Basten JA stated at [42]-[48], the key passage is at [47]:

> Whilst, in determining probative value as a question of capability to affect the assessment of a fact in issue, the court is not required to disregard inherent implausibility, on the other hand, contestable questions of credibility and reliability are not for the trial judge, but for the jury. Accordingly, the suggestion that the possibility of concoction is a factor which must be taken into account in determining whether particular evidence has significant probative value should not be accepted.

However, this passage needs to be understood in context. At [49]-[50], Basten JA stated:

> 49. … If a possibility of concoction at a level sufficient to affect the capacity of the evidence to bear significant probative value were to be identified, it would probably have been necessary to carry out a reasonably searching cross-examination on the *voir dire*. That did not happen. Thus, the reason why the trial judge did not consider the possibility of concoction in making his rulings, was that it was neither relied upon by counsel for the accused at trial, nor was it inherently necessary for the judge to consider such matters in assessing significant probative value.
>
> 50. Given the manner in which the evidence unfolded, the absence of reference to the possibility of concoction in the assessment of admissibility was unsurprising. On any view, it revealed no error on the part of the trial judge.

It is apparent that Basten JA did not hold that a possibility of concoction is immaterial to the question of whether the evidence has significant probative value. Rather, a mere possibility of this could not support a conclusion that the evidence lacks significant probative value. However, if the probability of concoction reached a particular 'level sufficient to affect the capacity of the evidence to bear significant probative value', then it would be appropriate to take it into account. The majority judgment in *IMM* did not take a different view. It only rejected the proposition that 'the possibility of joint concoction may deprive evidence of probative value'.

Presumably, in assessing whether the evidence has 'significant probative value' for the purposes of s 98(1)(b), a similar approach to that adopted under s 97(1)(b) would be required. The significance of the probative value of the coincidence evidence 'must depend on the nature of the facts in issue to which the evidence is relevant and the significance or importance which that evidence may have in establishing those facts' (French CJ, Kiefel, Bell and Keane JJ at [46]). The 'evidence must be influential in the context of fact-finding'.

Coincidence evidence is sought to be used 'to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally'. It may be that some degree of risk of joint concoction or contamination will have the consequence that the evidence will have a limited capacity to rationally affect the probability that the complainant's account of a charged offence is true. In those circumstances, the evidence would lack significance or importance in establishing those facts. Alternatively, while s 101(2) does not require the exclusion of either tendency evidence or coincidence evidence on the (common law) basis that there is a rational view of the evidence inconsistent with the guilt of the accused, it would be open to conclude that the probative value of coincidence evidence is reduced where the circumstances reveal such a risk of joint concoction or contamination as to negate a contention that 'it is improbable that the events occurred coincidentally'.

One final observation should be made about the approach of the majority judgment to the question of whether the tendency evidence met the requirements of s 97(1)(b). The majority judgment held that the evidence 'did not qualify as having significant probative value and was not admissible under s 97(1)(b)'. The majority determined the question for themselves. In terms of appellate review, the majority did *not* apply *House v The King* limitations. Neither the language of the provisions itself ('the court thinks that the evidence will … have significant probative value'), nor intermediate appellate authority that appellate review of this provision is limited by *House v The King* criteria, prevented the majority from deciding the matter for itself.

Summary

1. Evidence that is inherently incredible, fanciful or preposterous will not be relevant.

2. The making of an assumption that evidence 'is accepted' (and thus accepted as both credible and reliable) in assessing the 'probative value' of the evidence does not necessarily undercut the practical operation of those provisions in the Evidence Act

which require such an assessment. Close attention must be paid to what is involved in assessing the probative value of evidence on the assumption that the evidence 'is accepted'.

3. When assessing identification evidence, the circumstances in which the observation of the offender was made, or in which the accused was identified, may show that the identification of the accused has low probative value.

4. Similarly, when assessing expert opinion evidence, there is no requirement that it be assumed that the opinion is correct – the court in determining the extent to which a rational fact-finder could regard the evidence as affecting the probability of the existence of a fact in issue is permitted to consider such matters as whether or not the validity of the propositions upon which the opinion is based has been demonstrated.

5. Equally, when assessing the probative value of hearsay evidence, the requirement that it be assumed that the evidence will be accepted applies to *the evidence of* the out-of-court representation, not to the out-of-court representation itself, with the consequence that the surrounding circumstances or the inherent characteristics of that representation may support a conclusion that the evidence has low probative value.

6. When assessing whether tendency evidence or coincidence evidence has 'significant probative value', there must be a focus on the nature of the fact(s) in issue to which the evidence is relevant and whether the evidence may have significance or importance in establishing that fact or those facts. In particular:

(a) tendency evidence emanating solely from a complainant is unlikely to have that character; and

(b) the existence of alternative explanations for both tendency and coincidence evidence will bear on the assessment of whether the evidence has that character (so that, for example, while a 'possibility' of joint concoction or contamination will not deprive such evidence of probative value, that does not mean that such a risk is immaterial to the determination of whether the evidence has significance).

7. Appellate review of the requirement of 'significant probative value' in s 97(1)(b) is not subject to *House v The King* limitations.

IMM v The Queen: a response from Richard Lancaster SC

The decision of the High Court in *IMM v The Queen* [2016] HCA 14 addresses fundamental questions about the laws of evidence and the proof of facts in civil and criminal trials under the uniform Evidence Acts. The court unanimously allowed the appeal against conviction and ordered a new trial on three charges of child sexual assault, but there was a significant underlying difference of opinion about the applicable principles. While there are historical examples of our ultimate appellate court determining important questions by a narrow majority, the first arresting feature of the decision is that the court divided 4:3 on an issue so basal as whether the reliability and credibility of a witness can be taken into account when a judge measures the probative value of the evidence of that witness. The probative value of evidence is, of course, a central integer in various provisions regulating the admissibility of evidence, including the tendency rule (s 97), the coincidence rule (s 98), the restrictions additional to those rules in criminal cases (s 101), and the general discretions to exclude evidence (ss 135 and 137).

In this note, I make some observations about the decision and add comments in response to the paper of Stephen Odgers SC published first in *InBrief* on 20 April 2016 and again in this issue of *Bar News*.

Principles

The statements of principle by what I will call the majority (French CJ, Kiefel, Bell and Keane JJ) are clear:

- The question of relevance under s 55 is to be determined by a trial judge on the assumption that the jury (or judge as fact finder) accepts the evidence, as the terms of s 55 expressly require. The judge determining relevance need not and may not consider whether the evidence is credible or whether it is reliable – 'the only question is whether it has the capability, rationally, to affect findings of fact' (at [39]). The veracity or weight that might be accorded to the evidence does not arise (at [38]).
- Relevant evidence is, by definition, 'probative' because it has the capability to affect the assessment of the probability of the existence of a fact in issue and it is prima facie admissible even if the probative value of the evidence is slight (at [40]).
- The assessment of the probative value of evidence (for the purposes of provisions such as those considered directly in *IMM v The Queen*, which were ss 97(1)(b) and 137 but, oddly, not s 101) requires the possible use to which the evidence might be put to be taken at its highest (at

[44]). The significance of the probative value – that is, the significance of 'the extent to which the evidence could rationally affect the assessment of the probability of a fact in issues' – depends on the nature of the fact in issue to which the evidence is relevant and the significance or importance which that evidence may have in establishing those facts (at [46]).

- Evidence has 'significant' probative value if it is important or of consequence, that is, 'the evidence must be influential in the context of fact-finding' (at [46]).
- The words 'if it were accepted', which appear in s 55, should be understood also to qualify the evidence to which the Dictionary definition of 'probative value' refers (at [49]). Accordingly, the assessment of probative value requires the same approach as s 55, that is, an assumption that the jury will accept the evidence, taken at its highest (at [49]-[50]). It follows that 'no question as to credibility of the evidence, or the witness giving it, can arise' and that 'no question as to the reliability of the evidence can arise', those matters being 'subsumed in the jury's acceptance of the evidence' (at [52]).

Mr Odgers refers to the required assumption that the evidence is accepted and adds 'and thus is to be regarded as both credible and reliable'. I do not agree with his observation, which seems directly contrary to the majority's indication that questions of reliability and credibility do not arise if the required assumption is made. Whether or not the distinction much affects the practical operation of these provisions, it is a real distinction in principle: on the majority's approach, probative value is detached from questions of the reliability and credibility of the particular witness and it is assumed that the evidence is accepted; as Mr Odgers summarizes it, probative value continues to depend upon the evidence of a particular witness, who is assumed to be credible and reliable. As the Victorian Court of Appeal said in *Derwish v The Queen* [2016] VSCA 72 at [75], *IMM v The Queen* applies to ss 97, 98, 101(2) and 137 'so that reliability is not to be taken into account when considering probative value'.

There are four matters in the majority reasons on which I would comment. Considerations of space do not permit me to address, in this note, the detail of the reasons of Gageler J or of Nettle and Gordon JJ, who concluded (contrary to the majority's reasons at [49]–[52]) that an assessment of probative value under the Evidence Act necessarily involves considerations of reliability (at [96] and [139]–[140]).

Relevance

The first matter is not much more than cavilling, with respect, with the expression of a sentence in [39] in which it is said that there may be 'a limiting case in which the evidence is so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury' and thereby would not meet the criterion of relevance. The application of the statutory assumption does seem odd when applied to incredible evidence, but the terms of s 55 are explicit and provide for a criterion of relevance of evidence 'if it were accepted'. Nevertheless, it may readily be accepted that incredible evidence is not relevant because, even if one applies the statutory assumption, the incredible or preposterous fact could not rationally affect the assessment of the probability of the existence of a fact in issue.

The example of an identification

The second topic concerns an example created by the Hon J D Heydon AC QC, the utility of which is acknowledged by its repetition in each of the judgments in *IMM v The Queen*, which posits 'an identification made very briefly in foggy conditions and in bad light by a witness who did not know the person identified'. The majority states that the correct approach to assessing its probative value is to accept that it is an identification (being relevant and probative to some degree) but that it is a weak identification because 'it is simply unconvincing' (at [50]). As I understand it, this means that when taken at its highest the identification evidence has low probative value because, putting aside the reliability and credibility of the person giving the evidence, the identification had characteristics that diminished the extent to which the evidence could rationally affect the assessment of the probability of a fact in issue (being whether the person identified was at that place at that time). In other words, quite apart from the truthfulness, eyesight, attention span, memory or ability to report of the particular witness making the identification (that is, without any consideration of his or her reliability or credibility) the identification has a lower probative value than an identification made in good conditions.

Likewise, in my view, the measurement of the probative value of the tendency evidence in *IMM v The Queen* in the application of the majority's principles was to be undertaken with the complainant out of view. It was irrelevant that her evidence was uncorroborated, or that the jury might in due course decide that her account was not credible, or that there appeared to be no basis for distinguishing between different parts of her evidence so far as credibility and reliability was concerned. The probative value of the evidence was, on the principles stated

by the majority, to be determined separately and initially. In that assessment, reasonable people might arrive at different conclusions about the extent to which the (necessarily accepted) fact that the appellant ran his hand up the complainant's leg during the granddaughters' massage (whether considered by itself or with other evidence) increased the probability that the appellant had, on a subsequent occasion, done the acts the subject of the charged sexual assaults. Rationally it could affect that assessment, the s 97 question was whether the extent to which it did so was 'significant'.

Mr Odgers suggests an analysis by which (i) evidence of an identification may be treated as evidence of an opinion about the identification, (ii) applying the majority reasons, they require an assumption only that the opinion is honestly held and recounted reliably, but (iii) that this 'does not mean that the opinion itself must be assumed to be reliable'. I cannot agree with either premise, or with the conclusion. Identification evidence is not opinion evidence (it is a separately defined and regulated type of direct evidence: see Part 3.9 and the Dictionary to the Evidence Act) and, even if it were, the majority's statements of principle require an assumption that the evidence is accepted, not that it is accepted in some respects but not in other respects, such that it leaves open the opportunity to attack (at the point of admissibility) the reliability of what is, on the suggested analysis, the underlying identification.

Accordingly, in my view, Mr Odgers' analysis cannot legitimately be extended to and applied in the context of objections to expert evidence under ss 135 and 137, as he suggests. On the contrary, it is difficult to see how the majority's statements of principle provide any hope to objecting counsel keen to contend that a discretionary exclusion of the evidence should occur because the probative value of the evidence is low having regard to matters adversely affecting the 'cogency' and 'qualifications' of the particular expert.

Application of principles

The third matter in the majority reasons on which I comment arises when the majority turn to the application of ss 97(1) and 137 to the facts in the case at [60], addressing the tendency evidence first. The evidence in question was that the complainant had said that, on a previous (and uncharged) occasion, she and another granddaughter of the appellant were giving the appellant a back massage at his request, during which the appellant 'ran his hand up my leg'. At trial, that evidence went to the jury on the basis that it was tendency evidence adduced to establish that the appellant had a sexual interest in the complainant (as each judgment in the High Court records: at [61], [105] and [120], noting that Nettle and Gordon JJ add 'and was prepared to act on it'). The appellant did not dispute that the evidence was relevant.

The question of admissibility thus raised by the tendency rule was whether the evidence of the conduct of the accused on a previous occasion, which was tendered to prove that (in the words of s 97) he had a tendency 'to act in a particular way, or to have a particular state of mind', namely a sexual interest in the complainant, had 'significant probative value'.

The majority reasons at [62]–[63] are the reasons for the appeal being allowed and deserve particular attention. At [62], it is held that 'In a case of this kind, the probative value of this evidence lies in its capacity to support the credibility of a complainant's account'. That statement is unexpected because the probative value of the evidence of the earlier incident (and the purpose of the evidence and the basis of its admissibility) was as evidence of a tendency of the accused. If the event occurred and the tendency existed, rationally that made more likely the occurrence of a later incident in which the accused also acted on the sexual interest he had in the complainant. As the majority had earlier said in their statements of principle, credibility and reliability do not arise in an assessment of probative value, so the probative value of the evidence surely did not have anything to do with the complainant's credibility. The significance of the probative value of the evidence was instead, it seems to me, to be measured by the extent to which, and the way in which, the earlier incident indicated a type and degree of sexual interest (and willingness to act on it) that made it more likely that the appellant did the charged acts. Whether the jury would actually accept or reject the complainant's account of the earlier incident and/or the charged acts was a subsequent matter for the jury, not a question to be considered at the point of admissibility.

In a similar vein, the majority reasons at [63] read as though the tendency in question is that of the complainant to give an accurate account of events in which she has been involved. However, the relevant tendency in this case was not the 'tendency' of the complainant to give a true or accurate account of past events (putting aside the question whether evidence tendered for that purpose could ever truly be regarded as tendency evidence). It was, as had previously been identified in the majority reasons, the tendency of the accused to have a sexual interest in the complainant. In effect, the majority at [63] hold the evidence to be inadmissible because there was

no, even incremental, contribution to the determination of the truthfulness of the complainant's account of the charged acts arising from the complainant's account of the earlier incident. In my respectful view, that analysis replicates the very thing that the majority's statements of principle disavows, namely taking into account the reliability or credibility of the complainant's evidence for the purposes of admissibility.

Mr Odgers also considers the effect, upon admissibility, of a possibility that the relevant evidence has been concocted. He concludes that the majority reasons allow that if the possibility of concoction is sufficiently high, then it would be appropriate to take that into account for the purposes of determining whether the evidence had significant probative value. Mr Odgers also considers that the majority 'only rejected the proposition that 'the possibility of joint concoction may deprive evidence of probative value". In my respectful view, the majority reasons had no such limited intention or effect and, I would add, nor did the reasons of Basten JA in *McIntosh v The Queen* [2015] NSWCCA 184 at [47]–[50] to which Mr Odgers also refers.

My fourth comment on the majority reasons also arises in respect of the reasons at [63]. Even if one adopts the perspective that the 'fact' in issue to which the tendency evidence went is the truthfulness of the complainant's account of events, I dispute that an uncorroborated account by a complainant of an earlier uncharged act can never, rationally, have a material (or significant) effect upon the probability that the complainant's uncorroborated account of the subsequent charged acts is true. Each case will turn on its own facts and circumstances. There may in some cases be nothing in the record that allows the credibility or reliability of a complainant's evidence about different events to be disaggregated and regarded differently. The majority considered *IMM v The Queen* to be such a case, but of course that finding about the admissibility of the evidence in that case does not have precedential effect. In most cases, credibility and reliability are not once and for all assessments. For example, there is a line of authority in criminal appeal courts in which the court refuses to set aside allegedly inconsistent verdicts of a jury notwithstanding that the only evidence going to each of the charges is the uncorroborated evidence of a complainant, one recent discussion of these principles being *CH v R* [2014] NSWCCA 119 at [143]–[150]. In my view, that is entirely to be expected and is consistent with trial experience - the finder of fact may well have a reasonable and rational basis on which to accept the evidence of a witness about some things, but not about others. It may turn on something as fleeting and untranscribable as the way the witness / complainant recounts each incident. On the facts in *IMM v the Queen*, perhaps a jury could rationally have considered that the complainant's allegation, about an earlier incident in the presence of another person who was theoretically available to be called to confirm or deny the event, affected the veracity of the evidence about that event, whereas no such consideration affected evidence of the charged acts. In any case, if it be assumed that the evidence of the massage incident were accepted, the significance of the probative value of the evidence lay in the extent to which it made it more likely that the accused subsequently did the charged acts, which also involved a physical manifestation of his sexual interest in the complainant.

Constructive murder

By Richard Herps

A recent decision of the Court of Criminal Appeal has important implications for the doctrine of constructive murder, by making clear that the doctrine may apply more broadly than has sometimes previously been thought.

In *R v IL* [2016] NSWCCA 51, the focus of the court's attention was on the liability of an accused for the unintended consequences of her actions. Having set up a clandestine methylamphetamine laboratory in a suburban home without contemplating the possibility that someone might be injured or killed, she found herself charged with her partner's murder when he died of injuries sustained in the manufacturing process.

The case

On 18 November, 2014 IL was arraigned in the Supreme Court on a six count indictment. The first count charged her with manufacturing a large commercial quantity of methylamphetamine (1 kg or more). The second count charged her with murder and, in the alternative, the manslaughter of Mr Lan. The remaining counts related to weapons and firearms offences.

It was the Crown case that IL and Mr Lan had entered into a joint criminal enterprise to manufacture a large commercial quantity of methylamphetamine. The process of manufacture used acetone as the solvent which was heated on an open gas burner in a process referred to as 'crystallisation by refinement.' When the liquid caught fire in the bathroom Mr Lan attempted to smother it with a mattress. He had been badly burned and ultimately died of severe hypoxic brain injury caused by smoke inhalation or burn wounds. IL was charged with his murder.

The Crown did not allege an intention to kill or cause grievous bodily harm or reckless indifference to human life. Rather the Crown alleged that the act causing death, the lighting of the gas burner, was done during the commission of a crime punishable by imprisonment for 25 years or life, namely, the manufacture of a large commercial quantity of methylamphetamine – a basis of liability referred to as felony or constructive murder.

The brief facts

At about 4.40 am on Friday, 4 January 2013, uniformed police and fire brigade personnel attended a residential address in Ryde in response to a reported fire. Upon arrival police saw smoke coming from the open front door. As they approached the open door and announced their office IL rushed towards the front door saying, 'no, no, no,' and attempted to close the front door before emergency services could enter. Police pushed back against the door to prevent IL from closing it. While IL continued to make attempts to close the door police observed an Asian male crawling across the floor behind IL. Mr Lan had suffered 60% burns to his total body surface.

Police pushed past IL and removed Mr Lan from the premises in order that he might receive medical attention. Meanwhile fire brigade units entered the premises to extinguish the fire and render the premises safe.

During the initial search of the premises a number of containers of chemicals, tubing, portable gas cylinders and a large container in which the residue of a white crystalline substance were found. In addition, numerous empty containers of acetone were found. Ultimately, drug certificates tendered in the Crown case established some 6.7 kg of methylamphetamine in various stages of manufacture located throughout the premises, some in crystalline form drying in various bedrooms, while other trays of liquid were in the fridge and freezer.

The Crown did not allege an intention to kill or cause grievous bodily harm or reckless indifference to human life.

Police also found a Prada brand handbag in a bedroom which contained a number of personal items belonging to IL including her Australian passport, current driver's licence, numerous credit and debit cards, a small brown envelope with a safe deposit box key printed on the front, $1900 in cash and a Bunnings warehouse receipt dated 1 January 2013 for a number of items including 8 litres of acetone. Found in the middle bedroom was a sum of money in excess of $330,000.

After being removed from the premises Mr Lan was placed in an ambulance, breathing but unconscious, and conveyed to Royal North Shore Hospital. During the journey he went into asystolic arrest. He was placed into an induced coma and on 13 January 2013 palliative care measures were implemented. On the afternoon of 14 January 2013 Mr Lan died.

The process of manufacture

The Crown called a forensic chemist to establish the process of manufacture. He described a process in which the base material

was placed into a vessel capable of being heated into which a small quantity of water and then acetone would be added. The mixture would then be heated and evaporated off, thereby increasing the purity level of the drug. After the mixture was heated it was allowed to cool and later placed into Tupperware containers which were then placed in the fridge. The process of cooling was advantageous if prolonged because it allowed for larger crystal formation.

The only solvent used in this process of manufacture was acetone. There were 70 litres of used containers of acetone scattered about the premises. Acetone is a highly flammable solvent whose vapours are placed into the air when the evaporation process is taking place. If those vapours can't escape from their container, which was the bathroom in this case, they will ultimately reach a critical density at which time they can combust if there is an ignition source.

It was the Crown case that a pot containing the base material and acetone was being evaporated off on the burner in the bathroom and that at some point either the mixture had been disturbed or the vapours had reached critical density and ignited. The ignition source was said to be the open burner itself which was directly underneath the pot containing the acetone mixture.

It was the experience of the expert that explosions or fires in clandestine methylamphetamine laboratories are usually caused during the evaporation process of the flammable solvent.

The Crown case

It was the Crown case that IL was engaged with Mr Lan in a joint criminal enterprise to manufacture a large commercial quantity of methylamphetamine, a crime punishable by life imprisonment under section 33(3) (a) of the *Drugs Misuse and Trafficking Act 1985* (NSW) and as such became the 'foundation crime' for felony or constructive murder.

The Crown case drew attention to the fact that IL:

- owned the premises;
- was at the premises at the time of the fire;
- had attempted to keep the police out when the house was on fire and Mr Lan had been badly burned;
- had clothes in the wardrobe of the main bedroom, though it was not her primary address; and
- had in her handbag a recent receipt for 8 litres of acetone, the solvent used in the manufacture process.

More particularly, as they were engaged in a joint criminal enterprise to manufacture a large commercial quantity of methylamphetamine, which process involved the heating of acetone, a highly flammable solvent, each was responsible for igniting the burner no matter who actually lit it. As this act was done in the course of the commission of the felony or foundation crime, IL was guilty of the murder of Mr Lan.

Application for a directed verdict

At the close of the Crown case the defence made an application for a directed verdict on both the murder and manslaughter charges. In upholding the defence application his Honour held at [42] that there was no evidence capable of supporting the inference that IL contemplated the possibility that someone might be injured or killed in the manufacturing process.

While that was not of itself said to be determinative, his Honour went on to indicate that:

- there was nothing to indicate that the fire was deliberately set [74];
- this was not a case of 'extended common purpose' and the Crown had specifically eschewed reliance upon that doctrine [81];
- the liability of IL was derivative. IL was, if anything, a principal in the second degree [82].

Ultimately His Honour concluded at [85] by saying:

> I do not accept that the combination of principles of common purpose and constructive murder work together to make [IL] liable to conviction for murder in the circumstances of the present case.

The 107 appeal

The Crown appealed pursuant to section 107 of the *Crimes (Appeal and Review) Act 2001* against the directed verdict of acquittal. An appeal under section 107 must involve a question of law alone. Hence, a question of law alone does not permit an appeal on a mixed question of fact and law.

The Crown argued, among other things, that IL was a principal in the first degree and that she had done all those things necessary to constitute the crime of murder. More specifically, since the purpose of the joint criminal enterprise was to manufacture a large commercial quantity of methylamphetamine, the act of lighting the burner was within the scope of that enterprise.

The public policy considerations surrounding the availability of felony/murder are that those who embark on the foundation crime should be liable for the unintended consequences of their actions.

The outcome of the appeal

The court held that the trial judge had erred in the reasoning process. More particularly, the relevant question was not whether IL had contemplated injury to or the death of Lan but rather whether IL had contemplated the possibility that the ring burner would be ignited. If it was, it mattered not who lit the burner if it was within the scope of that enterprise. Hence, the principles of joint criminal enterprise were applicable to the foundation crime of drug manufacture. As the ignition of the ring burner was within its scope, both parties were responsible for it and liable for its consequences.

Accordingly, the acquittals were quashed and a new trial on the charges of murder and manslaughter was ordered.

Public policy

The usual scenario surrounding the preferment of felony/murder charges concerns the armed robbery of a convenience store or petrol station late at night when, during or immediately after the armed robbery, the store attendant is shot and killed.

The public policy considerations surrounding the availability of felony/murder are that those who embark on the foundation crime should be liable for the unintended consequences of their actions.

While Victoria limits the availability of constructive murder to cases where the foundation offence involves an act of violence (s3A(1) of the Crimes Act), New South Wales remains unfettered by such considerations. The only condition precedent is that the foundation crime must carry a maximum penalty of 25 years or more.

In an age where the Commonwealth Government has declared both a war on drugs and the existence of an ice epidemic, those who have chosen to mix up explosive combinations of chemicals in city flats or suburban homes should clearly understand in what peril they place themselves and others.

The war experiences of Justice Edward (Ted) Parnell Kinsella

By Tony Cunneen

Introduction

The material used to compile this article came from research into the experiences of barristers who served in the First World War. The short biographies of these men are available on the website of the New South Wales Bar Association at http://www.nswbar.asn.au/the-bar-association/first-war-world-war. The research into the life of Edward Parnell Kinsella uncovered some fascinating material which allowed for an unusually detailed insight into experiences on the battlefield and the effect of these on the individual and his family during and after the war.

Encounter in No Mans' Land

During the winter of 1917–1918 Edward Parnell Kinsella, later to be a judge of the Supreme Court of New South Wales, was leading a night time reconnaissance patrol for the 54th Battalion in No Mans' Land between the Australian and German front lines in France. Kinsella was armed with a Webley pistol and his men had only their rifles. They scouted the German lines, then on their return to the relative safety of their own trenches, a German patrol came towards them through the darkness. Kinsella made his men lie flat in the mud. The German officer leading his soldiers passed so close to Kinsella that he stepped on the Australian's outstretched hand. The German's boot laid open Kinsella's skin and flesh above the thumb and left a scar that would last for the rest of his life.

Edward Kinsella told his grandson, Brian, the story of what transpired on that patrol many years later, when the boy ran his finger along the white scar and asked the man he knew as 'Pop' how the mark had come to be there. Brian Kinsella knew that his grandfather had been in the war, but rarely spoke of it. On this rare occasion his 'Pop' described this encounter with the German patrol and its outcome.

Kinsella knew they had to fight, so the Australians rose up against the Germans, and, careful not to fire any shots that would give their position away, they used their bayonets to kill their enemy. Kinsella kept the German officer's luger pistol and ammunition as mementos and showed them to his awestruck grandson. It was not the only time in the war that Kinsella was involved in the gruesome business of a bayonet fight. He had a very adventurous war, most of which he kept locked away in his memory, only the long silences and gentle touch of a grandson's hand unpicking the lock of what lay beneath the surface. Edward Kinsella was lucky to survive at all. His story started in country New South Wales.

Early Life and Enlistment

Edward Parnell Kinsella was born in Glen Innes in 1893. His father, Patrick, was the Sherriff's officer in Western New South Wales. Edward was educated at Patrick's College, Goulburn and joined the Lands Department in Moree as a cadet draftsman. In the 1910 Federal Public Service examination he was ranked fourth in New South Wales. On 2 August 1911 he moved to the Miscellaneous Contract and Noting Branch, Sydney, and on 11 June 1913 he moved to the Local Land Board Office at Moree.

War broke out on 5 August 1914 and Kinsella travelled to Sydney and enlisted, aged 21, on 28 August at the Royal Agricultural Showground at Kensington in Sydney. His Battalion commander who signed his papers was Lieutenant Colonel Braund, a member of the New South Wales State Parliament. Kinsella trained with the 2nd Battalion of the 1st Brigade in the Kensington sand hills. There were a number of lawyers in the unit, including the mercurial warrior and solicitor, Charles Melville MacNaghten. The men of the 1st Brigade marched in great ceremony though the streets of Sydney under the overall command of the Sydney barrister, Lieutenant Colonel Henry Normand MacLaurin, who, along with Lieutenant Colonel Braund would be killed in action within a few days of landing on Gallipoli.

Gallipoli

Kinsella embarked for his very eventful war on *Suffolk* 18 October 1914 – part of a great send-off for the 2nd Battalion as a unit in the First Contingent of the AIF. He disembarked at Alexandria on 8 December 1914 and endured MacLaurin's 'severe training' in the desert around Mena Camp beneath the Egyptian pyramids before embarking on 5 April on *Derflinger* for Gallipoli. Kinsella was in the third wave of men from New South Wales that went ashore on Gallipoli in the late morning of the first day. He fought with the 2nd Battalion through the Gallipoli campaign to the evacuation in December 1915 – one of the relatively few ANZACs to do so.

The 2nd Battalion were in the thick of the fighting, particularly

in the opening weeks: charging against the Turkish defenders on the slopes above ANZAC Cove as well as withstanding the Turkish counterattacks in May. Sickness raged through the troops and the men were kept constantly working on 'fatigue' duty. Kinsella was promoted to corporal 6 August 1915, around the time of the great attack on Lone Pine; then to sergeant on 28 November 1915. Kinsella recounted his experience of one attack to his grandson, Brian, who described it in the following manner:

> In an incident which occurred during one attack on the strong Turkish trench lines, the soldiers of his battalion had been ordered to make a frontal assault on a particular length of trench and in an attempt to prevent unnecessary casualties to their own troops from accidental discharges of their weapons they had been ordered by their officers, in their wisdom, not to have rounds of ammunition in the breeches of their .303 Lee-Enfield rifles, but to use bayonets only. With an admirable sense of self-preservation, Edward Kinsella and other diggers ignored this order and made sure they had one 'up the spout 'and ready to fire when they clambered from their own trenches and attacked. They reached the enemy trench, which was covered with logs and earth for protection from artillery fire. They threw grenades down into the trench among the Turks wherever there were apertures. Some of the Australians were able to break holes in the roof and drop through into the trench itself. My grandfather was one of those who did so, his bayonet fixed to the muzzle of his rifle and ready for close quarter combat. As he dropped he was immediately confronted by a large Turkish soldier. 'He was well over six foot tall. In the confined space he looked huge. More importantly he was raising a rifle to point at me,' my grandfather said later. His rifle at the ready, his bayonet was pointing at the Turk but too far from him to reach him in time. My grandfather pulled the trigger and shot him in the chest, killing him instantly. He killed another two Turks with his bayonet before the trench was won. If he had not disobeyed that order he would probably have been killed.

The killings with the bayonet obviously affected Kinsella and Brian, recalls, years after the conversation, the pauses that followed the story and how his grandfather reached out to hold his hand in silence for a long time afterwards.

Alfred Kinsella, Edward's brother, arrived on Gallipoli with the 17th Battalion in late August 1915. The 17th Battalion escaped the worst of the action but the strain on any families in Australia with boys on Gallipoli was immense. Edward Kinsella wrote to his parents telling them of a lucky escape when a Turkish artillery shell landed in the earth next to his dug-out but failed to explode. As was common with proud parents at the time, his father passed the letter onto the local paper for publication.

Kinsella was among the last troops to leave Gallipoli and recalled setting up the last ruse to fool the enemy – the famous construction of jam tins filled with water that dripped from one to another and by being attached with a piece of string to the trigger of a fixed rifle fired shots at random to give the impression the Australians were still occupying the trenches. He told his grandson that he was one of the last to leave the beach.

The Western Front

Kinsella returned to Alexandria in Egypt on 28 December 1915. He transferred to the Camel Corps from 29 January to 9 February then went permanently to the 54th Battalion along with a number of other men from the 2nd Battalion on 14 February 1916, at Tel-el-Kebir in Egypt. These movements were part of the 'Great Reorganisation', or 'Doubling' of units, when the original ANZAC Battalions were halved and their experienced men used as the core for newly formed units which included new recruits from Australia. The process was not without bitterness among those men who left their comrades to be among the newcomers. Kinsella helped train the new men in the 54th Battalion then crossed with them on *Caledonian* to Marseilles in Southern France 29 June 1916. While the

voyage passed without incident it was not without its hazards – German submarines were active in the Mediterranean and a number of ships were lost.

The 54th Battalion travelled north by train with glimpses of the Alps, the Eiffel Tower and other sights provoking much interest among all those on board. The unit was then in action on the Western Front. Kinsella's service record indicates that he was serving with the 54th Battalion in its first major battle, at Fromelles, on 19 July 1916. According to the Australian War Memorial, the night attack 'was a disaster'. The 54th was part of the initial assault and suffered casualties equivalent to 65 per cent of its fighting strength – although Kinsella's exact experience of it was one of the silences which shrouded his war service, but it was clearly an intense time. His brother, Alfred, had travelled to France and was wounded in action 26 July 1916.

The Australian army was keen to promote men from the ranks. Kinsella obviously displayed his leadership ability as he was promoted Second Lieutenant 23 August 1916. He was granted leave in London in November 1916, but soon entered hospital. While hospitalised he was promoted to Lieutenant on 11 January 1917. Just after he was released from hospital, his father, Patrick, died. It was to be a very harrowing year for the Kinsella family.

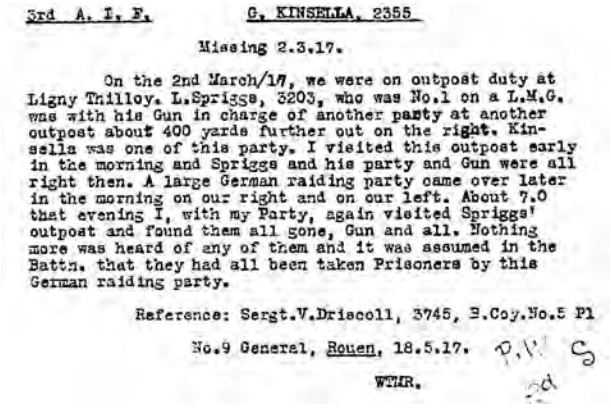
Kinsella was transferred to the Command Depot in Perham Downs, England, when discharged from hospital on 26 January 1916. His general health was not good and there was much concern for his family. His brother, Grattan Kinsella was serving with the 3rd Infantry Battalion and disappeared 2 March 1917 and there was much understandable concern as to his fate. There was some relief to know he was captured. The Red Cross inquiry into the incident uncovered the following account:

> Edward Kinsella was attached temporarily to the 66th Battalion and his record indicates that he attended a course of instruction at the Clapham Bombing School from 21 May to 2 June 1917. He was then an instructor at the school until finally re-joining his old unit, the 54th Battalion on 7 September 1917. It was a difficult time in the war and for the Kinsella family. Alfred Kinsella was wounded in action for the second time on 20 September 1917. Also, during 1917, Edward's brother, John, became seriously ill and was hospitalised for five months in Australia, and their father, Patrick, had died.

Kinsella served with the 54th Battalion in the trenches from late 1917 throughout the winter and into spring 1918. On 3 January 1918 Kinsella was appointed Lewis Gun Officer and spent time training the men in the use of this weapon. Other duties included supervising the men in salvage operations on the battlefields and maintaining their health and wellbeing through such activities as establishing bathing stations. His unit was involved in a series small, but often lethal, engagements around the Somme River – a much contested area, but events from home interrupted Kinsella's war and on the request of his mother he applied for compassionate leave to return to Australia.

Compassionate leave

The Kinsella family had had a difficult war. Two of Edward Kinsella's brothers had suffered severe hardship: Grattan was a Prisoner of War and Alfred had been wounded in action twice. Edward had been lucky to survive and had been ill himself. His distressed mother was desperate for him to get home and help sort out the situation. In her own words, she was in 'difficult circumstances', which included educating Edward's two younger sisters. As a result he was granted compassionate leave. He disembarked in Sydney from *Borda* on 1 June 1918. He had two month's leave on half pay, including a visit to Wagga, then re embarked on *Gaihi* on 30 July 1918 as an 'Indulgence Passenger' and ship's Adjutant. Edward's experience as an ANZAC and Western Front veteran gave him considerable status at home and on board ship. Perhaps his presence encouraged his brother James to enlist on 25 June 1918. James



3rd A. I. F. G. KINSELLA, 2355

Missing 2.3.17.

On the 2nd March/17, we were on outpost duty at Ligny Thilloy. L.Spriggs, 3203, who was No.1 on a L.M.G. was with his Gun in charge of another party at another outpost about 400 yards further out on the right. Kinsella was one of this party. I visited this outpost early in the morning and Spriggs and his party and Gun were all right then. A large German raiding party came over later in the morning on our right and on our left. About 7.0 that evening I, with my Party, again visited Spriggs' outpost and found them all gone, Gun and all. Nothing more was heard of any of them and it was assumed in the Battn. that they had all been taken Prisoners by this German raiding party.

Reference: Sergt.V.Driscoll, 3745, B.Coy.No.5 Pl

No.9 General, Rouen, 18.5.17.

WTHR.

Kinsella sailed in September but arrived in England three days after the war had ended.

Edward Kinsella moved through a variety of postings on return to the United Kingdom and France then was granted leave from 16 July to 16 October 1919 to attend a course in Motor Instruction. He married Marie Louise Josephine nee Graff, whom he had met previously on leave, at the Town Hall, Marchienne Au Pont, Belgium, on 9 August 1919.

Post war career

Kinsella returned to Australia on *Wahehe* 15 December 1919 and was discharged 25 July 1920. He returned to work in the Land Department and studied law part time, graduating in 1927; his health still affected by his war experiences. His fellow war veteran and law student from the 1920s, Vernon Treatt, recalled the men in the Law School whose nerves and general health were clearly affected by their experiences at the front.

Kinsella was admitted to the bar 5 May, 1927, but remained working with the Lands Department until 1930 when he began a very energetic public and professional life. He was elected to the seat of George's River for the Australian Labor Party in 1930 but lost the seat in the general election of 1932 and returned to the bar. He practised out of 170 Phillip Street in all jurisdictions but particularly in Common Law and was retained by the Railways Department for its Common Law work.

The *Australian Dictionary of Biography* summarises Kinsella's judicial career as starting with being appointed District Court Judge and Chairman of Quarter Sessions 19 January 1943. He joined the Industrial Commission of New South Wales from 7 October; his work included chairing the Crown Employees' Appeal Board. On 18 January 1950 he was elevated to the Supreme Court bench. He was described as 'austere and dignified, with a passion for justice. He ran a tight court and wrote careful judgments.' Kinsella twice served as royal commissioner, inquiring in 1951–52 into Frederick Lincoln McDermott's conviction for murder and in 1962–63 into off-course betting. He was also judge in Admiralty from 1961 until he retired on 6 June 1963. Kinsella's tipstaff for ten years was John Adams, MC and Bar as well as Mentioned in Despatches, a wounded veteran of the First World War. Adams had also served in the 54th Battalion at the same time as Kinsella. It is almost certain the men knew each other from that time. The 1960s' decade was a period in which there were many war veterans of both the First and Second World Wars at both bench and bar.

Kinsella was a leading Catholic layman, and was a foundation member (1952) and chairman (1961–67) of St Vincent's Hospital's advisory board and president of the Anti-Tuberculosis Association of New South Wales. He was appointed C.B.E. in 1964 and died on 20 December 1967.

Edward Kinsella had a remarkable life, which took him from country town New South Wales to the slopes of Gallipoli, followed by the Western Front; then the long mental and physical recuperation from all that he had seen and done, into a legal career that led to the Supreme Court Bench. He became one of the leading legal figures in New South Wales and only rarely allowed his demeanour to shift to reveal the store of memory which covered the battlefields of the First World War.

Anyone with further information on Edward Kinsella or other war veterans at the bar is invited to contact: acunneen@bigpond.net.au. The researcher is particularly interested in any personal memories people may have of dealing with war veterans in the law.

Further details and sources

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6. Kinsella Family website: http://www.nicolakinsella.com/familytree/kinsella_edward_p.html
7. The author gratefully acknowledges the support of the Kinsella family, particularly Brian Kinsella who generously provided his memories of his 'Pop' for the writing of this article.

The Hon Justice Anthony Payne

Anthony Payne SC was sworn-in as a judge of the NSW Court of Appeal on 30 March 2016. Attorney General Gabrielle Upton spoke on behalf of the New South Wales Bar.

His Honour attended the University of Sydney, graduating with a Bachelor of Economics in 1983, and a Bachelor of Laws with Honours in 1986. After law school, Payne JA worked first at the New South Wales Ombudsman's Office, and then with the Commonwealth Office of the Director of Public Prosecutions. Between 1987 and 1991 his Honour worked in the UK as a solicitor with the Crown Prosecution Service for England and Wales. In 1992 Payne JA returned to Australia to take up the position of assistant director with the Office of the Commonwealth Director of Public Prosecutions.

In 1995 his Honour was called to the bar, joining the Sixth Floor at Selborne Wentworth Chambers. Payne JA specialised in commercial and taxation law and quickly established himself as a leading commercial law junior. His Honour appeared in a number of high profile cases including, at the very beginning of his career, the Super League litigation, led by the former chief justice, James Spigelman AC QC.

Throughout his career, Payne JA advised and appeared on behalf of many of Australia's leading companies and government agencies, including the Reserve Bank of Australia in a number of cases relating to interchange fee reform and the Commonwealth Bank in the *Storm* litigation. His Honour appeared as senior counsel assisting ICAC in the Sydney Water inquiry, for the Crown in the Glynatsis insider trading case, and for the Commonwealth in the investor-state arbitration arising from the Phillip Morris Asia's challenge to the plain cigarette packaging legislation.

Notwithstanding his busy and demanding practice at the bar, his Honour co-authored the four volume *Federal Criminal Law* loose-leaf service by Butterworths, with his colleagues Neil Williams QC and Sarah McNaughton SC. His Honour also served on a number of Bar Association committees and was elected a member of the New South Wales Bar Council in 2015. His Honour is known as someone who has a number of interests outside of the law, who is a voracious reader of history and politics, and who enjoys the company of friends, especially around the dining table.

In her speech at Payne JA's swearing in on 30 March 2016 the Attorney General, the Honourable Gabrielle Upton MP said:

> Your Honour, your colleagues and your friends describe you as extraordinarily loyal. Loyal to them, to your family, your colleagues, your leaders and your juniors. You are well regarded for your high standards of work. Indeed, one of your colleagues stated that "Tony has the constitution of an ox" in reference to your ability not to feel burdened under the pressures of an extraordinary workload.

> Your colleagues also say you always have exceptionally good judgment and are highly skilled at working with witnesses and running a case. Your Honour has also been described as someone who is extremely agreeable to work with. You were also described as an extremely good communicator and it is these traits described by your colleagues that will serve you well on the bench and indeed make you a fine judge of this Court I am sure.
>
> …
>
> Your Honour, your colleagues in chambers and at the Bar will be sad to see you leave but, of course, are delighted to see you receive this great honour today. Your vast knowledge of the law, indeed your service to the law, your keen analytical ability, sound judgment, strong communication skills and your capacity for work will make you again indeed a fine judge of the Supreme Court of New South Wales and a Judge of Appeal.

The Hon Justice Natalie Adams

Justice Adams was sworn-in as a judge of the Supreme Court of NSW on 5 April 2016. Attorney General Gabrielle Upton spoke on behalf of the New South Wales Bar.

Her Honour was born in Narrandera, in the Riverina District of New South Wales. She attended St Joseph's Convent Primary School, then St Francis de Sales Regional College at Leeton for Years 7 to 10, before completing Years 11 and 12 at Kincoppal Rose Bay. Her Honour studied Economics and Law at the University of Sydney, before graduating with honours in Law.

Her Honour was admitted as a solicitor in June 1989 then practised commercial litigation with Freehill Hollingdale & Page. Her Honour also assisted in the representation of a medical practitioner in the Chelmsford Royal Commission. While practising at Freehills, her Honour completed a Master of Laws at the University of New South Wales, specialising in criminal law.

Her Honour then took up a role with the Office of the Director of Public Prosecutions, where she initially conducted a District Court trial practice. After six years with the DPP her Honour was subsequently promoted to a solicitor in the Court of Criminal Appeal Unit. Her Honour also conducted a Supreme Court practice that involved instructing in high profile murder trials.

Her Honour was then invited to take up the position of professional assistant in the director's chambers, writing legal advice for the DPP until mid-1996 before moving to work with the then Legal Aid Commission of New South Wales in the Hurstville office and then the indictable section at the Parramatta office.

Her Honour moved to the Crown Solicitor's Office in 1997 where, as a senior solicitor in the criminal law team, she conducted extensive coronial work, including as a solicitor assisting the coroner in the inquest into the death of John Newman MP. During her time with the Crown solicitor, her Honour represented the attorney general in several guideline judgments, appeared in numerous prosecutions for a range of government departments and professional boards, and prosecuted a variety of contempt of court matters.

Her Honour was called to the New South Wales Bar in 2001. She took a room in Maurice Byers Chambers and read with Neil Williams SC and Paul Lakatos, as his Honour was then. In 2002 her Honour was appointed as a Crown prosecutor. She practised mainly in administrative law, conducting prosecutions for various government departments and receiving regular briefs from the Crown Solicitor's Office. Her Honour also did appellate work in the Court of Criminal Appeal.

Her Honour was appointed Crown advocate in 2011 and took silk in 2012. Her Honour appeared in the High Court of Australia in *Lee*, a matter involving the use of Crime

Commission evidence in 2014. During her time as a Crown advocate she was, on a number of occasions, appointed as a deputy to act for the solicitor general.

Her Honour is known for giving generously her time and expertise for the benefit of the profession. Since 2010 she has been a guest lecturer at the University of Wollongong's Master of Prosecution course, and lectured in evidence at the University of Technology Sydney. Her Honour has also been a valuable mentor, both within the legal profession and in the wider community. Since 2005 she has been involved in the Women's Mentoring Programs at Sydney University, and for many years, was a volunteer mentor with the Big Brothers Big Sisters Program, which helps young people who face serious adversity develop supportive relationships.

Attorney General Upton, in her speech on behalf of the bar, also mentioned her Honour's love of cooking - specifically, her quest for a more authentic moussaka - and her fascination with films. The attorney said:

> Your Honour's interest in creative pursuits extends also to the world of the silver and small screens. Your Honour can be relied upon to know everything there is to know about films, new and old, and similarly your Honour is an expert and an early adopter when it comes to television series. At a time when many of your Honour's friends were wondering what an HBO was - it stands for Home Box Office of course - your Honour was deeply in the clutches of *The Wire*, *The West Wing*, *Game of Thrones, Girls*, and *Mad Men*. To some who think that those who occupy the Supreme Court Bench are out of touch, they will be pleasantly surprised of course, upon your Honour's arrival and popular cultural references thrown in the direction of your Honour, of course will be met with a knowing look.

The Hon Justice Tim Moore

Tim Moore was sworn-in as a judge of the Land and Environment Court at a ceremonial sitting on 2 February 2016. Chrissa Loukas SC spoke on behalf of the New South Wales Bar.

Justice Tim Moore was appointed as a permanent judge having served since 2002 as a commissioner, senior commissioner and acting judge of the Land and Environment Court of New South Wales. Chrissa Loukas SC, speaking on behalf of the bar, remarked: 'your elevation surprised no one and all expect your transition to be seamless'. Of his Honour's long record of achievements in public life, Loukas SC observed:

> Justice Moore, the planning and environmental laws and institutions of this state are imbued with your influence. You are regarded as having a 'hands-on approach' and formidable yet versatile intellect: one which has had considerable impact on the purposes for which it was deployed – be it reforming a bureaucratic behemoth, legislating to establish the Environment Protection Authority or mediating for the return of ancestral lands to Aboriginal people.

Tim Moore was elected to the New South Wales Parliament in 1976 and continued to hold the seat of Gordon until 1992. He entered parliament while still a law student and graduated with a Bachelor of Laws from the University of New South Wales in 1977. His Honour was admitted as a solicitor of the Supreme Court of NSW in 1979.

His long involvement with the environment portfolio began as shadow minister from 1984–88 and then minister from 1988–1992.

His list of achievements in the environment portfolio is considerable. His Honour transformed the Water Board – where once he worked as a labourer – from a monolithic and distrusted statutory body into a state corporation, with a commercial focus and environmental responsibilities that met community expectations. Indeed, no element of the board's operations was beyond ministerial purview. His Honour is a keen recreational caver and he sometimes took to a canoe to inspect the inner workings of main sewers.

His Honour at one time became an object of fascination to the media. The *Sydney Morning Herald*'s Mark Coultan wrote: 'Tim Moore was a rare Liberal – smart, articulate and funny: an environmentalist. The National Party hated him.' Another wrote: 'His obvious civil libertarian credentials … have not endeared him to right-wingers who, even now, believe Mr Moore is something of a closet socialist.'

His Honour's diligence was obvious in 1991–92, during the minority government of Premier Nick Greiner. He was the leader of the government in the Legislative Assembly, and with great skill he negotiated with three non-aligned independents to ensure the passage of bills through a hung parliament.

After his resignation from parliament in July 1992 his Honour was appointed as executive director of the NSW Master Builders Association. He then went to Canberra to serve as assistant secretary of the Aboriginal Reconciliation Branch of the Department of Prime Minister and Cabinet from 1993 to 1996. In this role his Honour was also secretary to the Council for Aboriginal Reconciliation – a role which he discontinued upon the election of the Howard government.

His Honour was admitted to practise at the New South Wales Bar in July 1997. He read with Brian Preston (as his Honour, the chief justice, was then) and David Cowan.

His Honour took a room in 4 Wentworth Chambers and practised mainly in commercial, planning, environmental and building law. However, perhaps his signal achievement at the bar came when the NSW Government appointed him as mediator to negotiate with traditional landowners for the transfer, leasing and joint management of five national parks. Among them was the 40,000 hectare Mootingee National Park, north-east of Broken Hill, which his Honour described at the time as the first of its kind in eastern Australia and the 'most significant step for reconciliation in this state'. Another was the transfer of 253 hectares of Wellington Common to the Wiradjuri people.

His Honour was appointed as a commissioner of the Land and Environment Court in November 2002. In 2009 he was appointed senior commissioner and he twice served as an acting judge. Between June and December 2015 his Honour handed down an estimated 18 decisions in matters ranging from the discharge of oil into Newcastle Harbour; air pollution discharged from a factory in Moorebank; and an 'offal tower' erected without development consent at a chicken farm in Mangrove Mountain.

In her concluding remarks on behalf of the bar, Chrissa Loukas SC said:

> Justice Moore, the jurisprudence of sustainable development is of growing importance to current and future generations. The Land and Environment Court is a specialist court, combining the roles of judges and technical experts in innovative ways. The New South Wales Bar is satisfied your knowledge and experience make you eminently suited to the tasks that lie ahead. We wish you every success in this new phase of your career.

The Hon Justice Robert Bromwich

Justice Bromwich was sworn-in as a judge of the Federal Court on 21 March 2016. Noel Hutley SC spoke on behalf of the New South Wales Bar.

Justice Bromwich was born in Darwin in 1961 and educated at Larrakeyah Primary School and Darwin High – making him the first Federal Court judge to be born and raised in the Top End. His father, the late Alan Bromwich OBE RFD KStJ, had answered two job advertisements for a surgeon – one in Rhodesia, the other in Darwin. Fortunately, he chose the latter and the Bromwich family arrived in what was then the sleepy capital of the Top End on Boxing Day 1958. For some period of time Alan Bromwich was the only surgeon in the Northern Territory and in 1975 he led the surgical response to the devastating aftermath of Cyclone Tracy.

His Honour studied economics and law at Macquarie University. He did a summer clerkship at the firm of Baker & McKenzie. Following his graduation in 1984, and subsequent admission as a solicitor of the Supreme Court, he went on to work at that same firm.

In October 1985 he moved to the Sydney office of the Commonwealth DPP to work in its civil remedies area. In 1988 his Honour was seconded to the newly established Independent Commission Against Corruption, then under the direction of Ian Temby QC.

In May 1990 his Honour returned to the Sydney Office of the Commonwealth DPP and in September the following year he was made senior assistant director, with responsibility for all tax, Medicare fraud and fisheries prosecutions.

In 1995 his Honour became in-house counsel at the Commonwealth DPP. He was involved directly in a number of special leave applications and appeals before the High Court, among them was *R v Brownlee* (*Brownlee v R*).

His Honour was called to the New South Wales Bar in 1998. He read with Geoffrey Johnson and Graham Turner. His Honour was briefed by the Commonwealth in numerous, complex criminal cases, particularly drug importation and insider trading matters. A notable example of the latter was *Hannes v DPP* (Cth), an appeal before the CCA involving a Macquarie Bank trader.

In the finest traditions of the bar, his Honour also appeared for the accused – many facing charges brought by the organisation he once worked for and would ultimately go on to lead. In *Campbell's Case* his Honour, led by Tim Game SC, defended Belinda Campbell, the owner of a furniture shop who imported items from Indonesia, which were found upon Customs inspection to contain narcotics. The decision handed down in the Court of Criminal Appeal remains a precedent on 'knowingly concerned', 'import' and 'intent'. He defended Ajay Rochester, hostess of Australia's Biggest Loser on 23 charges of defrauding Centrelink. There were migration and Fair Work matters as well.

Coronial inquests were an important area of practice. In 2009 he was counsel assisting the inquiry into the death of Rebekah Lawrence, who threw herself from an office tower in Macquarie Street. In 2012 he was counsel assisting the coronial inquest into the disappearance of toddler Rahma El-Dennaoui.

His Honour was perceived by his peers and by senior counsel as enthusiastic and pro-active – one who proffered views via streams of email and Post-it notes. This led Hastings QC to describe him as a 'noisy junior'.

A great many of his Honour's former readers and colleagues describe him as indefatigable. It was not unusual for his Honour to appear in court all day without having had lunch. A number of solicitors called this the Bromwich Diet. There's an apocryphal story that when his Honour broke his reading glasses shortly before commencing a case in the Federal Court, he appeared at the bar table reading with the aid of swimming goggles.

His Honour took silk in 2009.

In December 2012 his Honour was appointed as the 7th Commonwealth DPP, replacing Chris Craigie SC. There is widespread respect for his achievements as director, including fostering gender diversity through flexible work practices. Significantly, 20 per cent of lawyers work part-time, something that gives the CDPP an enormous competitive advantage in retaining talented women.

His Honour made robust decisions, many of them under the duress of budget cuts. He replaced the decades-old state and territory based structure of the CDPP with authentically national practice groups, headed by deputy directors.

It is further worth noting that while serving as Commonwealth DPP, his Honour appeared at the bar table in not less than 40 matters. Most were heard in state appellate courts. Among these was *Lukas Kamay v R*, involving an appeal by the NAB banker convicted of insider trading and who was given what was, until recently a record sentence. Others, such as *Pasquale Barbaro v R* and *R v Vu Lang Pham*, were before the High Court.

Speaking on behalf of the bar, President Noel Hutley SC described Bromwich J as 'a much-respected former Commonwealth DPP with exceptional expertise in federal criminal law, most notably with fraud and insider trading cases – one of a select group comprised of Tim Game SC, Wendy Abraham QC and Sarah McNaughton SC.'

Her Honour Judge Penelope Wass SC

Judge Penelope Wass SC was sworn in as a judge of the District Court of New South Wales on 18 April 2016. Arthur Moses SC spoke on behalf of the New South Wales Bar.

Her Honour was born in Tamworth and raised on a sheep farming property just south of Uralla in the Northern Tablelands of NSW. She graduated from the University of Sydney in 1987 with a Bachelor of Arts degree. Her Honour subsequently undertook a Diploma of Law from the Solicitors' Admissions Board, during which time she worked for various mid-tier law firms like the then Moore and Bevins.

Her Honour completed the SAB diploma in 1991 and was admitted as a solicitor of the Supreme Court in August of that year. For the next nine years she practised at the Commonwealth DPP, in what Moses SC called 'a remarkable cohort that included, among others, Tony Payne, Michael Wigney, Mark Buscombe, Robert Bromwich, Terry Buddin and Liz Fullerton – as their Honours were then'. Moses SC continued:

> If Macquarie Bank is sometimes dubbed 'The Millionaire Factory' surely the Commonwealth DPP of that era ought to be given the title of the 'Judicial Factory'.

Her Honour began practising at the New South Wales Bar in February 2000. She read with Lucy McCallum and Ian McClintock as they were then. Her Honour found a room on 6th Floor Selborne Chambers, where she remained until the time of her appointment.

Her Honour became a much sought-after mentor to many women barristers, particularly in respect of advice in conducting criminal cases. Lunches were organised, dinners were had, but perhaps the most well known were the skiing weekends in the Snowy Mountains.

Her Honour built up a diverse civil and criminal practice, civil appeal practice and Court of Criminal Appeal practice. Her Honour's hard work and dedication was rewarded in 2013 when she was appointed senior counsel. As senior counsel she was regarded as an all rounder who was happy to appear in all jurisdictions, ranging from the Local Court to the High Court.

Her Honour also served on a variety of Bar Association committees, among them the Criminal Law Committee, the Equal Opportunity Committee and a Professional Conduct Committee. Her Honour has presented and chaired numerous CPD seminars and assisted with the Bar Practice Course and Bar Exams.

In paying tribute to an advocate of 'the highest skill, integrity, common sense and strength', Moses SC identified an appropriate metaphor in the form of a painting that hung on the wall of her Honour's chambers.

> Judge Wass, there was a painting in your chambers, featuring a young girl with a looking glass. Entitled 'Looking for Clues'. It is an appropriate metaphor for one of our bar's most diligent, thorough and investigative female practitioners – one who readily accepted the most challenging cases in search of the truth. No detail was too small to escape your Honour's attention. Nowhere was this more evident than during the second coronial inquest in 2013 into the death of 33 year-old Nadine Haag, in which your Honour obtained an open finding on behalf of the Haag family, rather than one of suicide despite resistance from police investigations. There were many more cases, which were equally hard fought on behalf of worthy clients but for today it is suffice to say that your Honour brings to the bench of the District Court compassion, fairness, practicality and a wealth of experience before the District Court, the Court of Appeal and Court of Criminal Appeal.

Her Honour Judge Elizabeth Boyle

Her Honour Judge Elizabeth Boyle was sworn-in as a judge of the Federal Circuit Court on 6 April 2016. Richard Schonnell SC spoke on behalf of the New South Wales Bar.

Judge Boyle graduated with a Bachelor of Laws from the University of Sydney in 1988. She was admitted as a solicitor of the Supreme Court of New South Wales on 20 December 1989.

Her Honour volunteered at the Inner City Legal Centre in 1985 and then worked as a solicitor with the Legal Aid Commission of New South Wales in their Family Litigation Section from 1990 to 1999. There, she was under the tutelage of the venerable Judy Ryan, now the Hon Justice Ryan of the Family Court.

Her Honour didn't practise solely in family law matters. There were criminal cases as well. In fact, quite tellingly, her Honour once told a colleague that in many instances the same clients appeared in both family and criminal lists. Speaking on behalf of the New South Wales Bar, Richard Schonnell SC said:

> It was during this stage in your career that others first observed your Honour's remarkable ability to talk respectfully to people from all walks of life. One example I've been given described your *ex tempore* reduction and explanation of complex legal principles to a Vietnamese interpreter. Conversely, I'm told that your Honour has been known to mingle in New York society, and has pictures taken at a party in Lou Reed's home to prove it.

The next progression in her career came when her Honour was appointed as senior executive service registrar of the Family Court from May 1999 to June 2000. Then, after a brief interlude at Slade Manwaring, her Honour began practising at the New South Wales Bar in February 2001. She read with Chris Simpson (as he then was) and Denise Hausman. She took a room at Frederick Jordan Chambers, from which she practised until her appointment.

Her Honour appeared in a number of reported cases. There was *U v U*, a High Court matter regarding residence orders and the best interests of the child under sections 65E and 68F of the *Family Law Act 1975*. Her Honour was still only a reader but worked on the trial with Paul Brereton SC, now the Hon Justice Brereton.

Her Honour was instructed by the Legal Aid Commission (and others) for the independent children's lawyer in a number of important matters. She has presented conference papers regarding the role of independent children's lawyers – including the Law Society President's Charity CLE – with the thought provoking title of 'What do children want from their lawyer?'

Furthermore, Judge Boyle developed an even more specialist expertise in the representation of children who are transgender, making it an emerging area of practice located at the confluence of law and medicine.

In his concluding remarks, Richard Schonnell SC gave advice for those appearing before her Honour at the bar table:

> Your Honour's appointment did in fact take effect from 29 February and a quick check of the court's website did show that you have already heard a number of cases. Nevertheless, I'll conclude by submitting the best advice I have gleaned from the family law bar for those who will appear before your Honour. First, there is the universal hope and expectation that your grace and patience will endure at the coalface. That said, your Honour is a devotee of fine arts – particularly theatre – so sporting metaphors will be utterly wasted in your Honour's courtroom.

His Honour Judge Philip Dowdy

Judge Philip Dowdy was sworn-in as a judge of the Federal Circuit Court on 7 December 2015. Arthur Moses SC spoke on behalf of the New South Wales Bar.

His Honour grew up in Balgowlah, on Sydney's northern beaches (but had no inclination to surf). He was educated at Shore and studied at the University of Sydney, from which he graduated with a Bachelor of Arts in 1973 and a Bachelor of Laws in 1975. He was an articled clerk at Clayton Utz from 1976 to 1978.

His Honour did not practise as a solicitor, but chose instead to come directly to the New South Wales Bar in March 1978. He took a room in historic Chalfont Chambers, which at that time was headed by Derek Cassidy QC. He read with Rodney Parker and his application for membership of the Bar Association was moved and seconded respectively by A F Tolhurst and Adrian McInnes QC. In 1993 he moved to 6 St James Hall Chambers, where he remained until the time of his appointment.

During 37 years at the bar his Honour built up a strong banking, equity and commercial law practice in the intensely competitive environment of the Sydney Bar. He was briefed often by each of the 'big four' banks and appeared often in the Commercial List before the likes of justices Andrew Rogers, David Hammerschlag and Patricia Bergin. His peers consider him to be one of the nation's preeminent counsel for insolvency and commercial recovery – one who is remarkably disciplined and diligent.

A fixture of 6 St James Hall Chambers was his Honour putting in a few hours on a Saturday morning before going to his Sydney Badge tennis match in the afternoon. Speaking on behalf of the bar, Moses SC said in respect of tennis:

> ... it would be remiss of me not to mention that your Honour was a keen participant in the Bar Association's annual tennis tournament – the Hon Bryan Beaumont Cup. Naturally, I sought further and better particulars regarding your abilities in another court. I received responses to the effect that your style of play is quite appropriate for a banking and insolvency lawyer: that is to say, a baseline player who 'always returned' and eventually wore down your opponent. Some compared you to Bjorn Borg.

Moses SC noted that a sometimes-overlooked feature of banking cases is the frequency with which counsel appear against self-represented litigants. A regrettably high proportion of those appearing before the Federal Circuit Court are self-represented. Such cases can be especially awkward and stressful, but, Moses SC said:

> your Honour is said to have handled them 'with aplomb'. Reputedly, one of your favourite sayings is: 'everyone gets one chance to settle'. I'm told that in the context of banking and insolvency, this is equivalent to empathy.

Among his many notable cases were: *Taylor & Ors v Johnson*, in which he appeared as junior to Rodney Parker QC in the High Court; *Neale v Commonwealth Bank of Australia Ltd Trading as Bank of Western Australia*; and the complex case of *Octaviar*, which went before the NSW Court of Appeal and the High Court.

His Honour is an accomplished Greek scholar. With occasional assistance from a tutor on Friday afternoons, he spent time drafting annotated translations of Homer's *Odyssey* and *Illiad* as well as the works of Herodotus.

Judge Dowdy joins a very busy Federal Circuit Court, a fact which Moses SC did not overlook in his remarks before the ceremonial sitting:

> The bench of the Federal Circuit Court has, for many months, been well below its full complement, and has groaned beneath the weight of its enormous caseload. In 2014-15 more than 95,300 cases were litigated and divorce cases processed by this court – during which time, nine judges retired. Today's appointment, together with those foreshadowed last Thursday by Attorney-General George Brandis QC, will alleviate the situation – partly. Judge Dowdy's wealth of experience in banking and commercial law fits well with the bankruptcy, competition and consumer jurisdiction of this court. The state and territory bars congratulate the attorney and will watch attentively for more appointments to be announced.

Commissioner John Murphy

John Murphy was sworn-in on 4 December 2015 as a Commissioner of the NSW Industrial Relations Commission. Arthur Moses SC spoke on behalf of the New South Wales Bar.

Commissioner Murphy attended De La Salle College Caringbah and St Gregory's College Campbelltown and was a bright, enterprising young man who once sat for an IQ test, which ranked him among the brightest in NSW.

As Mr Moses noted, 'somewhat unusually for a teenage male' Cmr Murphy and a neighbour hit upon the idea of breeding pigeons, which were use to send messages to one another. The pigeons were released with notes strapped to their legs. The birds were neither seen nor heard of again.

Cmr Murphy's passion for pastimes involving animals did not end there. His passion for horses and horse racing is well-known and shared with close friends and family.

Cmr Murphy's mother worked as a settlement clerk at one of the large law firms and it was she who encouraged him to study law. He graduated from the University of New South Wales with a combined Bachelor of Laws and Bachelor of Jurisprudence in 1975.

Early in his career he was employed as a senior industrial officer with the Health and Research Employees' Association. Over the next decade Cmr Murphy conducted cases in both the Commonwealth and NSW industrial relations jurisdictions.

He was called to the New South Wales Bar in 1986 and licensed rooms at Frederick Jordon Chambers. His tutor was Greg Maidment, who went on to become a justice of the NSW Commission and who was present at Cmr Murphy's swearing -in.

Cmr Murphy proceeded to build up the diverse, thriving industrial practice, Appearing in a gamut of state and federal jurisdictions, from the High Court to the Federal Court, NSW Court of Appeal and various tribunals. Mr Moses stated that his opponents at the bar table 'describe him as tough and persistent but, in the best traditions of our profession, always fair and polite'.

Mr Moses noted that Cmr Murphy had for some time 'been acknowledged as a preeminent counsel in matters of employment law, in particular industrial disputes, discrimination, unfair contracts, equal remuneration and dismissals'.

Cmr Murphy represented the State of New South Wales and the minister for industrial relations in numerous, significant test cases. In particular the *Equal Remuneration Principle Case* (2000) 97 IR 177; the *ACTU Living Wage Claim in 1998*; the *Review of the Principles for Approval of Enterprise Agreements* (2000) 101 IR 332; and the *Secure Employment Test Case* (2006) 150 IR 1.

Cmr Murphy was junior counsel to Bernie Gross QC for the NSW Department of Housing in the Gyles Royal Commission into Productivity in the Building Industry between 1991 and 1992.

He also appeared as junior counsel to Jeff Shaw QC in the High Court in *Re Alcan Australia Ltd; Ex parte Federation of Industrial Manufacturing and Engineering Employees* (1994) 181 CLR 96. As Mr Moses noted, it is difficult to identify a State Wage Case in which Cmr Murphy did not appear.

Mr Moses concluded by saying:

> the stakeholders of this important institution in NSW – unions, employers and government alike – will be well served by your appointment. You are an able, experienced practitioner who enjoys the healthy respect and deep affection of your peers. You are a first class lawyer who has compassion and integrity. However, you are also known for not resiling from having to make a tough decision which may draw criticism.

The Hon John Bowditch Sinclair QC

The former District Court judge, the Hon John Bowditch Sinclair QC died on 17 December 2015 aged 89. His was a remarkable life.

Sinclair was born in Queensland on 25 August 1926. He was schooled in Brisbane but it was wartime, so he left school and entered the Royal Australian Navy as a cadet midshipman in 1940 – aged only 13. In 1943 he was first stationed under the Royal Navy at Scapa Flow on the *HMS Wager*. Sinclair's war was a '*good war*' – ie one where he was consistently exposed to danger.

After the war he served in the Occupation Forces in Japan and later on the supposedly benign job of minesweeping off the Australian coast, but in 1947 was aboard the *HMAS Warrnambool* when that ship struck a mine and was sunk. Four sailors died and many, including Sinclair, were seriously injured.

Lieutenant Sinclair was discharged from the Navy in 1950 and enrolled at the University of Sydney. He took a Bachelor of Laws in 1954 and came to the bar in 1955. He read with Ray Reynolds (later Reynolds JA) and joined with Seven Wentworth Chambers. His practice was mainly in the common law and Admiralty. He was briefed in both *Voyager* Royal Commissions representing the family of Duncan Stevens, the Commander of *HMAS Voyager*. Sinclair took silk in 1974.

In 1977 Sinclair was appointed to the District Court, where he sat in every aspect of the wide jurisdiction of that Court. As a judge he was very strongly interested in getting down to the facts of a matter with a corresponding lack of interest in matters of any legal technicality. He came from what might be regarded as an older, harder school – Sinclair was never regarded as a good draw by an accused in a criminal matter or a plaintiff in a damages claim. He was especially hard on those he perceived as liars and malingerers. His judicial style was heavily interventionist – he did not hesitate to express his opinion on how proceedings were progressing. While his general demeanour was avuncular, he could become explosively cranky. Appearing before Sinclair could be an intimidating experience. For all of that, Sinclair was a solid judge and his judgments were common sense and rarely successfully appealed. He remained on the District Court until he reached mandatory retirement in 1998, then accepted an acting appointment until 2001.

Personally, Sinclair was delightful company. In the best Naval tradition, he enjoyed a drink – there is a story, difficult to verify, that at a reception for Lord Diplock, Sinclair introduced himself – '*G'day Dippers, I'm Sinkers*'.

A brave serviceman, a capable lawyer, a sound judge – John Sinclair made a genuine contribution during war and in peace.

Andrew Thomas Martin (1973–2015)

Andrew Martin, barrister at Chalfont Chambers and son of Professor Thomas Martin, died on 11 November 2015.

Andrew graduated from the University of Sydney with a Bachelor of Economics in 1994 and a Bachelor of Laws in 1997. He was admitted as a solicitor of the Supreme Court of NSW in February 2000. For the next three years he worked in the Employment and Industrial Relations Group at Minter Ellison Lawyers, both in Sydney and in San Diego. In December 2003 he worked as associate attorney in Baker & McKenzie's Commercial and Securities Group in Hong Kong. In October 2005 Andrew Martin was admitted to practise at the New South Wales Bar. He read with Ingmar Taylor (as he then was) and Bryce Cross. His first room was in State Chambers, but he subsequently moved to a number of different chambers before settling at Chalfont in 2014.

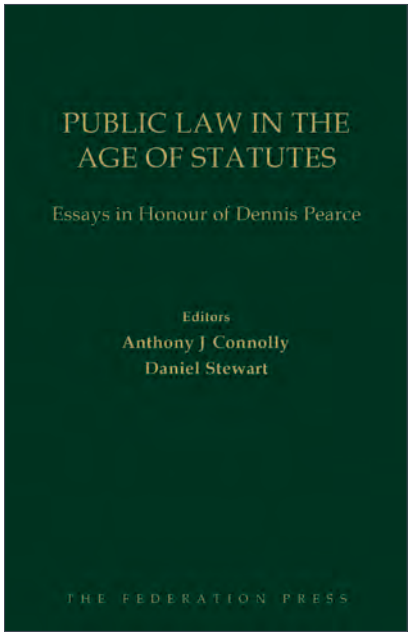
Following Andrew's death the Bar Association received a number of written expressions of sympathy and sorrow at his passing. One, from the president of a regional law society, reads:

> Andrew had generously given his time to present papers at our seminars. Those presentations were not only instructive but also most enjoyable. Andrew was well liked amongst our members. Andrew left this world much too early and his loss will be felt not only within the legal profession but also by all those who have had the privilege of knowing him.

Andrew was buried at a private funeral, but in memory of their colleague, Chalfont Chambers held a wake and church service on 25 November in the Crypt of St Marys Cathedral.

Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce

By A J Connolly and D Stewart (eds) | The Federation Press | 2015



Professor Dennis Pearce AO is emeritus professor at the Australian National University. This book of essays came out of papers given at a conference held in his honour in October 2014.

Pearce is a preeminent Australian authority on statutory interpretation, as the co-author of *Statutory Interpretation in Australia* with Robert Geddes, the 8th edition of which was published in 2014, and which has been cited in over 2000 Australian judgments. Pearce was made professor at ANU in 1981, was dean of the ANU Law School from 1982 to 1984 and again from 1991 to 1993, and was acting deputy vice-chancellor in 1994. Upon retirement in 1996 he was appointed emeritus professor. His other appointments, which are too numerous to list fully, include the Commonwealth and Defence Force ombudsman from 1988 to 1990, chairman of the Australian Press Council from 1997 to 2000, and foundation adviser to the Senate Scrutiny of Bills Committee from 1981 to 1983.

The Hon Justice Gageler, an author of one of the essays in the book and one of Pearce's former students, describes Pearce as 'astute and controlled'.

Pearce became an officer of the Order of Australia in 2003 for, among other things, his service to law through work in statutory interpretation, delegated legislation, and administrative law. Much as it was, and is a continuing, feature of his life's work, the delegation of legislative functions to the executive is a continuing theme in this book.

In the first chapter, 'Public Law and a Public Lawyer in the Age of Statutes', the editors Anthony Connolly and Daniel Stewart note the growth over the last 30 years of the delegation of legislative functions. They quote Guido Calabresi, who used the term 'statutorification' to describe the shift from an American legal system dominated by the common law to one in which its primary source was statutes. White settlement of Australia, on the other hand, was 'born to statutes', although its veritable 'orgy of statute making', the authors point out, was built on a common law foundation that protected the Crown in its dealings with citizens.

His Honour Justice Gageler, in 'The Master of Words: Who Chooses Statutory Meaning', discusses when an administrative decision maker can give a meaning to statutory words in circumstances where the words permit of a range of potential meanings: that is, which is to have the authority to give them meaning – the decision maker or the court? Deftly his Honour weaves in reference to Lord Atkin's dissent in *Liversidge v Anderson* [1942] AC 206 and his invocation of a funny colloquy between Alice and 'the obtuse and erratic anthropomorphic egg', Humpty Dumpty, from Lewis Carroll's *Through the Looking Glass*.

In an insightful essay on the 'Constitutional Dimensions of Statutory Interpretation', Cheryl Saunders explores the ways in which the Commonwealth Constitution affects the principles and practices of statutory interpretation in Australia. Saunders provides a framework divided between three pillars: mandate, influence, and catalyst.

In a detailed chapter titled 'Executive Versus Judiciary Revisited' Margaret Allars looks back on an essay of Dennis Pearce's from 1991 titled 'Executive Versus Judiciary', in which Pearce alluded to the concerns of the executive regarding the burdensome impact of judicial review proceedings. Allars bases the first part of her article on *Attorney-General (NSW) v Quinn* (1990) 170 CLR 1 (which came down not long after Pearce's original article), finding both synergies and obscurities between it and *Marbury v Madison* (1803) 5 US 137, a US case involving similar facts but delivered almost 200 years earlier.

In 'Private Standards as Delegated Legislation', Daniel Stewart, one of the editors of the book and a senior lecturer at the ANU Law School and a former John M Olin Fellow in Law and Economics at the University of Virginia, discusses how private standards such as Australian Standards – over a thousand of which are now referenced in Australian legislation – become legally binding obligations.

And in a timely piece titled 'Enquiring Minds or Inquiring Minders? Towards Clearer Standards for the Appointment of Royal Commissioners and Inquiry Heads', AJ Brown discusses the place of royal commissions and ad hoc public inquiries in Australia's modern system of governance and public integrity. As a prologue Brown quotes part of a debate on the *Judiciary (Diplomatic Representation) Bill 1942* (Cth) in which

Public Law in the Age of Statutes:Essays in Honour of Dennis Pearce

This is a timely collection of essays, with a vibrant range of topics of immediate relevance.

ire was directed toward the appointment of Sir Owen Dixon as Australian Government minister to the US; moving forward half a century Brown suggests that the appointment of former High Court Justice Dyson Heydon AC to chair the Royal Commission into Trade Union Governance and Corruption in 2014 raises similar questions as to whether there should be limits on how former judges may accept government appointments to head major inquiries.

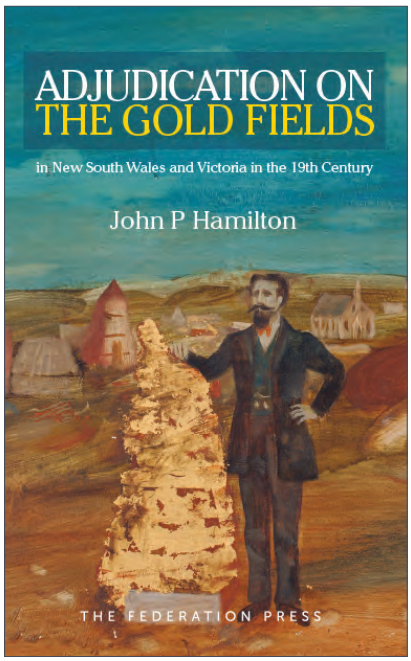
In a slight change of tack, the last three chapters look at the history and status of administrative review and governmental oversight bodies. Justice Susan Kenny in 'The Administrative Review Council and Transformative Reform' charts the history of the Administrative Review Council. Linda Pearson in 'The Vision Splendid: Australian Tribunals in the 21st Century' looks at the amalgamation of specialist tribunals into the Administrative Appeals Tribunal, and in doing so evokes Pearce's query in 1991 as to whether the 'vision splendid' of the consolidation of Commonwealth tribunals into the Administrative Review Tribunal had faded. And in the last chapter, John McMillan, a former Commonwealth and Australian information commissioner, reflects on the effectiveness of organisations such as the ombudsmen in effecting organisational cultural change.

This is a timely collection of essays, with a vibrant range of topics of immediate relevance. It is worthy of honouring the life work of Dennis Pearce.

Review by Charles Gregory

Adjudication on the Gold Fields in New South Wales and Victoria in the 19th Century

By John P Hamilton | The Federation Press | 2015



The mid nineteenth century gold rush period produced an unrivalled population explosion in Australia. Opportunists flocked from afar doubling the population in New South Wales and multiplying Victoria's sixfold. It was a golden period with Australia producing 39 per cent of the world's gold. A referenced extract captures the frenetic atmosphere, 'tents everywhere, an anthill swarming with frenzied activity… an earnestness you cannot imagine.'

An unexpected administrative crisis arose from the sudden onset of the fledging gold mining pursuits in the colony. Disputes frequently broke out on the gold fields. For example, disputes about the entitlement to ground, encroachment or stealing gold as well as co-ownership or partnership disputes. On busy fields, like Ballarat, there were hundreds of such disputes a year. There was a rush to establish a system of laws and processes to govern life on the gold fields and to promote order among a potentially revolutionary and demographically diverse community of mostly transient opportunists.

This book charts the development, between 1851and 1875, of the public administration of the gold fields in New South Wales and Victoria. In particular, it chronicles the origins, development and nature of the heyday of gold fields adjudication at that time in those two colonies. It gives a contained and carefully documented example of the development of government in colonial Australia which tended to be characterised by a blend of principle and pragmatism.

Adjudication on the Gold Fields in New South Wales and Victoria in the 19th Century (Federation Press, 2015)

There was a rush to establish a system of laws and processes to govern life on the gold fields and to promote order among a potentially revolutionary and demographically diverse community of mostly transient opportunists.

This is a valuable academic nugget. Its author, John Perry Hamilton, formerly a barrister and then judge of the Supreme Court of New South Wales recently obtained his PhD in history. His thesis forms the basis of this book. His research is meticulous. He relies upon primary records from what must have been exhaustive mining of archives, somewhat frustrated by the practice of many colonial mining adjudications taking place without written records.

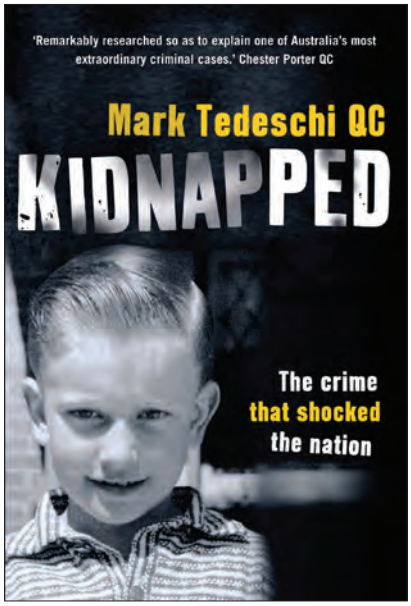
While there is considerable historical writing about life on the gold fields, particularly the rebellion of the Eureka Stockade, this book cures a long lasting lacuna of historical literature on the *adjudication* systems of the gold fields. It is a triumph of literary form. It is novel-like as well as a study and a subject matter authority. It contains both social history, colonial jurisprudence and personal stories. It really is a golden addition to any historical library, particularly one focussing on Australian history or legal history.

The book is structured thus. Chapter 2 summarises the history and social background, including the nature of gold fields demography and gives a brief account of the Eureka Stockade and the royal commission. Chapter 3 deals with the origins of the administrative systems for the gold fields. Chapter 4 provides an account of the legislative history relating to adjudication in both New South Wales and Victoria. Chapter 5 concerns the establishment of gold commissioners as adjudicators. It homes in on the role of John Richard Hardy, a pivotal figure in the administration of the gold fields in New South Wales who established a very successful dispute resolution system (coincidentally, he was the brother in law of Alfred Stephen, a chief justice of New South Wales). Chapter 6 concerns the operation of Wardens' Courts and Local Courts as adjudicators in Victoria, and the abolition of Local Courts and their replacement by the Courts of Mines. Chapter 7 deals with the manner of adjudication by gold commissioners and the continuation and development of their function in New South Wales. It contains some fascinating extracts of 19 entries of disputes from the 'Rocky River Record'. These are the (very rare) written records of a commissioner at Rocky River near Uralla maintained in a leather bound book. They record the disputes he presided over during a two month period. These are a remarkable and valuable record because the adjudication system was effectively unwritten. Chapter 8 is concerned with the 1866 legislation and the New South Wales Royal Commission. Chapter 9 deals with the continued operation of adjudicators in New South Wales from 1867 to 1873. Legislative activity during this period was sparse. Chapter 10 deals with the establishment of the Victorian Courts of Mines and Wardens' Courts and offers a comparison with the New South Wales system. Chapter 13 deals with the establishment and operation of the Wardens Courts in New South Wales and Chapter 14 with the body of jurisprudence in the superior courts of New South Wales and Victoria relating to the adjudication system in the specialised mining courts. It examines the reported cases available in the period 1851 to 1875 (which effectively means reported cases in the 1860s and 1870s). In New South Wales, there were 13 cases touching on mining adjudications. Of these, 8 were encroachment cases, three were criminal cases, one was a partnership case and one was a contract case. In Victoria, there was a larger volume of reported decisions: 46 cases were noted. Of these, 24 were encroachment cases, 12 were forfeiture cases, two were criminal cases and one was a nuisance case. Chapter 15 considers the history of the Wardens' Courts after 1875. In conclusion, the book offers three helpful appendices. One contains a table of cases determined by Beechworth Local Court, another contains cases from Hill End Bench Book. The third contains the Register of Complaints in Sofala Warden's Court.

Reviewed by Talitha Fishburn

Kidnapped

By Mark Tedeschi QC | Simon & Schuster Australia | 2015



Stephen harboured an under-current of intense envy and greed, fuelled by a desperate need for social acceptance, a readiness to undertake appalling risks, an un realistic sense of his own perspicacity, and a perverse thrill in the face of great danger.

We have all probably heard about this famous case. It might very well be one of the most famous cases in Australian history and it truly must have been 'the crime that shocked the nation'. On 7 July 1960 an eight year old schoolboy named Graeme Thorne was kidnapped in Bondi on his way to school. About a month earlier, Graeme Thorne's father had won the tenth draw of the Opera House lottery, 100,000 pounds prize (equivalent to about $4 million today-p.290). There was much publicity about this. However, for the Thorne family there was a shocking consequence: the kidnapping of their son and subsequent ransom demands. But that of course was not the end of the matter. On 16 August 1960, five weeks and five days after Graeme Thorne's disappearance, police found his body, still fully dressed in his Scots College uniform, on a bush covered vacant block, in Grandview Grove, Seaforth.

What followed was of course an intense police investigation and the subsequent arrest and trial of the accused - Stephen Bradley. The author, given his experience as a Crown prosecutor, has tremendous insight into police investigations, the analysis of evidence in a criminal trial as well as the mind of a killer. And this is what we have in this book.

The research is thorough and extremely interesting. We learn of Stephen Bradley's background, in Budapest, and his life there during World War II. He migrated to Australia in 1950 and had a life initially in Melbourne. He changed his name and moved to Sydney in 1957 with his third wife. We learn of the marriage that Stephen Bradley had and what he did, how he lived in Sydney and importantly, the financial pressure the family was under. But what the author does so well, is highlight the type of person Bradley must have been in order to have committed this terrible crime. He writes at page 37 '… beneath the surface, Stephen harboured an undercurrent of intense envy and greed, fuelled by a desperate need for social acceptance, a readiness to undertake appalling risks, an unrealistic sense of his own perspicacity, and a perverse thrill in the face of great danger.'

The book is fascinating because it is part of Australia's recent history, and not only because we have descriptions of what life was like in the suburbs of Sydney at this time, but also because we learn of the detailed, intense and thorough police investigation which eventually led to Stephen Bradley. Looking 'backwards' at what police did, i.e. analysing what they did after we all know the end result, is always a fantastic tale. What they did well is contrasted with what could have been done better and leads not taken could very well have resulted in an earlier capture. We also have a great summary of the trial with the author having access to the court records and speaking to several relatives of key players. Yet, we have the author's perspective on what Bradley must have been doing at the critical times and what he was thinking. As the author writes in the Preface:

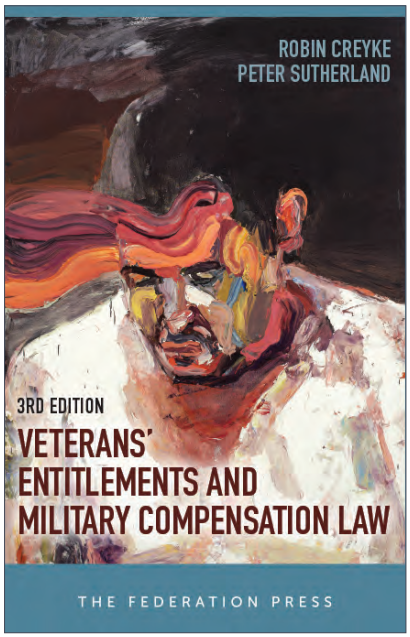
> Over many years, I have prosecuted a number of such people for murder. The feature I have observed that they most commonly share is an ingrained, almost unshakeable, belief that they are owed something by the universe. The man I describe in this book was so gripped by his desires and so intent on achieving his ends that he lost the ability to see what most other sane people would have realized in an instant: that he was hell bent on a path of inevitable self-destruction. His downfall was almost assured by the brazenness of his covetous pursuits and the risks inherent in his chosen methods.

This is a fascinating book and every lawyer in Sydney should read it.

Reviewed by Caroline Dobraszczyk

Veterans' Entitlements and Military Compensation Law (3rd ed)

Robin Creyke and Peter Sutherland (eds) | The Federation Press | 2015



The third edition of this work, first published in 2000, provides detailed commentary and annotations to the *Veterans' Entitlements Act 1986* (Cth) and *Military Rehabilitation and Compensation Act 2004* (Cth). The text is a companion to the statutes which are tracked sequentially, although the sections are referenced by catchwords rather than fully repeated.

The commentary on the later statute, which governs compensation to members of the armed forces who die or are severely injured due to their service on or after July 2004 and to the dependents of such members, is a new addition. Since there has, to date, been relatively little cause for judicial interpretation of the later statute the authors necessarily annotate it with references to comparable provisions of the earlier legislation or the *Safety Rehabilitation and Compensation Act 1988* (Cth). The interpretation of the two principal acts is assisted by the detailed cross references to other relevant statutes and annotations.

A notable example of the close analysis the statutes require is found in the commentary and annotations to section 120 of the *Veterans Entitlements Act 1986*. That section sets the standards of satisfaction or proof for claims under the Act. The discussion is necessarily extensive. The authors explain that there are two standards of proof, 'the reverse criminal standard, which is more generous, and the civil standard'. The more generous provision applies to a veteran whose incapacity is war-caused, 'provided there is a 'reasonable hypothesis' of a connection between service and the incapacity, which is not disproved beyond reasonable doubt'. This, the authors observe, offers a unique contribution to legal jurisprudence and the accompanying explanation demonstrates that it calls into play extensive consideration of evidentiary principles in general and the authorities which have determined the application of the standard to the facts of particular cases.

Claims lodged after 1 June 1994 became subject to the Statement of Principles scheme by which legislative instruments establish factors defining the 'reasonable hypothesis' that applies to particular circumstances (disease, injury, cause of death). The operation of the Statements of Principles scheme is explained with precision and considerable detail and supplemented by a detailed commentary on their interpretation, with focus on some key expressions and difficulties.

The authors have found scope for reflection on the history of military compensation legislation in Australia and the many complications the long history of its application has generated. It is explained that the *War Pensions Act 1914* was the first specific compensation scheme enacted by the Commonwealth of Australia but provision for compensation for injury in the course of service was in existence before the First World War. The principles for compensation retained in the *Veterans Entitlements Act 1986* are sourced in the provisions which were developed in response to successive major conflicts involving Australian armed forces. The authors explain by the 1970s there was compensation for death or incapacity (a) from employment directly in connection with war or warlike preparations, (b) that occurred during service, (c) which had arisen out of or was attributable to service, (d) due to a condition which predated service but which was contributed to in a material degree or aggravated by service, or (e) from pulmonary tuberculosis where the person had served in a theatre of war.

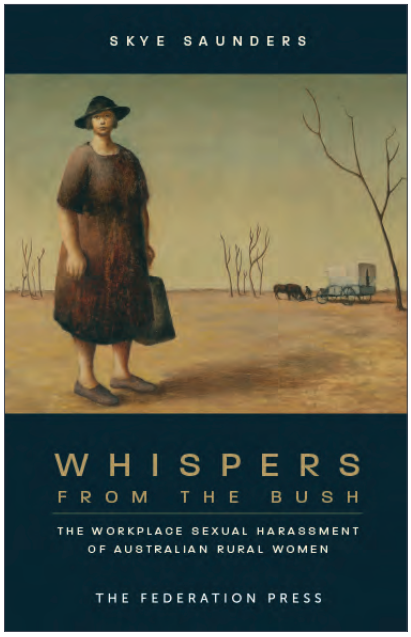
... the analysis is clear, accessible and supported by detailed reference to authorities and aids to interpretation.

The annotation form is driven by practical objectives to distil an extensive body of case law emerging over many decades into an efficient guide to the present operation of the compensation regime for military service. In this work the analysis is clear, accessible and supported by detailed reference to authorities and aids to interpretation. The authors expressed desire to honour those members of their families who served Australia and New Zealand as members of military forces has produced as clear a guide to the rights of claimants as the legislation and extensive judicial determinations can allow.

Reviewed by Jane Merkel

Whispers From the Bush: The Workplace Sexual Harassment of Australian Rural Women

By Skye Saunders| The Federation Press | 2015



Despite what the title may suggest, Skye Saunders' pioneering research publication speaks volumes about the extent of the 'cultural epidemic' of sexual harassment in rural Australian workplaces. In *Whispers From the Bush: The Workplace Sexual Harassment of Australian Rural Women* Saunders draws on original research to examine the entrenched sexual harassment culture pervading the lives of working women. A total of 107 interviews conducted with rurally located participants deliver results that are both staggering and heartbreaking, leaving the reader with far more than a whisper of a problem in desperate need of redress.

The foreword to the book is written by former chief of army, David Morrison who situates the book on a historical continuum of workplace sexual harassment in Australia. A coincidentally notable choice, Morrison records a sombre opinion that the same degrading cultures he says were in the army 'are present in almost every workforce and workplace in Australia'. However, he says, 'too often [women in rural environments] are not given the voice and resonance that they warrant.' And it is precisely into this cultural void that Saunders takes her aim.

Drawing on new and existing research Saunders' book proposes that sexual harassment is a 'cultural epidemic' that teeters on acceptance as a social norm in rural workplaces. She argues that 'urgent, remedial action must now be taken to provide women with the safe workplaces to which they are, by law, entitled' and sets out a plan of action for achieving this goal.

The use of both qualitative and quantitative research methods despite a smaller sample size allows Saunders' to construct a thorough and insightful portrait of sexual harassment in remote communities.

The book is useful from a legal perspective in a number of ways. Chapter 1 (Reduced to Silence) provides an analysis of the legislative responses to workplace sexual harassment, namely section 28(1) of the *Sex Discrimination Act 1984* (the Act). In particular Saunders concerns herself with examining the barriers of a rural lifestyle that compromise the Act's proper application.

In addition Saunders' exploration of the language of the Act opens an important dialogue around its ability to properly protect rural women. For example she argues the word 'possibility', which was intended to lower the threshold for sexual harassment, is instead undermined by the concept of 'reasonableness' and the male experiences that she contends are entrenched within it. Placing such an evaluation at the outset of the book allows Saunders to explore the legislation in later discussion of cases and her own empirical evidence.

Secondly, in the latter half of the book Saunders draws heavily on recent case law to present examples, particularly of the litigation experience across urban and rural areas.

The case of *Brown v Richmond Golf Club*[1] is used as an example of judicial responses to ongoing versus 'one-off' behaviours. In that case Britton J sitting as ADT Judicial Member was not satisfied that an attempted kiss on the cheek made by the claimant's general manager constituted conduct of a sexual nature, but instead should be considered a one-off event of relatively low harm. Saunders contrasts this with cases like *Fischer v Byrnes*[2] where ongoing humiliation and intimidation was more likely to lead to a successful sexual harassment claim.

Chapter 6 (So Help Me, God… A Comparison of (Un)Successfully Litigated Sexual Harassment Complaints from Rural and Urban Australia) will prove a useful resource for law practitioners and students. Saunders delves deep into a number of significant cases that explore factors affecting litigation outcomes in a rural setting. For example she writes about *Cross v Hughes*[3] where an employer booked a single hotel room for himself and an employee on a business trip and made unwelcome remarks and suggestions throughout the stay. This case is used by Saunders to demonstrate how the relative seniority of the alleged harasser can point to 'circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.'[4]

It is a credit to the author that a topic so often drenched in statistics preserves the personality and experiences of those who contributed to it. At times the book is hard to put down, at other times the weight of personal stories can make it hard to read at all.

Rigorous footnoting will also make this book an invaluable resource for those wishing to explore the issue further.

The remainder of the book, while not strictly legal in content, provides an up-to-date examination of sexual harassment in remote areas from all angles. Chapter 2 (Listening to the Distant Whispers) lays out the methodology employed in the research and serves as an indicator of the challenges involved in undertaking such a study.

Chapter 3 (The Dramatic Backdrop of the Bush and Gendered Harm Within It) looks at the legacy of gender-based harm and how it has been influenced by bush-culture in remote areas.

Chapter 4 (It's All a Bit Different Out 'Ere… Special Characteristics of the Bush and Their Effect on Reporting Rates) raises the myriad barriers to reporting sexual harassment in isolated areas, with particular reliance on first hand interviews with rural working women. Beyond the evident physical barriers, Saunders also raises a number of legitimate social barriers that can prevent women from seeking help, such as the power of gossip and victim blaming.

In Chapter 5 (When the Boys Come Out to Play… Sexual Harassment and the Impact of Male-Dominated Working Environments) fuses case law with interview responses to explore the nexus between 'male' working environments and the prevalence and nature of sexual harassment.

Chapter 7 (Fit In or F#$@ Off! The (Non) Reporting of Sexual Harassment in Rural Workplaces) draws on extensive data from previous and original research to present chilling evidence of low reporting rates despite the prevalence of sexual harassment incidents in rural areas.

Chapters 8 (Just the Boys Havin' Fun! The Nature, Pervasiveness and Manifestations of Sexual Harassment in Rural Australia) and Chapter 9 (Stripping Off the Layers… Sexual Harassment 'Survival' Behaviours in Rural Australian Workplaces) examine the manifestations of sexual harassment in remote workplaces and the mechanisms employed by victims in response.

Chapter 10 (A New 'Coo-ee!': An Australian Bush Transformation) is a space for Saunders to make recommendations for the 're-invigoration of rural workplace culture' with a particular focus on re-education and response strategies from the top down.

As may be seen by labelling each chapter with the same words and phrases used to normalise harassing behaviour Saunders subtly demonstrates the kind of complicity that has led to the very issue she is researching.

Despite the enormous quantity of data the book has to offer, Saunders' triumph is her ability to siphon through the information and bring the most salient points to the reader's attention in a thought-provoking way. It is a credit to the author that a topic so often drenched in statistics preserves the personality and experiences of those who contributed to it. At times the book is hard to put down, at other times the weight of personal stories can make it hard to read at all. The responses of the interviewees can, at times, make for uncomfortable reading, but play an important part in giving a voice to those who have remained voiceless for so long. In Saunders' own words this book is truly a 'work of the heart'.

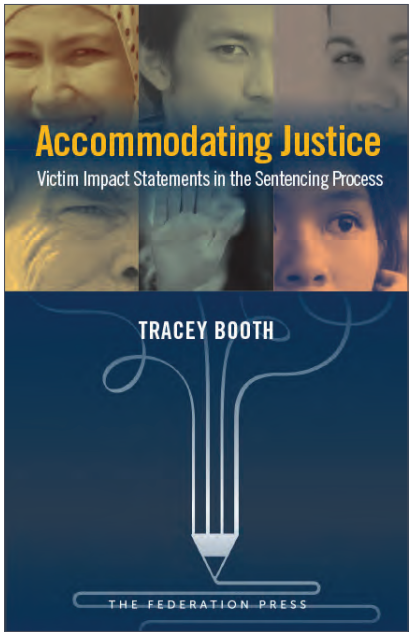
Endnotes

1. [2006] NSWADT 104
2. [2006] QADT 33
3. [2006] FMCA 976

Reviewed by Richard Bell

Accommodating Justice - Victim Impact Statements in the Sentencing Process

By Tracey Booth | The Federation Press | 2015



This book deals very comprehensively with an important topic in criminal law that still can cause confusion in its application: victim impact statements ('VIS').

Chapter 1 deals with the issues of who can submit a victim impact statement, what form it should take, what it should be about, and what is its purpose. The author makes clear that it is not simply a matter of considering the legislation to determine what VIS are, it is also a subjective, personal narrative. The author considers recent case law and legislation from around Australia.

Chapter 2 deals with the relevance of VIS to the determination of any penalty and in particular, the use of them as evidence in homicide matters where the consideration is the harm caused to 'family victims'. Once again the author considers case law around Australia. Chapter 3 is headed 'The Expressive Function of Victim Impact Statements' and includes the importance of victims having 'a voice' in the criminal justice process, and how VIS in sentencing proceedings might be considered to have restorative elements. Another interesting issue in this chapter is the therapeutic aspects of VIS, i.e., how the legal proceedings impact on a victim's welfare. Booth also describes how the expressive function of VIS are implemented in sentence hearings.

Chapter 4 deals with the theoretical incompatibility between VIS and the adversarial sentencing hearing, i.e., traditional views and processes are that victims are not 'technically' part of the sentencing proceedings, the focus should be on the offender and the excessive 'emotionality' of the victims does not assist in the sentencing process. The author details how VIS and emotionality can be managed in the court room.

Chapter 5 deals with how VIS are dealt with in a sentence hearing, i.e., the author details case law on the probative value and prejudicial nature of VIS, cross examining the makers of VIS, and what types of objections can be raised when such evidence is given. The author also details the interesting issue of how sentencing judges should be able to disregard overly emotional, unfairly prejudicial and non probative victim impact evidence for the purposes of sentencing. Once again the author details recent case law from around Australia in relation to this issue. The author also provides what the research shows in relation to the impact of VIS on penalties, including her own research. Interestingly, she says that in common law jurisdictions the research tends to show that VIS generally have little impact on sentencing outcomes although it seems that it is very difficult if not impossible to measure this. Her own research in NSW in relation to homicide offenders found it difficult to measure the impact of VIS on penalty where the courts adopt an intuitive approach to sentencing.

The last chapter, Chapter 6, deals with VIS from the perspective of the victims. Not surprisingly, the research shows that generally, crime victims have positive views about the value of VIS however the author details plenty of examples where the victims were left feeling frustrated and let down by the whole process. The author notes however that VIS '… can be empowering and cathartic and provide an important opportunity to be heard in the process...'(at page 137). She details the importance of 'speaking' and 'having a voice' and whether this is really constrained by the sentencing process. The author refers to many international studies to inform us.

In the Conclusion, she sums up numerous issues, including the fact that although VIS are a well established feature of contemporary sentence hearings, their '…bifurcated nature renders them contentious' (at page 162). There is no doubt that the subjective and 'real' aims of victims who come before our courts is not really matched in how the sentencing process evolves. She concludes by saying that 'It is the sentencing judge's task to provide a well managed space for victims to express their feelings publicly and treat those victims with respect in a manner that does not conflict with giving the offender's due process entitlements and the imposition of an appropriate penalty…judges should be provided with training and support as necessary.'

I recommend this book to all lawyers especially those who practise in criminal law.

Reviewed by Caroline Dobraszczyk

Bullfry and 'the storm before the calm'

(Being a personal reminiscence of Justice Ian Sheppard and a disquisition on a technical point of Equity practice)

Proust's remembrance of things past was triggered by the taste of cake and tea, Bullfry's by the terms of the Short Minutes granted the day before. In his absence (at an early lunch) his junior had ill-advisedly consented to the interim disposition of hard-fought interlocutory proceedings 'until further order'! Was Bullfry now *Brimauded*?

There is nothing more disturbing to the assumed equanimity of a callow, and thrusting, Equity junior than to be '*Brimauded*'[1] – that is the polite, colloquial way of describing the unfortunate forensic gaffe of consenting to an interlocutory order 'until further order', and thus not being able to reventilate the matter in the absence of new facts, until its final hearing, and ultimate determination.

The precise operation of *Brimaud v Honeysett*[2] has been explored by Ball J in *Abraham v Abraham*[3] and Brereton J in *Hancock v Rinehart*[4] which repay close reading by all those who practise in the 'whispering' jurisdiction.

It was a subject dear to Bullfry's heart because he once nearly suffered the ghastly fate of being *Brimauded* before Mr Justice Ian Sheppard, in circumstances set out more fully below.

Older practitioners will remember that great advocate and jurist, Justice Ian Sheppard – 'the storm before the calm'. Roddy Meagher gave a customarily picaresque insight into the origins of that sobriquet when speaking at Sir Laurence Street's farewell.[5]

> I first met Mr LW Street when I was an articled clerk. On behalf of an unfortunate plaintiff I had to brief the fashionable junior, Mr Ian Sheppard, in the District Court. The other side has secured Mr Street's services. The plaintiff's evidence in chief went as planned. Mr Street then began cross-examining in a very gentle voice. Within twenty minutes I noticed that he was saying to our client, 'Everything you said to Mr Sheppard was false, wasn't it?', and he said 'Certainly, Mr Street'. Then Mr Street said in a quiet voice, 'You are a fraud, aren't you?' and he said, 'Certainly, Mr Street'.
>
> Outside the Court, after our humiliation, there was a terrible scene. In those days Mr Sheppard seemed to suffer from a physical affliction which I can only described as seeming like having epileptic fits. He went bright purple in the face, his neck swelled like a lizard and he seemed to go into an ungovernable rage. *There was a storm before every calm.* He went into another of his fits and then said to our client, 'Why did you tell Mr Street the opposite of what you told us in conference?', and he received the reply, 'But Mr Street is so nice. I didn't want to upset him'.

Bullfry's own experience of 'the storm before the calm' in a *Brimaud* context was as follows. He had foolishly allowed solicitors for the oil company to appear at the first return of an injunction involving a petrol retail licensing agreement under the Commonwealth Act, and a newly appointed federal judge (formerly a solicitor) granted the plaintiffs an injunction, 'until further order' and stood the matter over until the next Monday.

When a young Bullfry then appeared before Sheppard J on the return day the full force of the storm before the calm hit him – he was told that the form of the order meant that he was now shut out until the final hearing unless there was some change in circumstance – and there was none. Slowly, slowly, tossed upon stormy seas, Bullfry managed to point out with studied politeness that the previous tribunal was new to the granting of injunctions, and that an examination of his other orders made it clear that the entire regime was only interlocutory and designed to hold the fort over a weekend. The calm descended, the matter continued, to what result Bullfry no longer recalled.

It was a subject dear to Bullfry's heart because he once nearly suffered the ghastly fate of being Brimauded before Mr Justice Ian Sheppard...

Bullfry had come across his Honour much earlier in his career when instructing the Crown prosecutor in Canberra in a most serious matter involving co-defendants who had broken into a home in dead of night and tied up and wounded the occupants with a view to gaining access to their business premises.

One of the defendants turned Queen's Evidence, and Sheppard J came down to Canberra to clear the Assizes before one of Canberra's notoriously soft juries. The remaining accused asserted, with some justification, that he had been assaulted by the Victorian Armed Robbery Squad into whose tender hands he had fallen when arrested in Melbourne, and before his extradition to Canberra. As a result , so he said, his coerced

confession was inadmissible. He gave a dock statement to that effect. Eventually, after a protracted hearing the jury acquitted him.

The result surprised Sheppard J. He observed that he could not understand the verdict of the jury at all and that they would all be required for the panel for the next day's trials on the morrow. The question of the disposition of the accused then arose.

With the jury still sitting and listening, Sheppard J innocently inquired whether or not the accused might be released. Mr Crown informed the court that that would not be possible. Oh – why was that? He was wanted on a drug charge in Adelaide, he was wanted for extradition to New Zealand for armed robbery, there were outstanding warrants in Queensland.

Was anything known of him? The 'priors' sheet for a man of only 24 almost reached the floor when it was unfolded. Bullfry turned and looked at the jury who all appeared stupefied with this information and sat agog like clowns in the Easter Show side-show game. (The next day every single 'tainted' juror was struck).

Bullfry turned and looked at the jury who all appeared stupefied with this information and sat agog like clowns in the Easter Show side-show game. (The next day every single 'tainted' juror was struck).

Bullfry had last heard Sheppard J at a reader's dinner many years ago – there he had told the story of his commencing new at the bar and receiving a call from his senior Equity opponent who asked if he might speak to him. The opponent arrived at his chambers and said, 'I am afraid that your summons is defectively drafted – this is the way you should plead it' and handed over a polished draft! He urged on his listeners to maintain the same level of collegiality and camaraderie. Bullfry last saw him valiantly walking up Phillip Street with his affliction clearly upon him.

But what is the meaning of 'until further order'? In *Abraham v Abraham* the defendants sought a peremptory order pursuant to section 74MA[6] of the *Real Property Act 1900* to compel the plaintiff to withdraw a caveat lodged over property where the plaintiff had been residing for many years. The dispute was between siblings variously contending that possession should be restored to the first defendant, the registered proprietor and youngest brother of the plaintiff, or that it should be sold and the resulting fund placed in court. As part of the dispute, the plaintiff had refused to vacate the premises, and had removed a 'For Sale' sign on them, and changed the locks.

The opponent arrived at his chambers and said, 'I am afraid that your summons is defectively drafted – this is the way you should plead it' and handed over a polished draft!

An order had been made granting the plaintiff leave to lodge a fresh caveat (after the first had lapsed) and ordering an injunction against the first defendant 'until further order' from seeking to eject the plaintiff. That order was made by consent with the usual undertaking as to damages.[7] The first defendant had continued to defray the mortgage but was relevantly 'under water' when his outgoings, including the mortgage, were taken into account. Time had passed and the first defendant feared that the undertaking as to damages would in the event of his success prove worthless because of the asset position of the plaintiff.

But were the defendants caught because of the 'until further order' position? As McLelland J had noted in the classic decision,[8] the practice had developed of not varying an interlocutory regime after a substantive and contested hearing unless there has been a material change in the circumstances, or fresh evidence has come to light'.

But what if, as here, the original orders had been made by consent? Does a consent order operate as an agreement between the parties so as to prevent any subsequent variation? As Lord Denning MR had observed in *Siebe Gorman & Co Ltd v Pneupac Ltd*[9] , the concept of an order 'by consent' is ambiguous. On the one hand it may evidence a real contract between the parties – if that is so, then the court will only interfere with it on the same bases as it will with any other contract. Or it may connote 'without objection', in which case it can be altered or varied as any other order not made by consent.

After a detailed analysis of the competing authority and arguments, Ball J concluded[10] that:

> whether it is in the interest of justice to vary consent orders depends in large measure on what was in the mutual contemplation of the parties at the time the original orders were made. Where no compromise is involved and a party simply consents to interlocutory orders, it can be more readily be inferred that that consent was not intended to operate for an indefinite period of time.

In *Hancock v Rhinehart*[11] Brereton J noted that the 'rule' in *Brimaud* flows from the fact 'that it would be productive of great injustice and waste of time and resources if there were no limit on the power of a party to have any interlocutory application or order relitigated at will, and held that the ordinary rule of practice was that an application to set aside, vary or discharge an interlocutory order must be founded on a material change of circumstances since the original application was heard, or the discovery of new material which could not reasonably have been put before the court on the hearing of the original application'.

Much will depend upon the particular context but if, as in *Hancock* an initial application to set aside a notice to produce has been litigated unsuccessfully, the court will be astute to prevent what is, in effect, a 'second bite at the cherry' by not permitting that party subsequently to narrow the issues in the main proceeding in order to blunt the impact of the unsuccessful application. To do so would controvert the expectation that the parties would put forward their best case on the first hearing.

Endnotes

1. *Brimaud v Honeysett Instant Print Pty Ltd* (1988) 217 ALR 44.
2. [2012] NSWSC 254.
3. [2015] NSWSC 1311.
4. The occasion is recorded in *Bar News*, Autumn 1989 at page 19.
5. Such an application must meet the usual standard for the grant of an interlocutory injunction: *Buchanan v Crown and Gleeson Business Finance Pty Ltd* [2008] NSWSC 1465 at [6] per Brereton J; *Lew v Bluescope Distribution Pty Ltd* [2010] NSWSC 794 at [5] per Pembroke J; *Bayblu Holding Pty Ltd v Capital Finance Australia Ltd* [2011] NSWSC 39 at [19] per Campbell JA all cited by Ball J in Abraham at [8]. In the case of an application under section 74MA, it is the caveator who bears the onus of proving that there is a serious question to be tried, and that the balance of convenience favours the continuation of the caveat. See, generally, L Aitken,''Many shabby manoeuvres' – the use and abuse of caveats in theory and practice' (2005) 26 Aust BR 205; L Aitken, 'Current issues with caveats – a pan-Australian conspectus' (2010) 84 ALJ 22
6. This factor is highly relevant: *Szanto v Bainton* [2011] NSWSC 278 at [3] per White J.
7. (1988) 217 ALR 44 at 46.
8. [1982] 1 LWLR 185 at 189.
9. At [17].
10. [2015] NSWSC 1311 at [7].

The Great Bar Boat Race

By Adrian Gruzman

For the past 32 years, the first Monday after the end of Michaelmas term is marked by the Great Bar Boat Race which was inaugurated as a competition between members of the Bench and Bar on Sydney harbour.

It was decided two years ago to extend a challenge to the solicitors of NSW. Regrettably, in 2015, they took two of the first three places in the race on corrected time.

The day was met with a reasonable south east wind, and fine weather. The course took yachts from Point Piper, around a naval buoy, around shark Island, up to Manly and ending with festivities on Store Beach. The conditions made for fast racing with elapsed times between an hour and three minutes, and an hour and 25 minutes. The first two yachts over the finish line were 20 seconds apart, with line honours going to *Next* (solicitors). First on corrected time was *Wine Dark Sea* (NSW Bar).

This event is a great way to end the year, and an opportunity to engage with members of the bench, the bar, and solicitors. Yachts may be hired for the event, and we hope to have more than 20 entrants in 2016. A number of entrants didn't make it to the start line in 2015 because of late commitments.

The date for the next race is Monday, 19 December 2016. We would welcome suggestions for improvement to this annual event to increase participation, and interaction between various branches of the legal profession. E.g., should the race end up back at, say, RANSA for lunch and prize-giving, or remain at Store Beach?

Line honours	Sail number	Yacht	Skipper	Time	Corrected place
2	6188	*Wine-Dark Sea*	David Talintyre	12:15:06	1
1	6081	*Next*	Matthew Fisher (Solicitor)	12:16:46	2
3	64	*Fortune of War*	Andrew Rowe (Solicitor)	12:19:32	3
5	3302	*Blind Justice*	Judge Mahony	12:21:37	4
4	2153	*Fiction*	Michael Blaxell (solicitor)	2:22:04	5
6	4751	*Following Sea*	Richard Petrie	12:22:45	6
7	AUS158	*Jayded*	Gordon McGrath	12:24:14	7
9	SM226	*Red William*	James Kearney	12:26:56	8
8	6452	*Irish*	Scot Wheelhouse SC	12:27:53	9
10	E226	*Pilgrim*	Brad Hughes SC	DNF	10

Bench & Bar v Solicitors Golf Match Report 2016

Dennis Flaherty

Victorious again! For the second consecutive year the Bench & Bar golfing team (again led superbly by Justice Robert Hulme) was successful in defeating the solicitors in the annual Bench & Bar v Solicitors at Manly golf course on 28 January last. But only just. Of the 11 games played the Bench & Bar were victors in six and the solicitors five.

The result means that the mace of the late Sir Leslie Herron (suitably engraved to record the victory) will remain in the chambers of Justice Hulme (or perhaps the Bar Association rooms) for another year.

Congratulations to all members of the Bench and Bar who participated (whether victorious in their individual games or not). As usual a wonderful dinner at the clubhouse ensued after the event to the obvious delight of all present.

Is a threepeat possible? We will find out in January 2017. Until then happy golfing.

Lady Bradman Cup Cricket

By W G Grace

There have been many memorable matches in this annual fixture between Eleven Wentworth (trading as Wentworth Wombats) and Edmund Barton Chambers over the last 26 years but perhaps none quite so memorable as the match held on Sunday, 17 April 2016 at the picturesque Bradman Oval. In scenes reminiscent of the tied tests at the Gabba in 1961 and in Madras in 1986, Richard Scruby (on loan from Tenth Floor Chambers and Vanessa Whittaker) punched a ball through covers and the despairing dive of the redoubtable Thos Hodgson for two to tie the scores on the final ball of the match.

Batting first, Edmund Barton had rattled along to a respectable total of 159 from 35 overs which, on a slightly wet outfield, was probably worth 180. The Wombat's bowling attack was led by red-headed, fire brand, Stephen Free, supplemented by the efforts of Brendan Lim (an emerging talent), the increasingly wily Greenwood SC, the masterly leg-spin of Durack SC, the steady, slow medium of Stephen Climpson and Malcolm Holmes QC's usual mixed bag of tricks. But perhaps the stars of Wombat's attack were two junior wombats in the shape of Henry

Pike and Tom Bell Bird, the former securing an early wicket with a spiraling catch to Pike SC at backward point and the latter securing the prized scalp of Foord as well as that of Jackman (Ian, not Hugh), both 'ring-ins' for Edmund Barton.

Behind the stumps for the Wombats was the resplendent John Ireland QC whose flexibility and reflexes continue to astonish. His son, Oliver, playing for Edmund Barton, was to give Hodgson much needed reliability when they took the field.

A memorable lunch was held between innings inside the Bradman Museum. Hodgson's initiative of providing copious quantities of white and red wine at lunch appeared to have backfired as Bell SC and Pike SC put on 60 for the first wicket with the former falling for 29 and the latter reaching a retiring score of 30. Scruby contributed solidly including aforementioned last over glory whilst Greenwood SC and the two junior tyros got the scoreboard moving during the latter half of the innings. Free displayed a public lawyer's measured dissent on being given out stumped but past good behavior prevented any fine being imposed.

It was an excellent day out and, as we say every year, 'Cricket was the winner'.