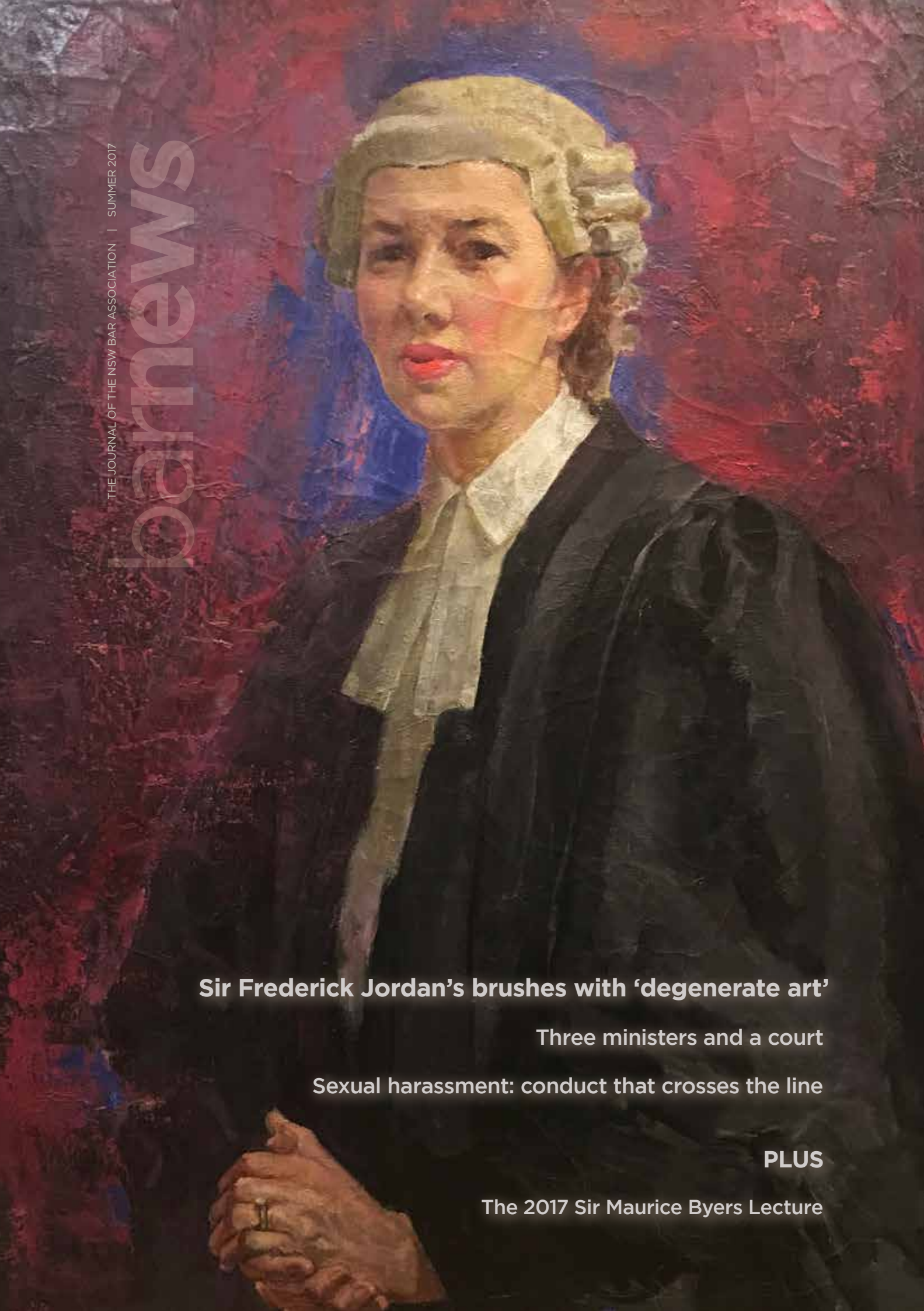
barnews
THE JOURNAL OF THE NSW BAR ASSOCIATION | SUMMER 2017



Sir Frederick Jordan's brushes with 'degenerate art'

Three ministers and a court

Sexual harassment: conduct that crosses the line

PLUS

The 2017 Sir Maurice Byers Lecture

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Contributions are welcome and should be addressed to the editor:

Ingmar Taylor SC
Greenway Chambers
L10 99 Elizabeth Street
Sydney 2000
DX 165 Sydney

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

Cover: Portrait of Ann Bernard, by Mary Edwards. Photo: New South Wales Bar Association.

Bar News was first published in the winter of 1985, edited by Ruth McColl. Its advent was welcomed by then president, Murray Gleeson, in a column titled 'What the Bar Needs'. He commenced by noting a plan to replace the carpet in the Bar Common Room and went on:

> There is reason to believe that funds for such lavish expenditure will soon be available. However, the answer to all our problems does not seem to lie in interior decoration. If, however, an appeal is directed to the mind rather than to the senses we may achieve a result. That is the idea of this publication.
>
> It is hoped it will provide, on a different level, some of the facilities of the Common Room: a medium for scandalous information; an occasion of privilege for defamation; and a forum for ideas about the Bar.
>
> What the Bar needs is a good free journal. The people who have participated in this enterprise are to be congratulated. Its success could be important to us all.

Under Ruth McColl's long-standing editorship *Bar News* was indeed a great success, becoming the journal of record of the NSW Bar, by the NSW Bar.

Its reputation was burnished and enhanced by its subsequent editors (in order) Justin Gleeson, Andrew Bell and most recently Jeremy Stoljar. Under their leadership *Bar News* established itself as one of the great institutions of the bar.

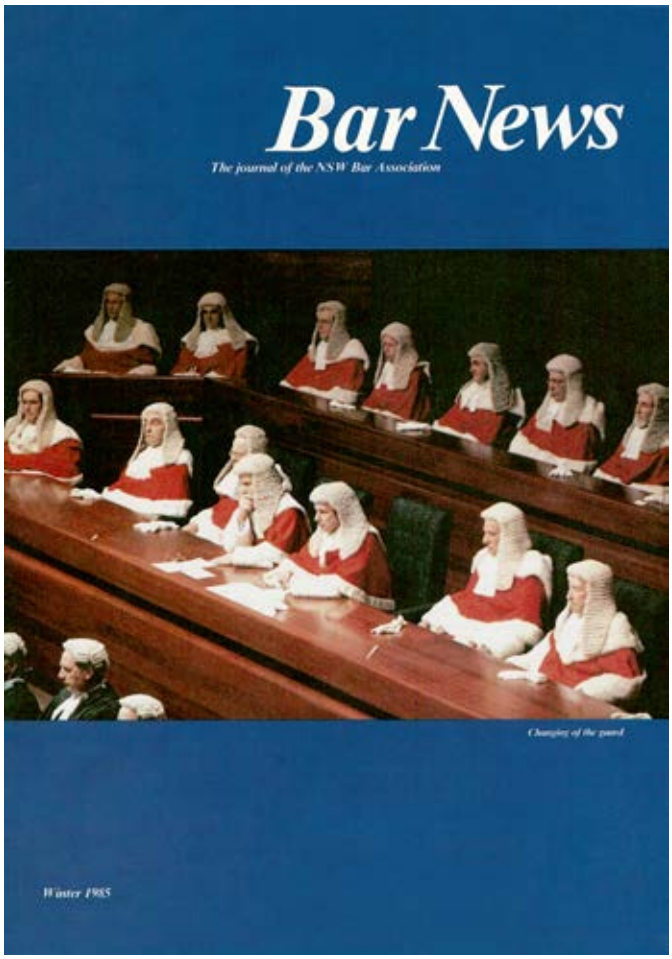
As the incoming editor I intend to carry on where the previous editors left off, encouraging legal writing and analysis of the highest order. I also want to return *Bar News* to its roots, with a renewed focus on the current state of the New South Wales Bar and its increasingly diverse membership. As the journal of record for the NSW Bar, *Bar News* should record what the bar was, what it is, and perhaps most importantly as a forum of ideas, what it can be.

As this is the summer edition, there is a focus on some great reading to enjoy over the holidays, including some fascinating book reviews and excerpts from two recent books.

We are pleased to publish the full text of Chief Justice James Allsop's brilliant 2017 Sir Maurice Byers Lecture. In thoughtful and beautiful prose, Justice Allsop examines the concept of what it means for the law to reflect human values, by reference to a wide variety of areas of law.

Arthur Moses has written an excellent president's column examining the importance of adequate representation for defendants in criminal proceedings, and the impact of inadequate funding of legal aid in NSW.

Other legal analysis includes an article of great practical value by Mark Brabazon, the chair of the Bar Association's Costs Committee, which examines when cancellation fees can be charged, and when perhaps they should not.



Anthony Cheshire returns to consider again when criticism of the judiciary amounts to contempt, in a fascinating examination what happened when three federal government ministers described the Victorian Court of Appeal as 'divorced from reality' and 'hard-left activist judges'.

It is important to look back at how the bar has changed, for worse and for better. In this edition there is a wonderfully entertaining piece by Keith Mason that examines the intersection of art and the bar, principally between 1935 and 1949 when Sir Frederick Jordan was chief justice (nicknamed 'Frigidaire Freddie', he was said to give his wife a cold whenever he got into bed). The article reveals how views that are now rightly regarded as repugnant were, at the very least, tolerated by leading members of society.

Kate Eastman, Sophie Callan and Aditi Rao examine another form of ugly conduct at the bar, in their thoughtful article on sexual harassment.

Each of us can no doubt recount observing or experiencing sexual misconduct at work – for many it involves witnessing conduct directed at a woman in our presence.

I recall my first meeting with a member of the New South Wales Bar. It was 1989. I was one of a number of College of Law classmates who had gathered at the end of the course to congratulate one of our fellow graduates who, unlike us, had made the brave decision to go straight to the bar. It was a Friday afternoon, and as we gathered in her tiny room to celebrate her new career we were unexpectedly joined by a much older member of her new floor. He had heard some noise and wandered to the doorway. He looked around and announced to no-one in particular in a booming and slurred voice 'Geez, you've got big tits, haven't you?'. Finding that his amusing repartee was not engendering the usual positive reaction, he wandered off. My colleague left the bar within 18 months.

It is hardly Harvey Weinstein territory, but as the article by Kate Eastman, Sophie Callan and Aditi Rao records, conduct like that, and worse, has been consistently reported at the New South Wales Bar. Their excellent piece, subtitled '… the bar cannot be the last bastion where sexual harassment and assault is countenanced in the workplace', examines the consequences for the bar generally, and perpetrators in particular, of engaging in acts of sexual harassment.

An important aspect of *Bar News* is to publish pieces that depict current life at the NSW Bar, in good times and bad. In this edition you will find two pieces by Kylie Nomchong that record both ends of that spectrum. There is a short note that records the long-standing successful bench and bar lunches that Kylie has organised for many years. There is also a serious piece that discusses the concept

of 'vicarious trauma', which occurs when barristers in the course of their practice are exposed to trauma suffered by others. Kylie discusses ways that barristers can deal with the feelings of hopelessness and despair that can be experienced after doing such work.

The Bar Association is active in many areas through its committees. It is important that *Bar News* record their activities. To that end this edition starts by including reports from the Young Barristers' Committee and the Technology Committee.

WHAT THE BAR NEEDS

In the early part of this century an American Vice-President, Thomas Riley Marshall, rescued himself from the obscurity that usually overtakes holders of that office by observing: "What this country needs is a good five-cent cigar."

In one respect time has not dealt kindly with his proposition. Changes in the value of money have produced the result that a five-cent cigar would today be a disgusting article, quite unlikely to be made of tobacco.

Worse still, the recreational practice to which he referred is now widely regarded as acceptable only when indulged in by consenting adults in private. The ash-tray is as useful in polite company as the cuspidor.

Nevertheless, the homespun wisdom underlying the thought is to be admired. It is based on the recognition that to complicated problems there are often simple solution, and that the remedy to public difficulties may be found at a more private level.

The problems of the bar in 1985 are more than sufficient to tax us. We know well enough what we do not need.

To identify our enemies and declare them anathema would be emotionally gratifying, but politically unprofitable. A more positive solution may be to concentrate upon a revival of our corporate spirit.

A new carpet in the Bar Common Room (tastefully furnished in the style of former President McGregor, indulgently elaborated by Meagher QC, and now in a state of aesthetic collapse) might draw more members to a central meeting place.

There is reason to believe that funds for such lavish expenditure will soon be available. However, the answer to all our problems does not seem to lie in interior decoration.

If, however, an appeal is directed to the mind rather than to the senses we may achieve a result. That is the idea of this publication.

It is hoped that it will provide, on a different level, some of the facilities of the Common Room: a medium for scandalous information; an occasion of privilege for defamation; and a forum for ideas about the Bar.

What the Bar needs if a good free journal. The people who have participated in this enterprise are to be congratulated. Its success could be important to us all.

A.M. GLEESON

Bar News, Winter 1985 — 3

There are few things that will have had and will continue to have a more significant effect on practice at the bar than the advent of technology. It was ever so. In the first edition of *Bar News* in 1985 Chief Justice Sir Laurence Street wrote an article titled 'Computerisation: our servant not our master' in which he said: 'there is room for justifiable fears that the day-to-day administration, and even more importantly the development, of the law may be crushed under too great a weight and proliferation of decided cases being fed into the data base'.

In the second edition of *Bar News* R H Macready wrote a lengthy piece titled 'Computerised legal data bases; Something useful, or a gimmick?' which concluded by opining that computerised data bases 'may well become a useful tool as a different means of researching topics' but 'the likelihood of them supplanting existing data bases is somewhat remote'.

In a more positive take on technology and its effect on the bar, in this edition Ting Lim discusses a number of changes that the Bar Association's new Technology Committee is working on, while I have written an article on using a tablet in lieu of hardcopy briefs.

Bar News will continue to be the journal of record of the NSW Bar. To that end it is appropriate to record our 46 newest members who graduated from the Bar Practice Course in February, including 21 women. It is also great to include a photo of the October 2017 silks.

As noted, as this is the summer edition there is some great light reading as well. Richard Beasley and Justice Michael Pembroke were both good enough to allow us to publish extensive excerpts from their recent books.

Geoffrey Watson has penned the amusing and true tale of Lord Trevethin, lord chief justice of England, who learnt about his resignation when he read the announcement in the Times.

Kevin Tang gives us the history of the Star Chamber, explaining why that expression came to mean the exercise of power without regard for personal rights or liberties.

The Furies continue to provide agony-aunt-like advice to the worried barrister, while our new column Advocatus, questions why readers are encouraged to charge far below commercial rates.

There are some interesting book reviews, including Justice Robert Beech-Jones' review of *The Trials of Justice Murphy* by Stephen Walmsley, and Carolyn Dobraszczyk's review of *The Charles Manson Murders* by Simon Davis, a book of particular interest perhaps as Manson died as this edition was going to print.

I am keen for *Bar News* to be both accessible and enjoyable to read and to that end we have altered the style and started to include more illustrations, cartoons and photographs. Illustrators and photographers of the bar are encouraged to contribute to future editions.

And while I am calling for volunteers, *Bar News* is of course no more than the sum of its contributors. Do not feel that you have to be a member of the Bar News Committee or an invitee to be able to contribute. If there is an issue that you think you can express elegantly, amusingly or poignantly (or better still, all three) drop me a line. At its essence *Bar News* should be the home of brilliant writing, and while one might not discern this from the content of some of our submissions, I am confident there is no better place to find brilliant writers than at the NSW Bar – so take a few hours off and write something interesting.

Finally, I would like to thank a number of people who have assisted me take my first steps as editor. First, Jeremy Stoljar, who was such a wonderful editor, and who was good enough to spend considerable time assisting me to understand what is needed. Second, I give thanks to the members of my committee who have been a great source of ideas, a solid sounding board and who have individually greatly contributed to this edition. Finally, I would like to thank Chris Winslow of the Bar Association who, working all hours, has patiently steered this edition to the printer.

Legal aid in crisis: a real and present danger to fair trials

By Arthur Moses SC
President

The importance, or indeed necessity, of adequate representation to achieve the objectives of ensuring a fair trial to a defendant in criminal proceedings, including the smooth and cost-effective operation of the criminal justice system, has been recognised by judges of great experience, both in Australia and abroad. Regrettably, it would seem most Australian politicians show little interest in this topic except when we represent them in a criminal trial or they are facing corruption allegations.

It is troubling to see how little has been done, and is being done, to provide adequate representation to members of the community. I want to address two topics in this President's column because we are at a critical stage of discussions with Legal Aid NSW and the NSW attorney general, and if we cannot reach an agreement on proper rates of pay for members of the New South Wales Bar undertaking work in the criminal justice system, then we may need to consider other options to resolve this issue.

- First, the key decisions in Australia and the United States, in which there has been judicial recognition of the importance of affording representation for defendants in criminal proceedings, are examined and compared; and
- Secondly, the present unsatisfactory state of underfunding in New South Wales, and the consequences of such underfunding, are considered.

Finally, I want to note the commendable efforts of members of the Bar Association who provide, on a voluntary basis, assistance to defendants in the criminal justice system, who would otherwise be unrepresented.

Recognition of the importance of adequate representation: *Dietrich* and *Gideon*

Judicial recognition of the importance of adequate representation finds expression in the seminal decisions of *Dietrich v R* (1992) 177 CLR 292 in Australia, and *Gideon v Wainwright*, 372 U.S. 335 (1963) in the United States. As will be seen from a comparison of the two decisions, there is a significant difference between the respective promises they offer to defendants in criminal proceedings.

In general terms, the principle for which *Dietrich* stands is that there is no common law right to legal representation at public expense in criminal proceedings, but that courts can stay proceedings where an accused is unrepresented if not doing so will result in an unfair trial.

The facts of the case are well known and are conveniently summarised in the recent publication, *Leading cases in Australian Law*.[1]

> Olaf Dietrich was charged before the County Court of Victoria with multiple charges under the *Customs Act 1901* (Cth). Dietrich attempted on multiple occasions to secure legal representation, first by applying to the Legal Aid Commission of Victoria; then, when that was refused, seeking a review of that refusal; then, by making an application under s 69(3) of the *Judiciary Act 1903* (Cth) to have counsel appointed by a judge; and finally, by applying for legal assistance from the Commonwealth Minister for Justice and the attorney-general. These attempts all failed.

Before the trial proper commenced, the applicant made an informal application for an adjournment. As the following exchange shows, this was peremptorily refused:[2]

> His Honour: I want you to understand this, Mr Dietrich — if you will listen to me — that I have no power to give you legal representation.
>
> Accused: You have the power to adjourn the matter, sir.
>
> His Honour: I don't propose to adjourn the matter. The matter is an alleged offence, which occurred the year before last, and it is desirable that the matter proceed to trial.
>
> Accused: Desire by whose side?
>
> His Honour: Desirable to the community.
>
> Accused: The community has got no interest in it. If the community is aware that they're putting people in front of court without representation, the community would be aghast.
>
> His Honour: Yes. Well, I don't propose to engage in this type of matter; this debate can get us nowhere.

As noted in the judgment of Mason CJ and McHugh J, on numerous occasions, the trial judge reiterated his lack of power to appoint counsel to represent the applicant, but on no other occasion did he appear to give any consideration to exercising his discretion to adjourn the matter on the ground that there was a real likelihood that the applicant would not receive a fair trial.

After a 40-day trial, Dietrich was ultimately convicted of one count of importing a traffickable quantity of heroin into Australia in contravention of s 233B(1)(b) of the *Customs Act 1901* (Cth).

Dietrich appealed, arguing that the failure of the trial judge to appoint counsel constituted a miscarriage of justice. Leave to appeal was refused by the Victorian Court of Criminal Appeal, and it was from that order refusing leave that Dietrich appealed to the High Court.

The High Court allowed the appeal 5:2, although it did so on the basis of an alternative ground advanced by Dietrich, which was

that the trial judge had a discretion to stay or adjourn the trial in order to give Dietrich further opportunity to seek legal counsel, and that in the absence of exceptional circumstances, that discretion should have been exercised in Dietrich's favour. Dietrich's primary ground of appeal, that he was denied the right to be provided with counsel at public expense, was held to be unfounded, with the court noting that the common law origins from which it was said to derive related only to a right to *retain* counsel, not to have counsel provided by the state.

Key statements of principle emerging from the case, and for which the case is often cited, come from a passage in the joint judgment of Mason CJ and McHugh J (at 311):

> … it should be accepted that Australian law does not recognise that an indigent accused on trial for a serious criminal offence has a right to the provision of counsel at public expense. Instead, Australian law acknowledges that an accused has the right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation may mean that an accused is unable to receive, or did not receive, a fair trial …
>
> A trial judge faced with an application for an adjournment or a stay by an unrepresented accused is therefore not bound to accede to the application in order that representation can be secured; *a fortiori*, the judge is not required to appoint counsel. The decision whether to grant an adjournment or a stay is to be made in the exercise of the trial judge's discretion, by asking whether the trial is likely to be unfair if the accused is forced on unrepresented. For our part, the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional cases only. In all other cases of serious crimes, the remedy of an adjournment should be granted in order that representation can be obtained …

The position on this topic in the US is different. There, a defendant in criminal proceedings is, to put it shortly, afforded a better promise. In the US, the case of *Gideon v Wainwright* has been described by some as 'the case that guaranteed the right to counsel in every criminal trial in the United States'.[3]

The story behind how the matter found its way to the US Supreme Court is intriguing.

Between midnight and 8:00 am on 3 June 1961, a burglary occurred at the Bay Harbor Pool Room in Panama City, Florida. An unknown person broke a door, smashed a cigarette machine and a record player, and stole money from a cash register. Later that day, a witness reported that he had seen Clarence Earl Gideon in the poolroom at around 5:30am that morning, leaving with a wine bottle and money in his pockets. Based on this accusation, the police arrested Gideon and charged him with breaking and entering with intent to commit petty larceny.

Gideon appeared in court alone as he was too poor to afford counsel. It is said that the following exchange took place in the court:[4]

> The COURT: Mr. Gideon, I am sorry, but I cannot appoint counsel to represent you in this case. Under the laws of the State of Florida, the only time the court can appoint counsel to represent a defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint counsel to defend you in this case.
>
> GIDEON: The United States Supreme Court says I am entitled to be represented by counsel.

The Florida court declined to appoint counsel for Gideon. As a result, he was forced to act as his own counsel and conduct his own defence in court, advocating for his own innocence in the case. At the conclusion of the trial the jury returned a guilty verdict. The court sentenced Gideon to serve five years in the state prison.

From the cell at Florida State Prison, Gideon prepared a handwritten application[5], appealing to the United States Supreme Court in a suit against the secretary of the Florida Department of Corrections, HG Cochran. Cochran later retired and was replaced with Louie L. Wainwright before the case was heard by the Supreme Court. Gideon argued in his appeal that he had been denied counsel and, therefore, his Sixth Amendment rights, as applied to the states by the Fourteenth Amendment, had been violated.

The Supreme Court assigned Gideon a prominent Washington, DC, attorney, future Supreme Court justice Abe Fortas of the law firm Arnold, Fortas & Porter.

The Supreme Court's decision was announced on 18 March 1963, and delivered by Justice Hugo Black. The decision was announced as unanimous in favour of Gideon. Three concurring opinions were written by Justices Clark, Douglas and Harlan.

The earlier Supreme Court decision of *Betts v Brady*, 316 U.S. 455 (1942) had earlier held that, unless certain circumstances were present, such as illiteracy of the defendant, or an especially complicated case, there was no need for a court-appointed attorney in state court criminal proceedings. *Betts* had thus provided selective application of the Sixth Amendment right to counsel to the states, depending on the circumstances, as the Sixth Amendment had only been held binding in federal cases. *Gideon v Wainwright* overruled *Betts v Brady*, instead holding that the assistance of counsel, if desired by a defendant who could not afford to hire counsel, was a fundamental right under the United States Constitution, binding on the states, and essential for a fair trial and due process of law regardless of the circumstances of the case.

Justice Clark's concurring opinion stated that the Sixth Amendment to the Constitution does not distinguish between capital and non-capital cases, so legal counsel must be provided for an indigent defendant in all cases. Justice Harlan's concurring opinion stated that the mere existence of a serious criminal charge in itself constituted special circumstances requiring the services of counsel at trial.

The Supreme Court remanded the case to the Supreme Court of Florida for further action not inconsistent with the Supreme Court's decision. Ultimately, Gideon was acquitted.

During a recent panel discussion in the US in 2017 about *Gideon v Wainwright*, which was attended by several judicial officers[6], Judge Timothy Dyk observed that '[a]nybody who has practised, really, over the last fifty years just assumes that this is the framework that exists and should always exist. You don't hear people questioning the right to counsel anymore.'

At the same panel discussion, Judge James Boasberg observed that the impact of the decision was so immediate that 'by 1975 … the court requires that before someone can proceed without a lawyer there must be a knowing, intelligent, and voluntary waiver'.

It is to be hoped that in New South Wales, and indeed Australia more generally, we can move towards a position closer to that which is established by the United States by *Gideon*. However, as will now be seen, there is a significant impediment to the achievement of this objective, in New South Wales and other states in Australia, including Victoria.

Lack of funding of legal aid in NSW and its consequences for the bar and the justice system

There are real and prescient issues confronting counsel, particularly junior counsel at the private bar in New South Wales who accept briefs to appear in District and Supreme Court trials when funded by Legal Aid NSW. Day rates of $987 plus GST for junior counsel have remained unchanged since May 2007, save that the day rate in the Supreme Court was adjusted from $1,142 plus GST to $1,150 plus GST upon the commencement of the 'Complex Crime Panel' for barristers during the period under consideration – that is, an increase of $8 per day, or expressed as a percentage – 0.7 per cent. In contrast, the NSW attorney general's rate for junior counsel appearing for the state in civil cases, as at

1 August 2017, is $285 per hour, with a daily maximum of $2,140 plus GST.

The cumulative level of inflation (Consumer Price Index) from financial year ending 30 June 2007 to financial year ending 30 June 2017 is 26.4 per cent with an annual average increase in inflation of 2.4 per cent.

Thus, in real terms (i.e. taking into account the effect of inflation), there has been a decrease in pay, to an extent which is unacceptable and can no longer be tolerated by the New South Wales Bar. Many of our members (including young and newly admitted barristers) who undertake legal aid work are doing stressful trials in difficult matters including historical sexual assault cases with no proper support. This places enormous pressure on them and their families. There should be no question that barristers should be adequately paid for undertaking such important work in the justice system let alone their remuneration being decreased.

The consequences of inadequate pay to barristers undertaking legal aid work has been the subject of a detailed study undertaken by the Victorian Bar and Pricewaterhouse-Coopers in April 2008. The key results of the study are troubling, but unsurprising.

It requires only an application of common sense, and little foresight, to identify the serious consequences that will flow from an under-funded, and therefore handicapped, scheme that is otherwise intended to provide representation for defendants in criminal proceedings. These have been referred to in the Pricewaterhouse Coopers study, with reference to Victoria, and include the following:

a. fees paid by Victoria Legal Aid to barristers in criminal cases fall significantly below (i) increases in CPI, (ii) remuneration paid by prosecuting agencies to police prosecutors and Crown prosecutors, and (iii) remuneration paid to government and private lawyers in other areas of law;

b. Victoria Legal Aid funded barristers' real take home pay is the lowest compared to similar professions, at the most 60 per cent of the mean salary, at each experience level;

c. Victoria Legal Aid funded barristers' real take home pay has fallen by 20-32 per cent over the past 10-15 years while other professions have increased 15 per cent during this period;

d. during 2001-02, Australian barristers undertook 289,100 hours of legal aid work at reduced or no fees, personally bearing part of the cost of providing access to justice. Practitioners who are currently subsidising the criminal justice system by offering their time at a significant discount to market, may withdraw their support once they feel that their contribution outweighs any potential benefit that they may be receiving;

e. barristers who undertake 90 per cent of more criminal work have been declining in number over the last three years (i.e. leading up to 2008);

f. deficiencies or unevenness in access to justice result in less than socially optimal outcomes and serves to perpetuate social disparity; and

g. the level of sufficiently experienced barristers taking up causes funded by legal aid will continue to decline.

Other flow-on effects, in at least some cases, will include incorrect incarceration, a loss of faith in the justice system, increases in appeals, and aborted trial and retrials. Many criminal cases require a high level of specialisation, experience and commitment and thus a public defence system needs to be able to attract and retain the appropriately skilled barristers to perform this work. Without this the result is an inefficient allocation of resources and sub-optimal justice outcomes that do not align with the principles of a fair and high quality justice system. Over-stretched, inexperienced or under-prepared barristers inflict a significant social cost by decreasing the efficiency and effectiveness of the court systems.

One of the conclusions reached in the PriceWaterhouseCoopers study is that the criminal justice system needs appropriate funding to attract and retain criminal barristers with the necessary commitment and experience.

The results of the review speak with equal force as to the troubling situation and inevitable consequences for the criminal justice system in New South Wales, which has worsened in recent years. Significant numbers of senior and experienced counsel undertake legal aid work in order to ensure that the justice system continues to operate. However, the government can no longer assume that the New South Wales Bar will continue to subsidise the justice system at great personal and financial cost.

The level of delay experienced in the criminal justice system in New South Wales is disturbing. As at July 2016, the District Court Criminal caseload was 2,042 criminal trials and 1,195 sentencing matters outstanding.[7]

In May 2017, BOCSAR released its *NSW Criminal Courts Statistics 2016* report.[8] The key findings are as follows:

a. between 2012 and 2016, the median delay in the NSW District Court between committal for trial and finalisation rose by 56 per cent from 243 days to 378 days; and

b. the median time between arrest and trial finalisation is now 714 days (up from 512 days in 2012).

BOCSAR released a report in April 2017 titled, 'Forecasting trial delay in the NSW District Court: An update'.[9] The key findings are as follows:

a. a pattern was observed for trial cases dealt with in the Sydney District Criminal Court. 10% increase in the Sydney trial case backlog results in an immediate 2.38 per cent increase in the average time taken to finalise criminal trials in the Sydney District Court; and

b. at present, it takes about 260 days to finalise 50 per cent of trial cases in the NSW District Court. To reduce the median time to finalise trial cases to 130 days, the backlog of pending trial cases would have to be reduced by about 80 per cent.

The disturbing levels of delay experienced in criminal proceedings in the New South Wales District Court can be expected to continue, if not be exacerbated, unless the under-funding is remedied. The early guilty plea reforms which are to be implemented from 1 April 2018 will fail in their objective to clear up the District Court caseload unless accused are represented by experienced counsel who are properly funded to deal with cases from the start to the finish of a matter. The delay in cases impacts not only on the accused but victims and witnesses who anxiously await a trial. Indeed, in some cases, the delay may impact on a successful prosecution because the memory of witnesses may fade.

Contrary to what some mischievous politicians and bureaucrats have asserted in the past, the Bar Association's push for better funding is not motivated by a desire to protect its own. Rather, it is motivated by the recognition that there will be a significant enhancement to the proper functioning of the criminal justice system when those involved in the system are represented by experienced counsel who understand how the criminal justice system works, and are able to provide assistance to the court. This will reduce delays and save money in the justice system.

The point was made earlier this year, in May 2017, by Ms Jelahn Stewart[10] during a panel discussion in the US, involving several judicial officers, about *Gideon v Wainwright*. Ms Stewart rightfully made the following observation:

> Most people would think that prosecutors would not be pleased with the decision and that their job would be easier if *Gideon* had been decided the other way, they would be able to obtain convictions more easily. However, that's just not the case. The job

> of the prosecutor is not just to obtain convictions but rather to seek justice, and seeking justice is far easier when you have competent, ethical counsel on the other side.

The current funding situation in NSW cannot be allowed to continue. The Bar Association is currently engaged in discussions with Legal Aid NSW and the NSW attorney general to ensure that our members who undertake this most difficult work are fairly remunerated.

The reality is that in order for the criminal justice system in any society to reap the benefits of the principles established in cases such as *Dietrich v R* and *Gideon v Wainwright*, there must be adequate funding to support counsel representing defendants in criminal trials. In the US, it was recently observed that '[u]nderfunding public defender programs is the most common way that states fail to keep the promise of the *Gideon* decision'.[11] The same may be said of the promise of the *Dietrich* decision in Australia.

Some of the current efforts of members of the New South Wales Bar to assist the justice system

I also want to touch upon the enormous contribution the Bar already makes to the justice system on a pro bono basis, to put into perspective the concerns we have raised about our members not being fairly remunerated by Legal Aid NSW when appearing in criminal trials. I spoke about this on 16 November 2017 when I thanked our members at a function in the Bar Common Room. Members of the judiciary, including Chief Justice Bathurst and Chief Magistrate Henson were in attendance to also thank our members as their work greatly assists the administration of justice.

The Duty Barrister Scheme at the Downing Centre has been operating for 23 years. The Duty Barrister Scheme at John Maddison Tower has been operating for the last two years. 120 barristers of all levels of seniority have volunteered to assist.

Four duty barristers see an average of four clients each per day which equates to assisting over 4,000 members of the public annually. This does not include the many urgent requests from the court and/or the DPP for a barrister to give discrete advice to witnesses or a self-represented accused to ensure a trial can properly proceed.

From the feedback that the Bar Association has received from both the judiciary and members of the public there is every reason to believe that duty barristers have provided, and continue to provide, a valuable resource for the fair and effective administration of justice.

The Legal Assistance Referral Scheme (referred to as 'LARS') has also been operating for 23 years. It is a scheme where less fortunate members of the public, who have been refused legal aid, can receive assistance from a barrister, either in the form of advice, representation or mediation.

Since inception, approximately 7,000 applications have been processed and members of the bar have contributed approximately 53,000 hours of work.

Since 2015 all Court of Appeal and Supreme Court referrals are made to LARS in cases where judges or registrars think a self-represented litigant is deserving of legal assistance. A recent analysis of the matters from the court indicates that LARS was able to assist the court in over 90 per cent of matters.

An analysis of the referrals made through the scheme over the years has consistently shown that over 60 per cent of the matters have legal merit – a statistic which may surprise some given the 'last port of call' circumstances of many of the clients.

This is not easy work – many of the clients deliver their paperwork in a form far less tidy than a crisp white folder bound in pink tape, but to the barristers' credit they are not put off and regardless, are able to obtain some very worthwhile results.

The Law Kitchen was established in 2011 by barristers Les Einstein and Geoff Pulsford, joined by Stephen Richards, a solicitor and a stalwart supporter of The Law Kitchen's work. Very sadly since those early days, both Geoff and Steve have passed away, Steve only recently. The Law Kitchen has as its objectives the provision of free legal services to marginalised persons including those who are transiently, episodically or chronically homeless or in danger of becoming so. Since inception, the Bar Association has allocated a solicitor employee to assist barristers who have volunteered to help the Law Kitchen by providing weekly advice sessions at the café in Woolloomooloo.

Conclusion

As can be seen, the New South Wales Bar contributes greatly to the justice system. It is hoped that the current efforts of the Bar Association to procure funding in order to support an already strained criminal justice system in New South Wales, will be fruitful. In short, the New South Wales Bar will not be taking no for an answer – 10 years of no increases in fees paid to barristers undertaking legal aid work is unacceptable. Rather than approaching this issue in a superficial manner and responsible ministers pointing the finger at each other, government needs to understand that paying adequate Legal Aid fees will allow experienced counsel to be retained on a regular basis. This will lead to the more efficient conduct of proceedings which will reduce delays, ensure persons are adequately represented and result in substantial cost savings to the community.

If more evidence is needed of the lack of appropriate funding for legal assistance and sustainable court funding then we urge the government to engage with the Law Council of Australia's Justice Project. The Justice Project is the Law Council's national review into the state of access to justice in Australia. It was set up by Law Council President Fiona McLeod SC and is led by an expert Steering Committee headed by former Chief Justice Robert French. The Law Council has released 14 consultation papers and the secretariat and president have attended 133 consultations and received over 130 submissions. A progress report outlining some of the emerging themes from consultations will be released in December this year. The final report will be released in late February 2018. The Justice Project is an extension of the work of the Law Council in promoting equality before the law, it recognises that the justice system is in crisis with legal assistance services chronically under resourced and are operating under immense pressure. Its conclusions will need to be taken seriously by government.

Best wishes for Christmas and the New Year

I would like to extend to each of our members, the NSW judiciary and our staff at the Bar Association, my best wishes for Christmas and 2018. I hope each of you takes time to reflect and to rest with your family and friends during the holiday period after what has been a busy year. It is our family and friends who sustain us during stressful and busy times at the bar. Now is the time for us to reconnect with them. Keep safe and well.

ENDNOTES

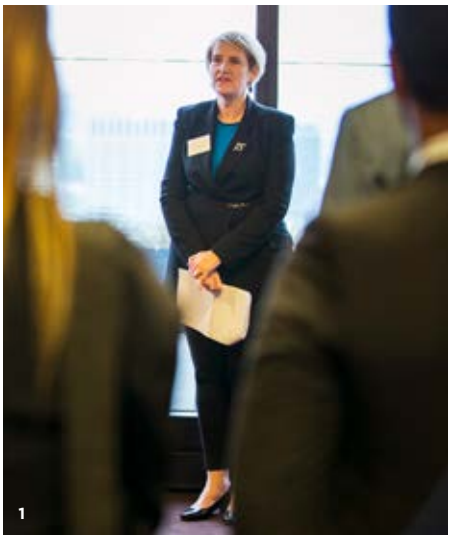
1 D Reynolds and L Goddard, 'Leading cases in Australian law' (2016, The Federation Press) at 121.
2 As recorded in *Dietrich v R* (1992) 177 CLR 292 at 314 per Mason CJ and McHugh J.
3 Robert White, *'Gideon v Wainwright'*, The Supreme Court Historical Society Quarterly, Volume XXXIX, Number 2, 2017.
4 https://www.law.cornell.edu/supremecourt/text/372/335
5 'Petition for a Writ of Certiorari from Clarence Gideon to the Supreme Court of the United States, 01/05/1962'. The National Archives. Retrieved 9 November 2014.
6 As reported by Robert White, *'Gideon v Wainwright'*, The Supreme Court Historical Society Quarterly, Volume XXXIX, Number 2, 2017
7 http://www.smh.com.au/nsw/district-court-delays-to-criminal-cases-unlikely-to-ease-for-a-year-judge-warns-20160902-gr7nie.html
8 http://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2017/mr-NSW-Criminal-Courts-Statistics-2016.aspx
9 http://www.bocsar.nsw.gov.au/Documents/BB/Report-2017-Forecasting-trial-delay-in-the-NSW-District-Criminal-Court-BB122.pdf
10 Special Counsel for Professional Development and Director of Training at the US Attorney's Office.
11 Robert White, *'Gideon v Wainwright'*, The Supreme Court Historical Society Quarterly, Volume XXXIX, Number 2, 2017

Open Chambers Evening

A report from the Practice Development Committee

10 October 2017

By Liz Cheeseman SC, Caspar Conde



1

One of the primary focuses of the Practice Development Committee is the promotion and marketing of the Bar's services to in-house counsel in two principal areas: direct briefing and early briefing. The Committee has been active in developing new ways to promote the services of the Bar beyond our traditional (and still core) market of instructing solicitors.

As part of this work, the committee initiated and co-ordinated an Open Chambers Evening, which was held to coincide with the recent International Bar Association Conference in Sydney. All Sydney-based chambers were invited to host an Open Chambers event. On the evening of 10 October 2017, a total of 18 chambers threw their doors open to welcome conference delegates and others to a variety of satellite events. There were over 320 registrations for the various events.

The event was directed to marketing the New South Wales Bar and the services it offers to conference delegates (many of whom are in-house counsel) in a convivial and informal atmosphere. Invitations were also extended to local in-house counsel, including through the Association of Corporate Counsel (ACC), as well as to members of the regional bars, the judiciary and others.

The proposal was aimed at showcasing the diversity of members' practices and chambers' specialties and to promoting collegiality and fostering connections across the profession.

The New South Wales Bar Association published a web-based program of the various Open Chambers events with a description of each event, and IBA delegates were invited to register to visit one of a number of participating sets of chambers.

Most chambers' events on the night involved a presentation, or presentations, from leading barristers on topical legal issues proceeded (and in some brave cases preceded) by drinks and canapés. There were some intriguing variations – one chambers offered a 'Tastes of Australia' evening, providing delegates with the opportunity to sample local produce while viewing exhibits from Australian artists; another offered a Q and A session on aspects of the Australian legal system and short presentations by an expert Australian sommelier and fromager (or cheese man).

The Practice Development Committee, with the assistance of Bar Association staff (led by Greg Tolhurst and Alastair McConnachie), was responsible for project managing the event. The committee continues to work to identify opportunities to develop new areas of work for the New South Wales Bar.

Future events

The next initiative arranged by the committee is the Bar Association's sponsorship of the ACC Annual Conference in Alice Springs in November 2017. In addition to sponsoring an award and a table at the gala dinner, the Bar Association will host a master class on direct briefing in an employment context (presented by myself [Cheeseman SC], Ingmar Taylor SC and Kellie Edwards). A Barista Bar staffed by clerks (Michele Kearns, Angela Noakes and Emma Houlihan) will run throughout the conference where delegates can drop in for coffee and find out more about what the New South Wales Bar has to offer, which, it is hoped, includes a decent espresso!

For next year, the committee is aiming to arrange a New South Wales Bar showcase event for in-house counsel – keep a lookout in *InBrief* for more details in the New Year.

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This page, top to bottom:
1 Elizabeth Cheeseman SC, New Chambers.
2 David Jackson AM QC New Chambers.
3 Jonathan Horton QC, Benjamin Rigby (England).

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5


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11

Photos: Murray Harris Photography

This page, left to right:

4 Monique Cowden presents a seminar at Level 22 Chambers.

5 Andrew Pickles SC, Janet McKelvey, Michelle Kearns, Justice Terry Sheahan (Land and Environment Court), Klaus Metsa-Simola (Hannes Snellman Attorneys, Finland).

6 Robert Angyal SC and Dr Christopher Ward at 6 St James Hall Chambers.

7 Komal Kritika Singh, (Fiji), Phillip Sharp, Bhavna Dhami (India), Chamith Senanayake (Sri Lanka).

8 Keni Josifoski, Sir Bernard Eder, Julia Baird SC, David Jackson QC, Elizabeth Cheeseman SC New Chambers.

9 Edmund Bon (AmerBon Malaysia), Marco Nesbeth, Daniel Thomas, Remy Choo (Peter Low & Choo, Singapore).

10 Simon Lusk (YPOL), Daniel Moujalli, Belinda Marshall (Beckley Marshall Legal) Ground Floor Wentworth Chambers.

11 Courtney Ensor, Keni Josifoski, Sabrina Acloque.

Bar Practice Course 02/2017

Back Row: Kim Boettcher, Claire Palmer, Jennifer Hillier, Kayt Hogan, Monika Knowles, Sophie Jeliba, Fiona Gray

Second Row: Michelle Yu, Karen Petch, Talia Epstein, Natasha Laing, Diana Tang, Amelia Smith, Holly Kemp

Front Row: Savitha Swami, Jennifer Mee, Beth Morrisroe, Nili Hali, Jessica Tat, Kate Lindeman, Kim Pham

Back Row: Joshua Nottle, Anthony Hopkins, Peter Berg, Matthew Coates, William Evatt, John Larkings, Hugh Morrison, Liam O'Reilly, Zoran Petric, Andrew Smorchevsky, Johnson Jiang, Roy Donnelly

Third Row: Nicholas Olson, Thomas Liu, Jennifer Hillier, Garth Campbell, Monika Knowles, Holly Kemp, Sophie Jeliba, Fiona Gray, John Anderson, John Mort, Adam Booker

Second Row: Claire Palmer, Kayt Hogan, Eamonn O'Neill, Natasha Laing, Kim Boettcher, Matthew Guyder, Diana Tang, Talia Epstein, Edward Anderson, Peter Thompson, Maurice Baroni, Thomas Woods

Front Row: Wen Wu, Jennifer Mee, Michelle Yu, Savitha Swami, Karen Petch, Beth Morrisroe, Nili Hali, Jessica Tat, Kate Lindeman, Kim Pham, Amelia Smith

Photos: Murray Harris Photography

Bench and Bar Lunch

Following the closure of the Bar Common Room many years ago, Phil Greenwood SC organised the first Bench & Bar Lunches.
Jeremy Gormly SC took over a few years later and then handed the reins to Kylie Nomchong SC in 2011.
The purpose of the lunches is to provide an informal and inexpensive forum where members of the bench and bar are seated next to the last person who arrived – in the very same way as the old Common Room lunches, thereby promoting collegiality in the profession and with the bench. They have been extremely successful with lunches arranged about twice per year, each attracting about 70 participants and being held at diverse venues such as The Barracks, Sky Phoenix and the Hellenic Club.

By Kylie Nomchong SC

(Clockwise) Bridie Nolan, Jane Needham SC, Danielle Woods, Kate Madgwick, Justice Ruth McColl, James Mack and Piotr Klank

(Clockwise) Long-standing Bench and Bar Lunch organiser, Kylie Nomchong SC with Carole Webster SC, Ingrid King, David Chin and Chris Micali (and in the background, taking urgent instructions on the phone, Paul Menzie QC)

Distinguished Gentlemen's Ride

Nathan Avery-Williams took part in the Distinguished Gentlemen's Ride on Sunday, 24 September 2017. Thanks in part to the generosity of the New South Wales Bar, he raised $2,213, while his team raised $4,423. The Sydney ride alone had 750 bikes, and raised $350,000 for the Movember Foundation and men's health.

Left to right: Nathan Avery-Williams, Tim Wallis, Liz Wallis and David White.

Three ministers and a court

By Anthony Cheshire SC

Photo: courtesy of the Supreme Court of Victoria

For the Autumn 2017 edition of *Bar News*, I wrote an article about criticisms of the judiciary by President Trump in the United States and by the press in the United Kingdom that would be likely to amount to contempt of court under Australian law. I expressed the following view:

> Honest and robust criticism of judicial decisions is a healthy part of our system and helps shape the development of the common law, but we all have a duty to be vigilant to ensure that personal insults and criticisms that are the meat and drink of the political process do not encroach into the legal arena.

Perhaps sooner than I had anticipated, the Victorian Court of Appeal was tested in September 2017 on this issue by comments of three federal ministers about the sentencing of terrorist offences in Victoria.

On Friday 9 June 2017 the Victorian Court of Appeal heard a prosecution appeal brought on the basis that the sentences against two men charged with terrorism offences were manifestly inadequate. During the course of argument, Warren CJ observed that there was an 'enormous gap' in the sentencing of terrorism offences between Victoria and New South Wales, which she described as being due to New South Wales placing less weight on the personal circumstances of the offender than Victoria and generally taking a more tough-on-crime approach. Justice Weinberg described that gap as 'extremely worrying'.

On 13 June, while judgment in the appeal was reserved, *The Australian* newspaper published extracts from unsolicited statements sent to it by three federal ministers concerning the hearing before the court. These included an allegation that the judges had made comments during the appeal 'endorsing and embracing shorter terrorist offences', which were 'deeply concerning'; descriptions of the judges as 'divorced from reality' and 'hard-left activist judges', who had 'eroded any trust that remained in our legal system'; and the court as being a place for 'ideological experiments'.

The judicial registrar of the Court of Appeal then wrote to the three ministers and the newspaper parties responsible for *The Australian* publication, requiring them to appear before the court on 16 June 2017 'to make submissions as to why you should not be referred for prosecution for contempt' in terms that included the following:

> The attributed statements appear to intend to bring the court into disrepute to assert the judges have and will apply an ideologically based predisposition in deciding the case or cases and that the judges will not apply the law.
>
> The attributed statements, on their face, also appear to be calculated to influence the court in its decision or decisions, and to interfere with the due administration of justice in this state.

Coincidentally, that week Tony Abbott said, in the context of the announcement of the settlement of the Manus Island class action against the Commonwealth:

> We've got a judiciary that takes the side of the so-called victim rather than the side of common sense.

During the week, other federal colleagues (including the industry minister, Arthur Sinodinos; the attorney general, George Brandis; the education minister, Simon Birmingham; and the prime minister, Malcolm Turnbull) expressed their support for the three ministers, stressing freedom of speech and the right of democratically elected representatives to raise legitimate community concerns, including criticism of the judiciary, and indeed an expectation that they would do so.

On Friday 16 June, the three ministers did not attend court, although they were represented, at the taxpayers' expense, by the solicitor-general. The court begun the hearing by stressing that the outcome of the appeal would not be affected by the comments, but Warren CJ noted that they had placed the court in the 'invidious position' that no matter what the result, the integrity of the appeal judgment would be questioned:

> On the one hand, if we don't allow the appeal then we will be accused of engaging in an ideological experiment of being hard-left activist judges. On the other hand, if we increase the sentences, the respondents would be concerned that we were responding to the concerns raised by three senior commonwealth ministers.

The solicitor-general said that the comments had been made 'in good faith' and that the ministers 'expressed deepest regret' if their comments had caused concern. When asked if he was instructed to provide an apology, he responded:

> My instructions are to read what I've read.

Some time into the hearing, the solicitor-general said his instructions had 'evolved somewhat in the time before this court' and certain of the comments would be withdrawn. *The Australian* parties offered 'a full and sincere apology', but still the ministers refused to do so. The court reserved its decision.

It is apparent that the ministers further reflected on the matter and, at their request, the matter was relisted on 22 June, when the solicitor-general (again in the absence of the ministers) offered an 'unconditional apology and unreservedly [withdrew] all comments made in relation to this matter'.

The court determined not to take the matter further (*Director of Public Prosecutions v Besim* [2017] VSCA 165), but Warren CJ noted:

> But for the apologies and retractions, we would have referred the groups, namely the Ministers and the Australian parties, to the prothonotary of the supreme court for prosecution for contempt of court.

Her Honour was extremely critical of the actions of the three ministers, noting that they had all trained as lawyers and that there was a significant delay in proffering the apology and retraction. Her Honour noted that they had:

> …failed to respect the doctrine of separation of powers, breached the principle of sub judice, and reflected a lack of proper understanding of the importance to our democracy of the independence of the judiciary from the political arms of government.

and concluded:

> The Court states in the strongest terms that it is expected there will be no repetition of this type of appalling behaviour. It was fundamentally wrong. It would be a grave matter for the administration of justice if it were to reoccur. This Court will not hesitate to uphold the rights of citizens who are protected by the sub judice rule.

This represented perhaps the best outcome for the judicial system. Although there is little doubt that the ministers' comments demanded action, full contempt proceedings could easily have been presented by the ministers as unacceptable attempts by unelected judges to silence valid criticisms made (or at least concerns raised) by democratically elected representatives of the people, reinforcing labelling of judges as out of touch, elitist and, perhaps worst of all, 'activist'.

In an era of unprecedented populism, as demonstrated by President Trump's election and the Brexit vote, a full-blown conflict between the judiciary and the executive could easily provoke a crisis and an excuse for politicians to seek to introduce curbs on judicial power, such as by introducing fixed judicial terms where renewal will depend upon the goodwill of the government of the day.

Although the comments of the ministers drew a storm of protest, it should be noted that this was largely from within the legal establishment. Similarly, it was largely the legal establishment that defended the judiciary from the press in the United Kingdom and from President Trump in the United States. Thus, the dissenting opinion of the 9th Circuit Court of Appeals, which would have upheld the president's travel ban, included the following:

> It does no credit to the arguments of the parties to impugn the motives or the competence of the members of this court; *ad hominem* attacks are not a substitute for effective advocacy. Such personal attacks treat the court as though it were merely a political forum in which bargaining, compromise and even intimidation are acceptable principles. The courts of law must be more than that, or we are not governed by law at all.

To similar effect, at his Senate confirmation hearing following his nomination by President Trump, Justice Gorsuch, responded to questioning on this issue:

> When anyone criticises the honesty, integrity, the motives of a federal judge, I find that disheartening, I find that demoralising, because I know the truth.

One could have no confidence, however, that the wider community would not have sided with the three ministers rather than the court.

In the context of the recent High Court decision on the disqualification of members of parliament for holding dual citizenship, the prime minister perhaps came rather close to the line when he said:

> The Leader of the National Party, the Deputy Prime Minister, is qualified to sit in this House and the High Court will so hold.

The prime minister subsequently described the result in entirely appropriate terms:

> The decision of the court today is clearly not the outcome we were hoping for, but the business of government goes on.

It was in 2004 that an application was made to refer the then premier of New South Wales, Bob Carr, to the Supreme Court for contempt proceedings. During an ICAC hearing, the premier noted that his then minister Craig Knowles had been the victim of attempts to blacken his reputation and that his behaviour had been vindicated, even though the minister had not yet given evidence and the hearing had not concluded. The premier escaped a referral by giving what was interpreted as an apology, although in fact it was in terms that he regretted any insult taken. Again, perhaps it was best there was an apology, avoiding a full-scale battle between the judiciary and the executive.

It must be hoped that it will be at least another thirteen years before this issue arises again in Australia, although whenever it does the court must be astute to determine whether any apology is genuine and remorseful or whether it is only given as a matter of expediency.

When services sourced overseas are in a 'market' in Australia

Air New Zealand Ltd v Australian Competition and Consumer Commission [2017] HCA 21

Peter Strickland

Introduction

The key issue before the High Court concerned whether Air NZ and Garuda supplied their air freight services from overseas ports in a 'market' in Australia within the meaning of s 4E of the former *Trade Practices Act 1974* (Cth) (TPA). Contrary to the decision of the primary judge, the Court unanimously affirmed the Full Court's decision that these services were supplied in a market in Australia, but did so for slightly different reasons.

There were also other grounds on which Air NZ and Garuda said they were exculpated from liability under the TPA. First, they both alleged that their conduct was compelled by foreign regulations, which meant they had not made the impugned understandings. Secondly, Garuda alleged that ss 45 and 45A of the TPA were inconsistent with certain provisions of the *Air Navigation Act 1920* (Cth), with the effect that s 45(2) did not apply to Garuda's conduct. These contentions were rejected by Gordon J, with whom the plurality (Kiefel CJ, Bell & Keane JJ) and Nettle J agreed.

Background

Section 45(2) of the former TPA prohibited the making of a contract, arrangement or understanding containing a provision that had the purpose, effect or likely effect of substantially lessening competition. It also prohibited giving effect to such a provision.

A provision was deemed to have had the requisite purpose or effect if it had the purpose, effect or likely effect of fixing, maintaining or controlling prices between competitors: s 45A. Although this meant there was no need in price-fixing cases to demonstrate a substantive impact on competition, the price-fixing still had to relate to competition in a 'market'. That was because s 45(3) defined 'competition' for the purposes of s 45 to be competition in any 'market' in which a party supplied or acquired goods or services. Further, it also meant that the market had to be in Australia, because s 4E defined 'market' as meaning 'a market in Australia'.

At first instance, the primary judge held that Air NZ and Garuda had been party to price-fixing arrangements in relation to fuel surcharges on their air freight services between Hong Kong, Singapore and Indonesia, on the one hand, and Australia, on the other hand. However, his Honour concluded that this conduct did not contravene s 45(2), because it had occurred in a market *outside* Australia. That decision was predicated on the finding that the substitution or switching decisions (being the ultimate choice of airlines) were given effect at the ports of origin in Hong Kong, Singapore and Indonesia.[1]

The Full Court disagreed with the primary judge's conclusion on the location of the market, and allowed the ACCC's appeal. Air NZ and Garuda both appealed to the High Court.

The High Court's decision on whether the market was in Australia

The plurality said that a market under the TPA is 'a notional facility which accommodates rivalrous behavior involving sellers and buyers'.[2] However, their Honours recognised that this abstract notion of a market presents a challenge when s 4E requires that it have a concrete location in Australia. Their Honours held that the task of attributing a geographical location to a market is to be approached 'as a practical matter of business' and not divorced from the 'commercial context of the conduct in question'.[3]

The plurality recognised that although substitutability is often an important, if not decisive, factor, this is not always the case.[4] Their Honours observed that s 4E treats substitutability as the principal driver of the rivalrous behavior accommodated by a market, but the act of substitution merely marks the conclusion of that rivalry.[5] In that way, the plurality found that the primary judge's approach accorded too much weight to substitutability in locating the market. Instead, the focus needed to be on the 'geographical area of the rivalry which precedes that act of substitution'.[6] In their Honours' view, the key issue is the location of the rivalry, or the interplay between the relevant supply and demand, not the place where the act of substitution is recorded.

In this case, the primary judge's findings of fact revealed that shippers in Australia were a substantial source of demand for air freight services from overseas ports, and that airlines engaged in rivalrous behavior that sought to match the supply of their services with that demand.[7] The airlines' 'deliberate and rivalrous pursuit of orders emanating from Australian shippers' provided compelling evidence that they were competing with each other in a market in Australia.[8] Accordingly, the plurality concluded that the price-fixing conduct took place in a market in Australia.[9]

Nettle J reached the same conclusion as the plurality, and the importance of focussing on the location of the competitive rivalry is apparent from his Honour's reasons. His Honour said that, 'where sellers are engaged in marketing their goods and services, or perceive themselves to be competing, in areas beyond the area in which they are located, *commercial reality* is likely to dictate that the market includes those further areas' (emphasis added).[10]

Gordon J also came to the same view. Like the plurality, her Honour recognised the abstract nature of market definition, and said 'market identification is an economic tool, or instrumental concept, that uses and integrates those legal and economic concepts best adapted to analyse the asserted anti-competitive conduct'.[11] However, in saying that, her Honour also acknowledged that a market should not be defined 'arbitrarily' and that it must be based on findings of fact.[12]

In her Honour's view, the key question in locating the market centred on what was the *area of effective competition* in which the airlines operated.[13] In this case, the evidence demonstrated that the airlines physically competed in Australia to obtain custom from shippers, and marketed their services to them.[14] Further, there was economically significant demand from large shippers in Australia, the airlines negotiated with those shippers, the airlines tracked those shippers' activities and the airlines designed their products according to this demand.[15] These factors were sufficient to demonstrate that the airlines competed in a market in Australia.[16]

The foreign state compulsion issue

The airlines contended that where conduct is compelled by a law or valid practice of a foreign state, it cannot be the case that the compelled person made a contract, arrangement or understanding with the requisite purpose, effect or likely effect under s 45(2). Their submission was that they did not arrive at, or give effect to, certain impugned understandings within the meaning of s45(2) because regulations made in Hong Kong, and the administrative practices of the Hong Kong regulator,[17] compelled each of them to do so.[18]

In holding that those contentions were rightly rejected by the primary judge and the majority of the Full Court,[19] Gordon J (with whom the plurality and Nettle J agreed) did not decide this issue as a matter of principle, because it was unnecessary to do so. The short point was that, on the unchallenged findings of the primary judge, the airlines were not compelled by any foreign law or practice to agree on fuel surcharges, or to impose fuel surcharges, so the contentions did not arise.[20]

The inconsistency issue

Garuda argued that ss 45 and 45A of the TPA, and certain parts of the *Air Navigation Act 1920* (Cth) were practically and operationally inconsistent. In particular, it was noted that s 13 of the Air Navigation Act permitted the Minister to suspend or cancel an international airline licence if the airline did not comply with the relevant air services agreement between Australia and Indonesia. This was said to be significant in Garuda's case, because the Air Services Agreement between Australia and Indonesia contained provisions requiring the fixing of 'tariffs'.

Gordon J (with whom the plurality and Nettle J agreed) found that the alleged inconsistency did not arise, because, the conduct that contravened the TPA involved understandings arrived at in Hong Kong and Indonesia containing provisions to charge specific fuel surcharges, not agreements or understandings to set tariffs by way of minima under the Australia-Indonesia ASA.[21]

ENDNOTES

1 *Australian Competition and Consumer Commission v Air New Zealand Limited* (2014) 319 ALR 388 at [323].
2 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [12].
3 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [14].
4 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [26].
5 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [27].
6 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [28].
7 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [31].
8 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [34].
9 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [35].
10 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [40].
11 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [59].
12 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [60].
13 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [83].
14 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [116].
15 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [121].
16 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [122].
17 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [53].
18 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [138].
19 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [140].
20 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [141].
21 *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 at [174].

Revisiting Project Blue Sky

Kate Lindeman reports on *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30

In *Forrest & Forrest Pty Ltd v Wilson*, the High Court, by a majority of 4:1 (Nettle J dissenting), allowed an appeal concerning the effect of non-compliance with certain provisions of the *Mining Act 1978* (WA). The case contains the High Court's latest statement on the effect of the principle established by *Project Blue Sky*,[1] specifically considering how the doctrine operates in the context of statutory regimes conferring power on states to grant rights to exploit natural resources.

Facts and procedural history

In 2011, the second and fourth respondents lodged applications for mining leases. The Mining Act required the lodgement of mining operations statements and mineralisation reports within a prescribed period after lodging the applications, but none were lodged in time.[2]

The warden (the first respondent) nevertheless held that he had jurisdiction to hear the applications. He considered that failure to lodge the mineralisation reports on time was no more than an irregularity, which could be cured by subsequent lodgement, as well as by the wide discretion given to the minister to grant an application under the Mining Act notwithstanding non-compliance with provisions of the Act. The warden proceeded to recommend that the minister grant the applications for mining leases.

Forrest applied for judicial review of the warden's decision on a number of grounds, only one of which was relevant in the High Court; namely, that the warden made a jurisdictional error in holding that he had jurisdiction to hear the applications for the mining leases. Allanson J, at first instance, concluded that the warden's hearing of the applications did not amount to a jurisdictional error, and the Court of Appeal of the Supreme Court of Western Australia (McLure P, Newnes and Murphy JJA) upheld the decision, finding that only a failure to provide a mineralisation report at all would prevent the satisfaction of a condition precedent to the warden making a recommendation to the minister. Forrest appealed to the High Court.

High Court Appeal

The majority of the court (Kiefel CJ, Bell, Gageler and Keane JJ) allowed the appeal, holding that the relevant provisions of the Mining Act imposed essential preliminaries to the exercise of power by the minister to grant a mining lease.[3] This conclusion involved a consideration of the application of *Project Blue Sky* to a statutory regime conferring power to grant rights to exploit natural resources.

Project Blue Sky

In *Project Blue Sky*, a majority of the High Court held:[4]

> An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.'

In *Forrest*, the majority observed that the court in *Project Blue Sky* was strongly influenced by the fact that the conditions in question regulated the exercise of functions already conferred on the relevant agency, as well as by the circumstance that the provisions did not have a 'rule-like quality', that many of the relevant obligations were expressed in 'indeterminate language', and that 'public inconvenience would be a result of the invalidity of the Act'.[5] The majority in *Forrest* considered that the present case was readily distinguishable.

The majority pointed to the fact that, first, the express terms of the provisions in question and their structure as 'sequential steps in an integrated process leading to the possibility of the grant of a mining lease', revealed that the relevant sections imposed essential preliminaries to the exercise of the minister's power under the Act.[6] Secondly, the majority observed that any inconvenience suffered by treating the requirements of the Act as conditions precedent to the exercise of the minister's power would enure only to those with some responsibility for the non-observance, whereas the contrary view would disadvantage both the public interest and individuals who were within the protection of the Act. Finally, the majority emphasised that *Project Blue Sky* was not concerned with a statutory regime for granting rights to exploit the resources of a state.[7]

Interpretation of statutory regime conferring power to grant rights to exploit state resources

The majority referred to a line of authority[8] which establishes that where a statutory regime confers power on the executive government of a state to grant exclusive rights to exploit the resources of the state, the regime will, subject to provision to the contrary, be understood as mandating compliance with the requirements of the regime as essential to the making of a valid grant. This means that, in short, the statutory conditions regulating the making of a grant 'must be observed.'[9]

This line of authority was said to support parliamentary control of the disposition of lands held by the Crown in right of the state, and to recognise that the public interest is not well served by allowing non-compliance with a legislative regime to be over-

looked or excused by officers of the executive government charged with its administration. Importantly, the majority held that '[n]othing said in *Project Blue Sky* diminished the force of the authorities which support this approach.'[10]

Applying this line of authority to the relevant provisions of the Mining Act, the majority held that nothing in the language of the relevant provisions revealed any intention to depart from what the majority termed the 'settled approach' to the construction of such a legislative regime. The majority also observed that compliance with the regime in question served the public interest, including by improving efficiency, by ensuring owners and occupiers of land were not troubled unnecessarily or prematurely, by protecting the rights of objectors by ensuring that objectors have the benefit of the information contained in mineralisation reports when preparing their objections, and by protecting the interests of miners in competition for access to the state's resources.[11]

Accordingly, the majority held that the appeal should be allowed, and relief sought by Forrest granted.

Nettle J delivered a dissenting judgment. His Honour agreed with the majority that the Mining Act required that the respondents' applications for mining leases be accompanied by a mineralisation report at the time of lodgement. However, his Honour did not agree that a delay between the lodgement of an application and the lodgement of a mineralisation report vitiates the minister's power to grant a mining lease in response to the application.[12]

Implications

The decision in *Forrest* clarifies the operation of *Project Blue Sky* in the context of a statutory regime governing the grant of rights to exploit the mineral resources of a state. Specifically, the majority held that nothing in *Project Blue Sky* limits the long line of authority holding that such a statutory regime must be followed and observed, subject to provision to the contrary.

ENDNOTES

1 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355.
2 Sections 74, 74A and 75 of the *Mining Act 1978* (WA).
3 *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30 at [63].
4 *Project Blue Sky* at [91].
5 *Forrest & Forrest* at [62].
6 *Forrest & Forrest* at [63].
7 *Forrest & Forrest* at [63].
8 *Watson's Bay and South Shore Ferry Co Ltd v Whitfield* (1919) 27 CLR 268; *Cudgen Rutile (No 2) Pty Ltd v Chalk* [1975] AC 520 at 533; *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 at 76; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 63-64; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 173; *Western Australia v Ward* [2002] HCA 28; 213 CLR 1 at [167]-[168]. See also *New South Wales Aboriginal Land Council v Minister Administering Crown Lands Act* [2016] HCA 50; (2016) 91 ALJR 177 at [121].
9 *Forrest & Forrest* at [64].
10 *Forrest & Forrest* at [65].
11 *Forrest & Forrest* at [89].
12 *Forrest & Forrest* at [101].

The sufficiency of evidence to a finding of guilt beyond reasonable doubt

Alexander H Edwards reports on
GAX v The Queen [2017] HCA 25; (2017) 91 ALJR 698.

Overview

The High Court unanimously determined that the evidence as to a historical sexual offence was not capable of supporting the conviction.

Background

The appellant was charged with three counts of indecently dealing with a child, his daughter. He was acquitted on the first two counts, but convicted of the third. The particulars of the third offence were that on the relevant date, the appellant touched the complainant 'on or her near the vagina'.

The evidence relating to the third count came from three sources: the complainant; her sister, DML; and her mother, GJC. The complainant made a statement to police 10 years after the incident. The complainant's evidence in chief as to the events was vague and uncertain but she did say that her father's fingers were 'near my vagina'. The complainant conceded that her memory was unreliable and that this had been a problem for most of her life. GJC said she returned home from picking up dinner to find the appellant in bed with the complainant with the sheets pulled up. GJC said when she pulled back the covers she saw that the complainant's underpants were folded down about an inch. She yelled at the appellant and pulled him out of the bed. She made her statement to police about the incident three weeks before she commenced family law proceedings, seeking orders against the appellant. DML said that she had been out with her mother on the night in question, and had returned to see the appellant in bed with the complainant. DML recalled that the complainant got out of bed crying with her underpants pulled 'right down' and her nightie in disarray. The appellant gave evidence denying any occasion where he had been in bed with the complainant.

Court of Appeal decision

By majority, the Court of Appeal (Atkinson J, Morrison JA agreeing) found that there was a rational basis for the conviction on ground three. Atkinson J reviewed the evidence in support of count three in the course of considering the inconsistent verdicts ground of appeal. Her Honour found that the evidence of DML and GJC relevantly supported the complainant, and that the inconsistencies between those accounts were minor. McMurdo P, in dissent, would have allowed the appeal.

Appeal to the High Court

The first ground of appeal before the High Court was that the reasons given by Atkinson J failed to demonstrate that her Honour had conducted an independent assessment of the evidence. The second ground was that it was not open to the jury to conclude beyond reasonable doubt that the appellant was guilty of the charge in count three.

The sufficiency of the evidence

The High Court accepted that the evidence of the complaint allowed an inference that was capable in law of supporting the particulars of the charge upon which the appellant was convicted.[1] This limited evidence was, however, marked by serious inconsistency with the accounts of DML and GJC,[2] and by recollections that suggested reconstruction.[3] This latter aspect, in particular, could not be excluded beyond a reasonable doubt.[4] The court unanimously (Bell, Gageler, Nettle and Gordon JJ, Edelman J agreeing) upheld the second ground of appeal for those reasons, resulting in an acquittal.[5]

Independent assessment by appellate court

The majority (Bell, Gageler, Nettle and Gordon JJ) found force in the contention that the reasons of Atkinson J did not disclose her Honour's own assessment of the sufficiency and quality of the evidence as to the particularised touching,[6] but noted the controversy in that regard was somewhat arid in light of their view as to the second ground of the appeal.[7]

Justice Edelman, who joined in the reasons of the majority as to ground two,[8] would have rejected the ground relating to the failure of the court below to make an independent assessment of the evidence.[9] His Honour observed that 'Submissions provide context to the reasons given by a court' and that proper determination of the ground may have required reference to the submissions made before the Court of Appeal.[10]

ENDNOTES

1 At [25] and [28].
2 At [28].
3 At [29].
4 At [30].
5 At [32].
6 At [25].
7 At [3].
8 At [33].
9 At [35].
10 At [37] and [40].

When tendency evidence will have significant probative value

Kirsten Edwards and Belinda Baker report on *Hughes v The Queen* [2017] HCA 20.[1]

Introduction

The High Court has held that in determining whether evidence will have 'significant probative value' for the purposes of admissibility as tendency evidence under s 97 of *Evidence Act 1995* (NSW), (Evidence Act), it is not necessary that the evidence exhibit 'similarity', 'underlying unity' or a 'modus operandi' with the charged act. In so finding, the High Court resolved a divergence in approaches in Victorian and New South Wales courts as to the extent to which similarity of tendency evidence was necessary in order to meet the statutory threshold in s 97.

Background to the decision

The appellant was a former star of the television program '*Hey Dad!*' which was broadcast in Australia in the 1980s. He was charged with 11 counts of child sexual abuse against five complainants. The complainants varied in age (from 6 years to 15 years). The appellant had come into contact with the complainants through his work, social and family connections. The conduct comprising the charged acts varied in nature.

At trial, the Crown sought to rely on tendency evidence which included the complaints made by the five complainants, together with the evidence of six other tendency witnesses who had either worked with the appellant or had known him through social or familial connections. Three of the tendency witnesses were women who alleged sexual misconduct by the appellant in his home when they were young girls and the other three were women who alleged inappropriate sexual conduct by the appellant at his workplace when they were in their late teens or early twenties.

The Crown sought that each complainant's testimony be admitted as tendency evidence in relation to the charges in respect of each other complainant, and that the testimony of the six other witnesses be admitted as tendency evidence in relation to all of the charges.

There were dissimilarities in the conduct that was the subject of the tendency evidence, in the ages of the complainants, the nature of the alleged conduct and in the locations of the alleged incidents. However, it was contended that the tendency evidence had significant probative value because the evidence 'disclosed the appellant's sexual interest in underage girls and tendency to engage in sexual activity with them opportunistically as the occasion presented in social and familial settings and the work environment'.[2]

The evidence of the several complainants and the tendency witnesses was held by the trial judge to be cross-admissible as tendency evidence pursuant to ss 97 and 101 of the Evidence Act. The appellant was convicted of nine of the alleged counts, relating to four complainants.

An appeal to the New South Wales Court of Criminal Appeal in respect of the admissibility of the tendency evidence (amongst other grounds) was dismissed.[3] In its reasons, the Court of Criminal Appeal held that there was no requirement that tendency evidence necessarily exhibit similarity, underlying unity or a modus operandi with the charged act for the evidence to have significant probative value for the purposes of s 97.

In so doing, the Court of Criminal Appeal rejected the approach adopted by the Victorian Court of Appeal in *Velkoski v R* which had held that for tendency evidence to have significant probative value, it 'must possess sufficient common or similar features with the conduct in the charge in issue so as to demonstrate a pattern that cogently increases the likelihood of the occurrence of that conduct' and that 'it remains apposite and desirable to assess whether those features reveal "underlying unity", a "pattern of conduct", "modus operandi", or such similarity as logically and cogently implies that the particular features of those previous acts renders the occurrence of the act to be proved more likely'.[4]

The High Court granted special leave in respect of the question of whether the tendency evidence had significant probative value for the purposes of s 97 of the Evidence Act. The grant of special leave did not extend to the Court of Criminal Appeal's determination that the probative value of the tendency evidence 'substantially outweighed' its prejudicial effect for the purposes of s 101 of the Evidence Act.

The High Court's decision

By majority (Kiefel CJ, Bell, Keane and Edelman JJ; Gageler, Nettle and Gordon JJ dissenting), the High Court dismissed the appellant's appeal against his convictions.

The majority, in a joint judgment, held that the decision of *Velkoski* 'evince[d] an unduly restrictive approach to the admission of tendency evidence' and that the New South Wales Court of Criminal Appeal's conclusion that the tendency evidence adduced at the trial had significant probative value was not attended by error.[5]

The majority held that the absence of any reference to 'similarity' in the text of s 97 was a 'clear indication that s 97(1)(b) is not to be applied as if it had been expressed in those terms.'[6] The majority stated further that '[d]epending upon the issues in the trial, a tendency to act a particular way may be identified with sufficient particularity to have significant probative value notwithstanding the absence of similarity in the acts which evidence it.'[7]

In reaching the conclusion that the tendency evidence in the present case was of significant probative value, the majority had regard to the unusual nature of the tendency in the present case, namely, an 'inclination on the part of a mature adult to engage in sexual conduct with underage girls and a willingness to act upon that inclination are unusual as a

matter of ordinary human experience'.[8]
The majority also considered it significant that the interactions which the appellant was alleged to have pursued involved 'courting a substantial risk of discovery by friends, family members, workmates or even casual passers-by' and that that level of 'disinhibited disregard of the risk of discovery by other adults is even more unusual as a matter of ordinary human experience'.[9]
The majority further observed that the use of the words 'the court thinks' in s 97(1)(b) has the result that the admissibility of tendency evidence may involve questions on which reasonable minds might reach different conclusions. In view of this, the majority warned that the prosecution should be conservative in deciding whether to rely upon tendency evidence given the risks involved in seeking to adduce tendency evidence that is 'borderline'.[10]
In detailed dissenting judgments, Gageler, Nettle and Gordon JJ were each of the view that the key passages in *Velkoski* were correct statements of principle. Justices Gageler and Gordon held that the trial judge and the Court of Criminal Appeal had erred in concluding that the evidence of one of the 15 year old complainants (EE) was admissible on the other counts.[11] In addition, Nettle J was of the view that there was error in the admission of further counts and evidence as tendency evidence.[12] Each of the dissenting justices considered that it was significant that the act that was the subject of the count relating to EE was in the context of a 'reciprocated' relationship which was of a different character from the alleged acts which were the subject of the other counts.
Hughes v The Queen was the second time in two years that the High Court had resolved a divergence between New South Wales and Victorian approaches to the interpretation of the Evidence Act. In *IMM v The Queen*,[13] the High Court by a 4:3 majority found in favour of the approach of the New South Wales Court of Criminal Appeal to the definition of 'probative value'.

ENDNOTE

1 The authors appeared as junior counsel for the appellant and the respondent in the High Court. Any expression of any opinions is their own.
2 *Hughes v The Queen* [2017] HCA 20 at [10].
3 *Hughes v R* [2015] NSWCCA 330.
4 [2014] VSCA 121; (2014) 45 VR 680 at [17], [35].
5 [2017] HCA 20 at [12].
6 *ibid* at [34].
7 *ibid* at [37].
8 *ibid* at [57]. See also at [40].
9 *ibid* at [57]. See also at [63].
10 *ibid* at [42].
11 *ibid* at [114], [170] and [225].
12 *ibid* at [170].
13 [2016] HCA 14; (2016) 257 CLR 300.

What does it mean to hold an office in an international organisation?

Piotr Klank reports on *Commissioner of Taxation v Jayasinghe* [2017] HCA 26

Background and significance

The High Court has set out the principles for determining when a person holds an office in an international organisation for the purposes of the *International Organisations (Privileges and Immunities) Act 1963* (Cth) (IOPI Act). If a person does hold such an office, the person is entitled to several privileges and immunities including exemption from Australian taxation.
The respondent, Mr Jayasinghe, was a qualified civil engineer, who was engaged by the United Nations Office of Project Services (UNOPS) under what was known as an 'Individual Contractor Agreement' to work in Sudan as a project manager. Mr Jayasinghe was an Australian resident for tax purposes and the commissioner of taxation (commissioner) assessed the taxpayer on earnings from his engagement with UNOPS.
Mr Jayasinghe objected to the assessments contending that his earnings were exempt from taxation under the IOPI Act, both on the facts and also because the commissioner was bound by his public ruling TD 92/153. Mr Jayasinghe's objection was disallowed and with the aid of counsel appearing pro bono, he appealed to the Administrative Appeals Tribunal. Mr Jayasinghe was successful on both grounds in the Tribunal,[1] and again on the commissioner's appeal to the Full Federal Court.[2]
The commissioner further appealed to the High Court, which unanimously allowed the appeal in respect of both grounds. The primary judgment comprised joint reasons of Kiefel CJ, Keane, Gordon and Edelman JJ. In a short, separate judgment, Gageler J also held in favour of the commissioner for reasons that were consistent with the joint judgment.

Questions before the High Court

Two questions were considered by the High Court. The first was whether, during the relevant income years, Mr Jayasinghe was a person who held an office in an international organisation within the meaning of s 6(1)(d)(i) of the IOPI Act, such that he was entitled to exemption from taxation on the income he received from UNOPS. The second was whether, by reason of s 357-60(1) of Schedule 1 to the *Taxation Administration Act 1953* (Cth) and TD 92/153, the commissioner was bound to exempt Mr Jayasinghe from taxation on the income he received from UNOPS.

Did Mr Jayasinghe hold an office in an international organisation?

Section 6 of the IOPI Act, titled 'Privileges and immunities of certain international organisations and persons connected therewith', relevantly provides for the conferral, by regulations, of privileges and immunities on entities and persons. Different categories of personnel are entitled to different privileges and immunities.
In the present case, the High Court had to consider the proper construction of 6(1)(d)(i) of the IOPI Act. This confers the privileges and immunities in Part I of the Fourth Schedule of the IOPI Act on a person who holds an office in an international organisation to which the IOPI Act applies. One of those privileges is an exemption from taxation on salaries and emoluments received from the organisation, on which Mr Jayasinghe was relying.
In determining whether Mr Jayasinghe was a person who held an office in an international organisation, the High Court did not adopt either the approach advanced by Mr Jayasinghe (which had been accepted by the Tribunal and by the majority in the Full Federal Court), which focussed on the concept of 'office' adopted in domestic law following the decision of Rowlatt J in *Great Western Railway Co v Bater*[3], nor the approach advanced by the commissioner (and accepted by Allsop CJ in dissent in the Full Court), which focussed on the designation of a position as an office by the international organisation itself.[4]
Rather, Kiefel CJ, Keane, Gordon and Edelman JJ held[5] that in determining whether a person 'holds an office in an international organisation', s 6(1)(d)(i) of the IOPI Act is concerned with the incidents of the relationship between the person and the relevant international organisation. It focuses on the substance of the terms upon which a person is engaged - not whether the relevant

organisation has attributed a particular label to the engagement - and on the relationship between that engagement and the organisation's performance of its functions.

Their Honours held further[6] that the phrase 'a person who holds an office in an international organisation' directs attention to the structure of the organisation and the place of the person within it. The holder of an office in such an organisation may be expected to have a position to which certain duties attach, duties relating to the performance of the organisation's functions and a level of authority with respect to the organisation. The position of the person within the international organisation and the duties and authority associated with it should render explicable why the privileges and immunities are conferred. By comparison, a person whose terms of engagement place him or her outside the organisational structure, and which do not provide that person with any defined duties or authority with respect to the organisation and its functions could not be said to hold an office within the organisation.

Applying the above analysis, Kiefel CJ, Keane, Gordon and Edelman JJ determined that during the relevant period, Mr Jayasinghe did not hold an office in the United Nations (UN), by reason of his being engaged by the UNOPS, within the meaning of s 6(1)(d)(i) of the IOPI Act.[7] Their Honours considered the incidents of the relationship between Mr Jayasinghe and the UN and held that the Individual Contractor Agreement between Mr Jayasinghe and UNOPS was determinative of the relationship.

In this regard, the terms of the agreement[8] provided that Mr Jayasinghe was engaged in his individual capacity to undertake a non-core function; was paid a monthly fee; had the legal status of an independent contractor; did not have the status of an official of the UN for the purposes of the Convention on the Privileges and Immunities of the United Nations[9] and was considered an expert on mission for the UN within the terms of that convention; was responsible for paying any tax levied by the Australian Government on his UNOPS earnings; and was solely liable for claims by third parties arising from his own negligent acts or omissions in the course of his service under the Individual Contractor Agreement.

Was the commissioner bound by TD 92/153?

In the alternative, Mr Jayasinghe relied on the effect of the commissioner's public ruling, TD 92/153. The decision on this point, which turned on the somewhat obscure language of the ruling and on the particular terms of Mr Jayasinghe's engagement, is of limited significance beyond the specific context of the appeal.

The ruling excluded from its protection 'persons engaged by [an international] organisation as experts or consultants'.[10] Kiefel CJ, Keane, Gordon and Edelman JJ held that whether or not Mr Jayasinghe was engaged as an expert depended on the terms of his engagement, which showed that he was so engaged to perform 'specialist services' in recognition of his 'skills and expertise.' There was no inconsistency between his being engaged as an expert and his performing the functional role of a 'Project Manager'.[11] He was not entitled to exemption by reason of the ruling.

ENDNOTES

1 *Jayasinghe v Commissioner of Taxation* [2015] AATA 456; (2015) 101 ATR 476.
2 *Commissioner of Taxation v Jayasinghe* [2016] FCAFC 79; (2016) 247 FCR 40.
3 [1920] 3 KB 266.
4 Kiefel CJ, Keane, Gordon and Edelman JJ at [32]-[33], [37].
5 Kiefel CJ, Keane, Gordon and Edelman JJ at [37].
6 Kiefel CJ, Keane, Gordon and Edelman JJ at [38].
7 Kiefel CJ, Keane, Gordon and Edelman JJ at [43].
8 Kiefel CJ, Keane, Gordon and Edelman JJ at [42].
9 [1949] ATS 3.
10 TD 92/153 at [2].
11 Kiefel CJ, Keane, Gordon and Edelman JJ at [57].

Going behind a bankruptcy order

Sudarshan Kanagaratnam reports on *Ramsay Health Care Australia Pty Ltd v Compton* [2017] HCA 28.

Introduction

The High Court has considered the circumstances in which a Bankruptcy Court, exercising jurisdiction under s 52 of the *Bankruptcy Act 1966* (Cth) (Act), may 'go behind' a judgment in order to be satisfied that the debt relied upon by a petitioning creditor is in fact owing. In rejecting a narrow formulation of those circumstances, the majority affirmed the approach taken by Barwick CJ in *Wren v Mahony*[1] and emphasised the need to have satisfactory proof of the petitioning creditor's debt.

Factual background

Ramsay Health Care Australia Pty Ltd (Ramsay), an operator of private hospitals, entered in to an agreement with Compton Fellers Pty Ltd, trading as Medichoice, whereby Medichoice would import medical products on Ramsay's behalf and act as a distributor of those products. Mr Compton, a director and shareholder of Medichoice, entered, in his personal capacity, into an agreement with Ramsay whereby he guaranteed to Ramsay the payment of all monies that Medichoice might become liable for in the performance of its obligations under the agreement with Ramsay (Guarantee).

Ramsay commenced proceeding in the Supreme Court of New South Wales against Mr Compton claiming for monies owed to it under the Guarantee. Mr Compton, who was legally represented at the hearing, served evidence on the quantum of the alleged debt but did not read that evidence or dispute the quantum of the alleged debt. Instead, Mr Compton relied on a non est factum defence to Ramsay's claim. That defence failed and in the absence of a challenge to quantum, Ramsay was awarded judgment in the amount of $9,810,312.33.[2] Mr Compton did not appeal from the judgment.

Mr Compton did not pay the debt and Ramsay served on him a bankruptcy notice. Mr Compton failed to comply with the bankruptcy notice in the time stipulated and so committed an act of bankruptcy by reason of s 40(1)(g) of the Act. Ramsay presented a creditor's petition in the Federal Court of Australia in reliance on Mr Compton's act of bankruptcy. Mr Compton, in opposing the creditor's petition, contended that no debt was owed because the judgment in the Supreme Court was not founded on a debt that was owed to Ramsay.

Interim application

Mr Compton filed an interim application to determine, as a separate question, whether the Federal Court should exercise its discretion to 'go behind' the Supreme Court judgment to examine the debt upon which the creditor's petition was based.

At the hearing of the interim application, Mr Compton sought to rely on a 'reconciliation' of indebtedness between the parties, which purported to show that, in fact, Ramsay owed money to Medichoice and an affidavit from one of the joint liquidators of Medichoice to the effect that it was more likely that Ramsay was indebted to Medichoice.

As to the 'reconciliation', senior counsel for Ramsay said that it was an 'open question' whether the calculation contained in it with respect to 'offsets' and 'rebates' was factually correct.

Section 52(1)(c) of the Act provides that at the hearing of a creditor's petition, the court shall require proof of 'the fact that the debt or debts on which the petitioning creditor relies is or are still owing and, if it is satisfied with the proof of those matters, may make a sequestration order against the estate of the debtor'.

The primary judge (Flick J) dismissed the interim application. He accepted the judgment as satisfactory proof of the debt and declined to undertake his own investigation into whether the debt to Ramsay was truly owed.

Mr Compton appealed to the Full Federal Court (Siopis, Katzmann and Moshinsky JJ). On the appeal, Ramsay argued that it was only in the limited circumstances identified by the High Court in *Corney v Brien*[3] namely, where 'fraud, collusion or miscarriage of justice' was made out, that a Bankruptcy Court may, or should, 'go behind' a judgment. Further, Ramsay argued that *Corney v Brien* established that a Bankruptcy Court should not 'go behind' a judgment with which follows a contested hearing where both parties were represented.

The Full Court unanimously rejected Ramsay's argument.[4] The Full Court concluded that *Corney v Brien* did not support such a narrow view of the function of a Bankruptcy Court. Instead, the Full Court applying the approach articulated by Barwick CJ (Windeyer and Owen JJ agreeing) in *Wren v Mahony* held that the primary judge erred in focussing his approach on forensic choices made in the Supreme Court proceedings rather than 'the central issue, which was whether reason was shown for questioning whether behind the judgment there was in truth and reality a debt due to the petitioning creditor.'

The Full Court held that focussing on the pertinent issue revealed substantial reasons for questioning whether the debt was owed, considered afresh whether to 'go behind' the judgment and concluded that the Bankruptcy Court should do so to determine whether there was in fact any debt owing to Ramsay.

High Court

Ramsay sought special leave to appeal to the High Court. By majority (Kiefel CJ, Keane and Nettle JJ, Edelman J agreeing in separate reasons, Gageler J dissenting), the High Court upheld the judgment of the Full Court, holding that there was a substantial question as to whether the debt that Ramsay was relying on to found the creditor's petition was owing and the Bankruptcy Court should investigate this question in order to decide whether it was open to it to make a sequestration order. Central to the High Court's reasoning were the judgments in *Corney v Brien* and *Wren v Mahony*.

In *Corney v Brien*, Fullagar J said, in a judgment that concurred with that of Dixon CJ, Williams, Webb and Kitto JJ:[5]

> No precise rule exists as to what circumstances call for an exercise of the power, but certain things are, I think, clear enough. If the judgment in question followed a full investigation at trial in which both parties appeared, the court will not reopen the matter unless a prima facie case of fraud or collusion or miscarriage of justice is made out.

Ramsay relied on the above passage in submitting that *Corney v Brien* established that a Bankruptcy Court's discretion to go behind a judgment after a contested hearing was limited to circumstances of 'fraud, collusion or miscarriage of justice'.

Observing that by s 52 of the Act, a 'Bankruptcy Court must be satisfied with the proof of 'the fact that the debt ... on which the petitioning creditor relies is ... still owing', if the court's power to make a sequestration order is to be enlivened', Kiefel CJ, Keane and Nettle JJ held that *Corney v Brien* was not authority for the proposition that a Bankruptcy Court must treat a judgment as satisfactory proof of the petitioning creditor's debt, save in cases

of fraud, collusion or miscarriage of justice. Rather, their Honours held that while a Bankruptcy Court has 'undoubted jurisdiction' to go behind a judgment in circumstances of fraud, collusion or miscarriage of justice 'to say that the court may do a thing in certain circumstances is not to say it may do that thing only in those circumstances.'[6]
In *Wren v Mahony*, Barwick CJ (Windeyer and Owen JJ agreeing) said:[7]

> The judgment is never conclusive in bankruptcy. It does not always represent itself as the relevant debt of the petitioning creditor, even though under the general law, the prior existing debt has merged in a judgment. But the Bankruptcy Court may accept the judgment as satisfactory proof of the petitioning creditor's debt. In that sense, that court has a discretion. It may or may not so accept the judgment. But it has been made quite clear by the decisions of the past that where reason is shown for questioning whether behind the judgment or as it is said, as the consideration for it, there was in truth and reality a debt due to the petitioning creditor, the Court of Bankruptcy can no longer accept the judgment as such satisfactory proof. It must then exercise its power, or if you will, its discretion to look at what is behind the judgment: to what is its consideration.

Ramsay sought to distinguish *Wren v Mahony* on the basis that it involved a default judgment and submitted that the Full Court took too broad a view of *Wren v Mahony*. Ramsay argued that a judgment obtained in the absence of fraud or collusion after a contested hearing precludes the possibility of sufficient reasons for questioning whether behind that judgment there was, in truth and reality, a debt due to the petitioner.
However, Kiefel CJ, Keane and Nettle JJ held that Barwick CJ's statement 'should not be given the artificially narrow application urged on behalf of Ramsay'.[8] Their Honours observed that *Wren v Mahony* held that a Bankruptcy Court may go behind a judgment, notwithstanding that the judgment was obtained after a contested hearing. Their Honours said that 'fraud, collusion or miscarriage of justice' are the most frequent examples of the exercise of a Bankruptcy Court's jurisdiction to go behind a judgment, however the overarching obligation imposed by s 52(1) of the Act 'requires a Bankruptcy Court to be satisfied that there is, in truth and reality, a debt'.[9]
Their Honours held that Ramsay's reliance on *Commonwealth Bank of Australia v Jeans*[10] did not assist it because, in *Jeans*, Hely J explicitly applied the approach in *Wren v Mahony* though, on the facts of *Jeans* no question was raised in the Bankruptcy Court as to whether the underlying debt was owed. In contrast, in the present case there was no suggestion of a lack of good faith in Mr Compton's application and while the evidence disputing the debt may ultimately have been unreliable, absent an investigation, that conclusion could not have been reached.[11]
Ramsay further argued that miscarriage of justice in this context was confined to the kind of miscarriage of justice which would impeach the obtaining of the judgment. In rejecting that argument, Kiefel CJ, Keane and Nettle JJ identified the importance of protecting third party creditors. Their Honours held[12] that 'in point of principle, scrutiny by a Bankruptcy Court of the debt propounded by a judgment creditor seeking a sequestration order in no sense involves an attempt to impeach the judgment'. The function of the Bankruptcy Court is to fulfil its statutory duty to be satisfied as to the existence of the debt founding the application for a sequestration order. The purpose of the scrutiny is not only because 'a creditor should not be able to make a person bankrupt on a debt which is not provable' but also to protect the interests of third parties and, in particular, other creditors of the debtor who were not parties to the proceeding resulting in the judgment debt and who should not be prejudiced by the making of a sequestration order which does not reflect the truth and reality of the debt.
Further, their Honours held[13] that there was no suggestion in the cases that 'merger of a debt in a judgment limits the power of a Bankruptcy Court to go behind a judgment so that it is confined to circumstances in which the judgment itself might be set aside'. That a prior existing debt is taken, at general law, to merge in the judgment does not operate 'to relieve a Bankruptcy Court of the paramount need to have satisfactory proof of the petitioning creditor's debt'.
Ramsay's final argument, that a narrow formulation of the circumstances in which the discretion was to be exercised was consistent with the principle of finality in litigation also was rejected. Kiefel CJ, Keane and Nettle JJ held that while Ramsay's concession that it was an open question whether the calculation in the 'reconciliation' was factually correct was 'no more than an acknowledgment of the existence of evidence which might tend towards a different result from that reflected in the Judgment',[14] that concession meant that there was evidence before the primary judge, which, if left unanswered, supported a conclusion that Mr Compton was not indebted to Ramsay at all.
Their Honours said that while the failure of Mr Compton to rely upon such evidence was unexplained, there was, prima facie, a real question as to whether Mr Compton had failed to present his case on its merits at the trial in the Supreme Court. It was no answer to this to say that Mr Compton was bound by the conduct of his case. That is because the Bankruptcy Court is concerned to protect the interests of third parties to the litigation leading to the judgment debt and those third parties (creditors in the bankruptcy) should not be prejudiced by a failure on the part of Mr Compton to present his case on the merits such that a sequestration order is made while that question remains unresolved.[15]
Edelman J, in his concurring reasons, agreed that 'neither precedent nor principle' imposed a constraint on the power of a Bankruptcy Court acting under s 52(1)(c) of the Act to 'go behind' a judgment obtained after a contested hearing.[16]
Gageler J dissented. His Honour identified the question to be whether Mr Compton had shown a prima facie case for the exercise of the discretion to go behind the Supreme Court judgment.[17] Gageler J considered[18] that Fullagar J's reasoning in *Corney v Brien* had repeatedly been interpreted and applied and should continue be treated as a 'guiding principle'. His Honour distinguished *Wren v Mahony* on the basis that the creditor there chose to rely on the antecedent debt as opposed to the judgment debt which was not entered after a trial on the merits.
His Honour held further[19] that creditors of a bankrupt are not to be protected 'by an exercise of judicial discretion from what might be shown in retrospect to have been poor forensic choices which the debtor made in the course of contested proceedings which have resulted in a judgment on the merits against the debtor.' Accordingly, Gageler J held that the Full Court's identification of the central issue was incorrect and the focus of the primary judge on whether there had been a failure of legal process was correct in principle.

ENDNOTE

1 (1972) 126 CLR 212.
2 *Ramsay Health Care Australia Pty Ltd v Compton* [2015] NSWSC 163.
3 (1951) 84 CLR 343.
4 *Ramsay Health Care Australia Pty Ltd v Compton* (2016) 246 FCR 508.
5 (1951) 84 CLR 343 at 357-357.
6 *Ramsay Health Care Australia Pty Ltd v Compton* [2017] HCA 28 at [39].
7 (1972) 126 CLR 212 at 224.
8 [2017] HCA 28 at [43].
9 [2017] HCA 28 at [49].
10 [2005] FCA 978.
11 [2017] HCA 28 at [52].
12 [2017] HCA 28 at [54], [55].
13 [2017] HCA 28 at [58].
14 [2017] HCA 28 at [66].
15 [2017] HCA 28 at [71].
16 [2017] HCA 28 at [97]-[98].
17 [2017] HCA 28 at [79].
18 [2017] HCA 28 at [81] to [88], [90] and [91].
19 [2017] HCA 28 at [92], [94].

When are state laws 'picked up' by s 79 of the Judiciary Act?

Nicolas Kirby reports on *Rizeq v Western Australia* [2017] HCA 23.

Introduction

The High Court has considered when a state law will be 'picked up' pursuant to s 79 of the *Judiciary Act 1903* (Cth) and applied as a federal law when a state court is exercising federal jurisdiction pursuant to s 39 of the Judiciary Act. The appropriate approach is to assess the distinction between the jurisdiction of the state court and the power that the court is permitted or required to exercise in the exercise of that jurisdiction.

Background

Section 75(iv) of the Constitution provides that the High Court has original jurisdiction in certain matters including a matter between a state and a resident of another state.
Pursuant to s 77(iii) of the Constitution, the Commonwealth Parliament may invest other courts with federal jurisdiction. Section 39(2) of the *Judiciary Act 1903* (Cth) does just that: investing state courts with federal jurisdiction in relation to matters in which the High Court has original jurisdiction.
When a state court exercises federal jurisdiction, certain state laws are 'picked up' and applied as federal laws pursuant to s 79 of the Judiciary Act. Section 79(1) of the Judiciary Act provides:

> The laws of each state or territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all courts exercising federal jurisdiction in that state or territory in all cases to which they are applicable.

The issue

Rizeq was a NSW resident charged with offences against s 6(1)(a) of the *Misuse of Drugs Act 1981* (WA) (MDA). After a trial in the District Court of Western Australia, he was convicted by majority verdict in accordance with s 114(2) of the *Criminal Procedure Act 2004* (WA) (CPA).
It was not in issue that the District Court was exercising federal jurisdiction under s 39(2) of the Judiciary Act.
The appellant argued that because the District Court was exercising federal jurisdiction, s 6(1)(a) of the MDA was picked up and applied as a law of the Commonwealth up by s 79 of the Judiciary Act. The effect, so the argument went, was that the trial was a trial on indictment of an offence against a law of the Commonwealth to which s 80 of the Constitution applied. That provision requires the verdict of the jury to be *unanimous*,[1] contrary to the operation of s 114(2) of the CPA, which allows for majority verdicts.
The State of Western Australia, with each of the Commonwealth and other state attorneys- general intervening, argued that s 6(1)(a) of the MDA was not picked up by s 79 of the Judiciary Act.

The judgments

The appeal was unanimously dismissed. The primary judgment comprised the joint reasons of Bell, Gageler, Keane, Nettle and Gordon JJ. Kiefel CJ and Edelman J delivered separate concurring reasons.
Bell, Gageler, Keane, Nettle and Gordon JJ held that the MDA imposed criminal liability as a law of Western Australia and it continued to apply to govern his criminal liability, notwithstanding that the jurisdiction subsequently exercised by the District Court to resolve the controversy between him and the State of Western Australia about the existence and consequences of that criminal liability was federal jurisdiction.[2]
Therefore, although the District Court was exercising federal jurisdiction, s 79 of the Judiciary Act 'was not needed, and was not engaged' to pick up and apply the text of s 6(1)(a) of the MDA as a law of the Commonwealth. The trial was of offences against a law of a state and not of offences against a law of the Commonwealth, and s 80 of the Constitution had no application.[3]
Their Honours referred to the fact that the words used in s 79 of the Judiciary Act, namely, 'laws relating to procedure, evidence, and the competency of witnesses' to some extent elucidates what is encompassed within the description in s 79 of state laws that are 'binding' on a court. That, however, does not invite an excursion into the 'difficult and sometimes elusive distinction between 'substance' and 'procedure''.[4]
Rather, Bell, Gageler, Keane, Nettle and Gordon JJ considered that the appropriate way in which to consider which laws s 79 of the Judiciary Act will 'pick up' is the distinction between the 'jurisdiction' of a court (in the Chapter III sense) and the 'power' that the court is permitted or required to exercise in the exercise of that jurisdiction. Their Honours said:

> By making state laws that are 'binding' on courts also binding on courts exercising federal jurisdiction, s 79 of the Judiciary Act takes the text of state laws conferring or governing powers that state courts have when exercising state jurisdiction and applies that text as Commonwealth law to confer or govern powers that state courts and federal courts have when exercising federal jurisdiction.[5]

Kiefel CJ concluded that s 79 of the Judiciary Act was directed to courts and that its purpose was to 'fill the gaps created by a lack of Commonwealth law governing when and how a court exercising federal jurisdiction is to hear and determine a matter and the inability of a state law to apply directly to that court whilst exercising federal jurisdiction'. In such a case, it is necessary that s 79 adopt the state provision and apply it.[6]
Accordingly, by that reasoning, s 114(2) of the CPA was such a provision as it regulated the manner in which a person's guilt or innocence was to be determined by a court. However, s 6(1)(a) of the MDA was not such a provision. It created an offence and applied directly, of its own force. There was therefore no need for it to be 'picked up' by s 79 as its

application was unaffected by the fact that the court deciding the matter was exercising federal jurisdiction. Therefore, s 80 of the Constitution was not engaged.[7]

Edelman J outlined four possible constructions of s 79 of the Judiciary Act:[8]

> First, that s 79 refers to all statutory laws of a state and thus all state laws become federal laws in a court exercising federal jurisdiction. This was the broadest construction and the only one which would, if accepted, have yielded success for the appellant.
>
> Secondly, that s 79 refers to statutory laws that confer powers on courts or that govern or regulate a court's powers. Edelman J said that this was the construction adopted by the other two judgments.
>
> Thirdly, that s 79 refers to only those statutory laws that govern or regulate the powers that a court exercises as part of its authority to decide. This was the construction that Edelman J preferred.
>
> Fourthly, that s 79 refers to laws concerning procedure rather than substance. Edelman J said that this was the construction adopted by the WA Court of Appeal. Edelman J acknowledged that this construction found some support in early High Court decisions but had been since rejected and was not supported by any party or intervener. The other judgments also rejected the notion that the laws referred to by s 79 are informed by the substantive/procedural dichotomy.

His Honour found that the appellant's construction had 'significant support' in some High Court decisions.[9] His Honour examined each of those authorities in detail and concluded that the result in each would be maintained if the second or third construction were adopted. In Edelman J's view, the third construction best accorded with the history, text, context and purpose of the section.[10]

ENDNOTES

1 *Cheatle v The Queen* (1993) 177 CLR 541; [1993] HCA 44.
2 [2017] HCA 23 at [40].
3 [2017] HCA 23 at [41].
4 [2017] HCA 23 at [83].
5 [2017] HCA 23 at [87].
6 [2017] HCA 23 at [32].
7 Ibid.
8 [2017] HCA 23 at [115]–[122].
9 [2017] HCA 23 at [109].
10 [2017] HCA 23 at [181]–[197].

Sydney Law School under wraps

Photo: Darren Covell / New South Wales Bar Association

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2017 Sir Maurice Byers Lecture

The law as an expression of the whole personality[1]

James Allsop*

Photo: Murray Harris Photography

I have taken the title of this evening's lecture from a short, but powerful, article on the advocate's view of the judiciary, given by Sir Maurice Byers in 1987, in which he wrote: [2]

> The law is an expression of the whole personality and should reflect the values that sustain human societies. The extent to which those values influence the formulation of the law varies according to the nature of the particular legal rule in question.

What did Sir Maurice mean by the phrase 'law as an expression of the whole personality'? We cannot ask him now, but we can look around and discern the shape and fabric of an answer: an answer that reflects his subtlety, complexity and humanity. Subtlety and complexity are not matters of choice. They are how life is. They are features of the human, as a whole.

A personality is a human attribute, an outward expression of the character of the whole. It is incapable of definition. It can be described, though not fully. It is neither understood nor described by breaking it down into separate component parts (if they be separate at all), though the parts may help one understand the whole. It can be illuminated by many things – art, poetry, music, metaphor, dance. It can be appreciated by experience. It is full of contradiction. It is made up of the explicit and the implicit, the contradictory and the ambiguous. It lives relationally, as part of human exchange and experience.

Subtlety and complexity are not matters of choice. They are how life is. They are features of the human, as a whole.

Where is the place of logic, of abstracted idea, and of taxonomy in a personality? Taxonomy is an abstraction of the mind. It is the disembodiment of the whole into its parts into an organised logical structure. It can be seen as a depersonalised abstraction; but it can also be seen as a human feature – as part of the human search for order. It is a way of thinking abstractly, in particular about parts and their ordering, as opposed to thinking about the whole and its character including its implicitness – about its whole personality.

How do these features of personality have relevance for the law? How do these different features and perspectives of the personality affect legal thinking, judicial technique and legal doctrine? There is something to be said, in thinking about the law, of the relationship between abstraction and theoretical taxonomical ordering of the parts, on the one hand, and a feeling of the human, the relationally experiential and the contextual, on the other. It is this that I wish to explore from Sir Maurice's phrase.

One dimension of the meaning and content of the phrase, 'the law is an expression of the whole personality,' can be implied from its place in the paper. It followed shortly after the citation of a passage from Sir Anthony Mason's 1987 Wilfred Fullagar Lecture entitled 'Future Directions in Australian Law'.[3] Sir Anthony referred to the evolving concept of the democratic process moving beyond an exclusive emphasis on parliamentary supremacy and majority will, and to the respect for the fundamental rights and dignity of the individual. In this respect, Sir Anthony said: '[t]he proper function of the courts is to protect and safeguard this vision of the democratic process'.[4]

The phrase used by Sir Maurice links the law to the individual, not as a political abstraction, but as a human in his or her living character. It is the human, with all his or her frailties, strengths and limitations, who is entitled to dignity, not the atomised and abstracted element of society.

The phrase (expression of the whole personality) implies the necessary wholeness of the law. It also implies the humanity of the law, as something constructed of more than (but including) organised abstractions and rules. It must be more than this if it is to express a personality. The phrase denies the exclusive authority of the abstracted rule as the essence or nature of law.

To say that law is an expression of the whole personality is not to deny the central place of articulation of rule, of clarity, of precision, of logic, of abstracted ideas, and, where helpful, of the giving of coherent taxonomical form to necessary abstractions of rules. But it is to deny the complete dominion or hegemony of such. That denial is necessary for doctrine to be shaped in a fully human form, and for the application of law to control power in human society. At times, this requires the recognition of the limits of text and expression. Sometimes striving to define in order to reach greater precision and clarity is counterproductive; it brings lack of clarity and false distinctions when the subject does not yield meaning beyond a general expression. The 'unacceptable risk' of sexual abuse of a child to justify an order denying a parent custody of the child is an example.[5] Unacceptable risk is not to be further defined. This is so – because of the human and experientially founded nature of the subject: the test is left at the appropriate degree of generality, to be judged against the facts.

Taxonomy's relationship with the messiness of reality is important for law. Taxonomy too simplistically arrived at will see the complex and subtle made falsely simple. Taxonomy too elaborately structured will see the simple made complex, and the complex made incomprehensible, with false distinctions and dichotomies, definitions and distinctions without difference, making the meaning of the whole obscure.

The world may be ruled by words, but it is understood by the implicit.

Something may also be drawn from the balance of Sir Maurice's sentence in which the phrase appears – that the law should reflect the values that sustain human societies. This directs one to the relationship between rules and values. The derivation of rules from values, and the importance of values to the law which I have elsewhere explored[6], can perhaps be explained and illuminated by today's discussion – by focussing on the way life and experience, as much as abstracted theory, shape the law.

Too detailed an explanation of Sir Maurice's phrase, pregnant as it is with meaning and implicit metaphor and nuance, may deaden its meaning by the flat weight of prose. The better approach may be to look at some examples of the formation and application of legal doctrine and rules to contemplate the force and power of the phrase.

I propose to discuss a number of topics of private and public law, civil and criminal, in order to suggest the depth of Sir Maurice's statement, and in order to illustrate what I am searching for in exploring the phrase, in particular its suggested element of the humanity of the law. This is not an exercise in seeking to show the gentleness or goodness of law, rather to show its structure, fluidity, simplicity, complexity, intellectual abstraction and experiential blunt reality.

The relationship between rules and values to which I just referred reflects, to a degree, an abstracted dialectic in this enquiry, in that both are conceptions. Though the critical values that inform the law, the dignity of the individual and the rejection of unfairness, are conceptions, they are derived from emotion, sentiment, the human condition and social experience. These values come from life and experience. As important as the contrasting of rules and values is the relationship between the abstract (in its different forms) and the experiential (in its countless manifestations). It is from the experiential that the abstracted human values that sustain societies manifest themselves in concrete situations, in law and in society. It is the human and the experiential that give the proper context for the derivation and expression of rules, principles and law. From that derivation, rules, principles and law become infused with values.

These ideas and this perspective, are not just important to the content of substantive legal doctrine, but they are also important for how we think about the law and how we express ourselves. For that reason, I wish to say something a little later about statutes and their expression.

Let me begin with a simple example. No one now would deny the objective theory of contract. The formation and meaning of the contract is to be judged by notions of objective reasonableness.[7] Within that framework, the place of the plea of *non est factum* sits awkwardly. It is grounded on the lack of subjective consent. But, as Lord Wilberforce put it in *Gallie v Lee*,[8] the doctrine is necessary as an instrument of justice. The cases recognise the difficulty in theoretical expression in identifying the boundary (if there truly be one) between *non est factum* and lack of capacity (with the differences in remedial consequences) but coherence is maintained by the experientially derived expression of principle and its application to concrete facts. This is an example of one rule qualifying another for the necessary response of the law to human considerations in the control of power, and the place of the law in protecting the vulnerable, by reliance on rule or principle expressed generally by reference to human experience.

Certainty is sometimes best created not by drawing a black line, but by creating a recognisable space.

Let me turn to a creature of law and equity – the doctrine of penalties in obligations. I propose to spend a little time on the subject because it displays with some clarity how the abstract and the experiential interrelate in the formation of legal doctrine. The setting aside or reforming of private contractual arrangements because of the presence of a penal provision has a long history. It was recently described by Lord Neuberger and Lord Sumption as 'an ancient, haphazardly constructed edifice which has not weathered well'.[9] It might be thought, however, that if a doctrine has developed and changed over 700 years, and still maintains a contemporary relevance, it is hardly surprising, in a legal system built on the literal expression of rules, that there have been twists, turns and inconsistencies and that the doctrine is a little weather-beaten. When one looks to the history of the doctrine,[10] one is struck by the feature that different judges saw different priorities and different rationales for the interference with freely-entered bargains. But the principal problem has been the attempts by judges to define the limits of a concept which is to a degree indefinable, to express abstract rules as a **comprehensive** representation of human standards which are experientially and relationally founded and recognised in circumstance, not logically or theoretically derived. One aspect of this is the limits of language. Clarity of expression is vital, but only up to, not further than, the end point of its utility. Recognising that point is not necessarily easy or self-evident. But a recognition that there is or may be such a point is of some importance. The world may be ruled by words, but it is understood by the implicit. From the earliest examples of the Chancellor's interference with the enforcement of defeasible conditional penal bonds (the origins of the doctrine of penalties[11]), the concern of the courts was the control of private power. The human imperatives that generated that exercise of state authority were not capable of definition, but were capable of description and recognition from an examination of circumstances and by reference to experience. Thus, the notions (all concepts of value, degree and indeterminacy) of exorbitance, unconscionability and extravagance were enunciated as the core of the doctrine. The values that underlay these notions were decency and fairness in the relational arrangements of commerce; derived not from definitions, but through lived experience.

As the doctrine developed through the 18th century, cases were decided, rules emerged, and surrounding private law developed.[12] The separate doctrinal and precedential growth of the common law and equity, together with the intervention of Parliament[13] revealed a body of law tolerably coherent which saw provisions acting as security for the performance of conditions (promissory in the view of the United Kingdom Supreme Court but not so restricted according to the High Court[14]) limited in their effect to what was just and appropriate given their fundamental purpose to act as security for the primary performance condition.

The 19th century saw the development of a more rigidly structured approach and a change in focus. This coincided with, and grew out of, the development of the modern law of contract. There came to be an emphasis on the intentions of the parties in a society increasingly influenced by *laissez faire* philosophy which saw debates framed in terms of rules and precedents, not in terms of experientially and relationally derived norms of conduct applied to circumstance. The doctrine became fixed around the distinction between the penalty and the genuine pre-estimate of damage, albeit expressed in terms of extravagance and unconscionability. In the first fourteen years of the 20th century, three powerful courts in a Scottish appeal in the House of Lords (from a jurisdiction without a separate stream of equity),[15] a Privy Council appeal from the Supreme Court of the Cape of Good Hope,[16] and an English appeal in the House of Lords,[17] sought to reconcile the abstracted rules and the experientially and relationally derived human values.

In the third of those cases, *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*,[18] Lord Dunedin provided a remarkably lucid compromise that became the orthodox penalties model for the 20th century. Its stability came from its form as a rule-based construct to solve the enigma to positivists of the setting aside of freely entered bargains by reference to values. *Dunlop*, you will recall, concerned a contract for the supply of trademarked 'Dunlop' tyres, tubes and associated products to a garage. As was permitted at that time, the contract contained a resale price maintenance clause with a provision for the payment of £5 by way of 'liquidated damages' for every article sold in breach of the agreement. The garage sold the tyres for a lower price, thus breaching the agreement. The court held that the clause providing for the £5 payments was a valid liquidated damages clause.[19] The four tests of Lord Dunedin were summarised by Lord Neuberger and Lord Sumption in *Cavendish* as follows:[20]

> (a) that the provision would be penal if 'the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach'; (b) that the provision would be penal if the breach consisted only in the non-payment of money and it provided for the payment of a larger sum; (c) that there was a 'presumption (but no more)' that it would be penal if it was payable in a number of events of varying gravity; and (d) that it would not be treated as penal by reason only of the impossibility of precisely pre-estimating the true loss.

The contemporary significance of *Dunlop* was that it was an attempt to draw together centuries of cases in equity and at common law and the differing approaches of judges with different philosophical views into a stable structure that yet provided for flexibility. The framework laid down by Lord Dunedin had two central features. The first was the identification of the relevant legal technique – he called it 'this task of construction'.[21] This can be seen, if only in language, to be a doctrinal recognition in the compromise of those judges (such as Lord Eldon[22] and Sir George Jessel[23]) who had given primacy to the intention of the parties in describing the clause as a genuine pre-estimate of damage, which was, by then, the reflex of the penalty. But, Lord Dunedin did not mean construction in the strictly textual and interpretive sense. He meant characterisation of all the circumstances including (but not bound by) the language of the parties: 'upon the terms and inherent circumstances of each particular contract'.[24] Characterisation goes beyond ascription of meaning and is not a process of definition; it is the evaluative formation of a conclusion from given circumstances applying explicit or implicit norms, values and assumptions. It is a process and legal technique that pervades the law and legal thinking that sometimes goes ignored, and often goes unrecognised or unremarked.[25]

The second feature of Lord Dunedin's framework was the expression of tests or rules that had a significant degree of certainty, but which sought to embody the value-based heart of the doctrine: a money stipulation that is extravagant and unconscionable in amount compared with the greatest loss that conceivably could be proved to have followed from the breach. Around these two features moved 'propositions' that too often were taken as rules. We see in Lord Dunedin's structure a search for clarity by structure, yet a vindication of human relational standards.

A more simply expressed expression of the test came from the speech of Lord Atkinson (which has become central in the recent cases). Lord Atkinson saw the broad justification for the impugned provision by reference to the legitimate interests of the obligee.[26]

The core of the matter was extravagance and unconscionability of compensation by reference to something. The 'greatest possible loss' was the phrase most often used, being rooted in the doctrine's history concerned with securing performance and the remedial consequences thereof. The greatest possible loss has an obvious and direct relationship with the protection of the legitimate interests of the party to whom performance is owed, but it does not necessarily define those interests comprehensively. One can (as the cases from the 19th century did) seek to concretise the law to give certainty. This is what dominated the analysis in the 19th century: what could be taken as a genuine pre-estimate of damages was not a penalty. One could, perhaps in the search for certainty, make this assessment by going to more rules about recovery of damages under *Hadley v Baxendale*[27] and such cases against which to compare the amount in the clause. Or, one could make the evaluation by reference to a broader conception closer to human experience, expressed more generally, involving the protection of the legitimate interests of the obligee. The former tended to be the approach taken until recently; the latter has now commended itself to both the United Kingdom Supreme Court and the High Court of Australia.

In *Cavendish* Lord Neuberger and Lord Sumption recognised the vice of rule-making in this area. They spoke of the doctrine of penalties having become: [28]

> the prisoner of artificial categorisation, itself the result of unsatisfactory distinctions: between a penalty and genuine pre-estimate of loss, and between a genuine pre-estimate of loss and a deterrent.

They recognised that:[29]

> These distinctions originate in an over-literal reading of Lord Dunedin's four tests and a tendency to treat them as almost immutable rules of general application which exhaust the field. … All definition is treacherous as applied to such a protean concept.

The concept is protean (and so changeable, polymorphic and variable) because it is human and experientially based, and to be recognised as such, by reference more to value than to rule.

Although disagreeing in an important respect about the relevance of a breach of contract to engage the doctrine, the Supreme Court in *Cavendish*[30] and *ParkingEye*[31] and the High Court in *Andrews*[32] and *Paciocco*[33] have moved away from a rule-based structure to one based on the evaluation of interests. In *Andrews*, drawing on the broader formulation of the obligee's interests as articulated by Lord Atkinson in *Dunlop*, the High Court said it would look to 'whether the sum agreed was commensurate with the interest protected by the bargain'.[34] This idea of legitimate interest was adopted (variously expressed) by the members of the court in *Paciocco*.[35] The members of the Supreme Court expressed the matter not dissimilarly.[36]

That the doctrine is experientially and relationally based, not logically founded on abstracted rules, is a powerful reinforcement of the true nature of the doctrine and of its role in the control of the exercise of private power, but in a way that does not undermine central legal values of party autonomy, freedom of contract and faithfulness to the bargain. This proper balance is not achieved by rules that give a false sense of certainty, but which in fact undermine freedom of contract by ignoring business relational reality in the particular circumstances of the case. Rather, the balance is achieved by experientially founded evaluation of the genuineness of interests in real life. Certainty is sometimes best created not by drawing a black line, but by creating a recognisable space. Business people understand conceptions rooted in business experience. Thus, one buttresses freedom of contract by the textually less precise, but experientially more certain principle because of its closeness to commercial reality without the need to follow precise rules of potentially arbitrary application. The buttressing of freedom of contract can be seen in the results of *Paciocco*, *Cavendish* and *ParkingEye* where the interests recognised as legitimate went beyond a mechanical approach involving comparison with damages calculated in the usual way.

The recognition of the importance of legitimate interests of the obligee, and the balance with freedom of contract was perhaps no better said than in 1986 by Mason and Wilson JJ in *AMEV-UDC*,[37] in a passage that has been recently recognised by Lord Hope for its importance.[38] Together with the recent formulations of the Supreme Court and the High Court, this passage contains experientially founded principles that balance two fundamentals of commercial law – freedom of contract and the control of unconscionable exercise of power through the recognition of the relevance of inequality of bargaining power.[39]

Let me now turn to restitution. There have been tensions and contrasts in the recent development of the law in England and Australia, and over more than three centuries between judges of different generations. This can be seen in the different importance given to abstracted rules on the one hand, and to relational conceptions based on experience and values, on the other.

Certainty and predictable coherence is a basal feature of a mature and civilised legal system.

In 1760, in *Moses v Macferlan*[40] Lord Mansfield sought to replace an unstructured and historically-based body of rules and causes of action with a principle: 'the defendant, upon the circumstances of the case, is obliged by ties of natural justice and equity to refund the money.'[41] By the early 20th century, the rules and precedential analysis thrown up by 19th century positivism, saw English courts retreat into more (barely logical) rules excluding, and sometimes with condescension describing, the place of conscience and equity in this field. In 1913 in *Baylis v Bishop of London*,[42] Hamilton LJ (later Lord Sumner) described *Moses v Macferlan* as 'vague jurisprudence'. In 1914 in *Sinclair v Brougham* the House of Lords (including Lord Sumner) equated restitutionary recovery to the availability of, and rules concerning, implied contract.[43] In 1923 in *Holt v Markham*,[44] Scrutton LJ referred condescendingly to Mansfield's 'well-meaning sloppiness of thought'.

But *Moses v Macferlan* today, certainly in Australia, provides the principled foundation

and the unifying concept of the law of restitution. In a series of cases,[45] the High Court has been largely faithful to what might be said to be the development of doctrine from the experiential – by recognising a unifying concept of unjust enrichment drawn from human intuitive response, recognising its application in particular known factual circumstances, and using legal reasoning (inductive and deductive) to consider the concept's application to human circumstances. This was the force of what was said by Deane J in 1987 in *Pavey & Matthews Pty Ltd v Paul*, when he said:[46]

> [unjust enrichment is a] unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation to make fair and just restitution … and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case.

The recognition of restitution resting on unjust enrichment took place in England in 1991 and 1996 in *Lipkin Gorman v Karpnale Ltd*[47] and in *Westdeutsche*.[48] But English law has been substantially informed by the work of the great English scholar of restitution, Professor Peter Birks. He embarked upon the great task of seeking to divine an overall structure or taxonomy for the law of restitution. Birks' contribution was of immense significance; it demonstrates the benefits (but also perhaps risks) that flow from structured and analytical thinking about the law. Birks contended that a case should be analysed[49] according to a framework of whether a defendant has been enriched, whether the enrichment was at the plaintiff's expense, whether there was a vitiating factor present that made the enrichment unjust, and whether any relevant defences were open on the facts. These elements, drawn, to a significant degree, from abstracted deductive reasoning, then led to a conclusion as to whether a defendant has been unjustly enriched.[50] Evaluative judgment or discretion of what is said to be unconscionable was to be eschewed.[51]

Language is not merely the vehicle of meaning, it is a source of law, because it has the capacity to excite meaning and understanding through feeling.

Birks' framework, as taken up in English law, presents an analysis with an abstracted structure and which could be considered as dividing unjust enrichment into distinct elements that come to approach constituents of an unjust enrichment cause of action.[52] There are, however, signs that the Supreme Court is softening this somewhat strict taxonomical approach.[53]

That the two approaches can lead to very different results can be seen in the case of *Ford*.[54] The decision of the trial judge that the recipient of funds received an incontrovertible benefit making him liable to repay it to the lender, in circumstances where he was vulnerable and simple-minded and duped by his son to part with the money, have the hallmarks of a legitimate and structurally sound application of the Birksian rule of enrichment by incontrovertible benefit by receipt of money. The Court of Appeal evaluated the justice of the case where the simple and vulnerable man had signed documentation in circumstances plainly bespeaking his weakness to the mortgage originator and which enlivened the doctrine of *non est factum*.[55] A taxonomy of a cause of action based on incontrovertible enrichment would have led to a gross injustice by any human standard. The appeal was allowed.

The law as to criminal responsibility should be as certain as possible, with as little place for value judgment as is reasonably possible.

Let me say a little more about certainty in commercial law. Certainty and predictable coherence is a basal feature of a mature and civilised legal system. The less certainty, the more risk; the more risk, the higher the cost.

But certainty is not gained by the written word alone. It is derived and felt from an understanding of a stable and known position. That comes as much from a known demand for trust, honesty and a lack of sharp practice as from clarity of expression. That is why, in most civilised legal systems, there is a concept of good faith in the law of bargains; not as a particular or specific implied term upon which to seek damages, but as a pervading norm that helps supply the blood and oxygen to honest common sense in the process of implication and construction of contracts.

Litigation lawyers in particular (by which phrase I include judges) sometimes resist these ideas in the name of certainty. That resistance can sometimes partly be traced to the fact that many gained their 'commercial' experience from 'commercial' litigation. The difficulty with that is they see commerce at the failure end, at the place of unravelling of relationships, where parties sometimes seem to compete with each other to be more unreasonable, dishonourable, greedier or meaner than the other. Litigation is often a place of little trust, and less good faith. The trouble is that the common law is forged in such a place. That is unfortunate because the other 99 per cent of commercial parties who do not need to go to court to engage in mutually profitable arrangements have their rules made there.

Certainty is made by strong, clear, reasoned principles based on trust, honesty, reason, common sense and good faith. These are human values and qualities not definable, but regularly displayed and recognised by commercial people, which lower the transactional costs of business.

New York is, and was in the early 20th century, a world commercial centre. It was then, and no doubt still is, home to judges of great commercial acumen. In the 1920s and 1930s, these judges included the great Cardozo. Not only was he a great lawyer and judge, but also he wrote with a style and grace that exemplified the importance of language to law. Language is not merely the vehicle of meaning, it is a source of law, because it has the capacity to excite meaning and understanding through feeling. The implicit strength of an idea gives the idea a quality that distinguishes it. Thus, to understand the nature of the requirement of fiduciary trust, one can read text book after text book, case after case, Corporations Act provision after Corporations Act provision, but one will never obtain a better sense, feeling or sentiment of fiduciary trust than by reflecting upon Cardozo's famous dictum in *Meinhard v Salmon*:[56]

> A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

And common law is no different to equity. In dealing with a building contract in 1921, Cardozo was faced in *Jacobs & Young v Kent*[57] with a problem of substantial performance and dependent promises. A builder had been required to install a particular brand of piping. A subcontractor had installed a different brand, but one which was qualitatively substantially equivalent. The owner refused to pay the balance of the contract sum until the whole piping was replaced with piping of the brand requested – an onerous and expensive task. There is much in Cardozo's language that illuminates the process of characterisation of terms, and the commercial values which underpin the law. Speaking of the process of characterisation of terms as dependent or independent, he said:[58]

> Considerations partly of justice and partly of presumable intention are to tell us whether this or that promise shall be placed in one class or another … Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. If

> something else is in view, it must not be left to implication. There will be no assumption of a purpose to visit venial faults with oppressive retribution.

He then went on to say something of symmetry and logic, saying:[59]

> Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favour of a stricter standard. The courts have balanced such considerations against those of equity and fairness, and found the latter to be weightier …Where the line is to be drawn between the important and the trivial cannot be settled by a formula.

These words reveal the importance of the human and the just as well as of the word in commercial law. That is because law is to be felt as well as read to be understood. Commercial people do that for a living in their own relational activity.

Let me turn to the criminal law. There, most clearly, one can see the places of the rule and the value, and the abstracted expression and the experiential.

The need to define, with clarity, the limits and content of criminal liability is clear, indeed perhaps self-evident. The law as to criminal responsibility should be as certain as possible, with as little place for value judgment as is reasonably possible.[60] This is so even though the criminal law is regulating human relationships and experience. That is not to say, however, that the content of the rules of liability must not be derived from a human experiential and relational sense of justice. If the rules of criminal responsibility do not conform to, and are not expressed by reference to and in language conformable with, the relationally human and the experiential, they will lose community consent and respect. Sometimes, however, the evaluative assessment is a central part of an offence. The offence of wilful misconduct in public office includes as elements of the offence 'wilful misconduct, by wilfully neglecting or failing to perform his duty in a way that merits criminal punishment'.[61]

The duty of the judge is to reflect the human, experiential and relationally whole response of society; not as a person, but as the embodiment of just state power.

Further, to recognise the central place of the expression of the rule in criminal liability does not detract from the force of something I said earlier about the limits of text. Rules are necessary to make clear the line past which the citizen becomes criminal and becomes subject to punishment. But the conception of wrongdoing is relational and experiential and at some point in the expression of the rule clarity is best achieved by ceasing to define, or clarity is impeded by continuing to define. Such considerations no doubt have been important to the general expression of the offence of misconduct in public office. The criminal cartel provisions of the *Competition and Consumer Act 2010* (Cth)[62] when read with the Commonwealth *Criminal Code*[63] and the definition-ridden insider trading provisions of the *Corporations Act 2001* (Cth)[64] are perhaps examples of more text leading to less clarity.

...the subject is power: who is authorised to wield it, how should it be exercised and what are its limits?

Upon conviction, the criminal must be sentenced to punishment. From the universe of liability where rule is central to legitimacy, one moves to a universe where rule is part, but only part, of an exercise that is experientially intuitive at heart. Rule plays a part because sentencing must be undertaken in accordance with relevant legislation. But it is the human response which dominates.

That sentencing must be undertaken according to statute directs one towards, not away from, the ultimately intuitive response to the offending by the offender. The duty of the sentencing judge is, as the High Court said in *Elias*, 'to balance often incommensurable factors and to arrive at a sentence that is just in all of the circumstances'.[65] The instinctive synthesis[66] is the human, and not mechanical or mathematical, response to the circumstances and the often conflicting factors and considerations. There are no quantitative boundaries or rules of literal application in sentencing. It is a process fixed upon individualised justice in the context of the offender's relationship with society. It is the evaluation of the human context of the offender that marks the process, eschewing any structured approach, or mechanical application of any abstracted rule. These themes have dominated the jurisprudence of the High Court since *Wong*.[67] The experiential, the implicit and the importance of feeling to the human circumstance allows the court as an institution, with its experience and knowledge, to express its response as the manifestation of just state power to the inherently human, infinitely varied, often tragic and violent situations before it. One cannot reason out in logic, or even describe, except by conclusions evoked from human feeling, why the sentence imposed on the step-father in *Dalgliesh*[68] – who had committed incest with his step-daughter under 14 – was manifestly inadequate. A universe of factors can be expressed, but the conclusion can only be reached intuitively by contemplation and elucidation. The comprehensive expression of the precise weight and importance of each factor is impossible because the task is the assessment of the whole by reference to a human judgment of appropriateness and justice, based on experience and instinct. The plurality judgments in *Wong* and *Markarian* are clear in their expression of these concepts. The concurring judgment of McHugh J in *Markarian* illuminates them with literary power in a piece of writing of devastating force. His Honour cited[69] the gritty blunt expression of the depression years of Sir Frederick Jordan in *Geddes*[70] that evokes in the mind the human circumstance, reality and tragedy of Mr Geddes' crime – the drunken beating to death of his physically more powerful rival after the taunts of his estranged partner – an intended 'thrashing' that ended a life. It is from the articulation of the reality that the justice of the response, so long ago, is still felt. This is law and justice, because it is not all abstracted rule. This is why McHugh J was so correct, if that expression be permitted, when he stressed in *Markarian*[71] the importance of the transparent articulation of the instinctive synthesis. I would only respectfully add that the articulation requires the direct language of life; and also that there exist limits, and a likely ultimate inadequacy, of that articulation, because of the nature of the conclusion as, at least partly, an implicit human response of feeling to the circumstances of life and the human condition. It is the feeling from which, at least in part, the law springs.

Within sentencing lies complexity, humanity (sometimes with its contradictions), rule of statute and general law, values and societal response and will to the always unique circumstances of an individual's life and relationship with society. The duty of the judge is to reflect the human, experiential and relationally whole response of society, not as a person, but as the embodiment of just state power. Thus, in a modern judicial reflection of the medieval theory of kingship of the King's Two Bodies[72], the societal response is administered by a human, but one necessarily abstracted; an abstracted representation of human society. The contradictions, the requisite balance, and the inability to draw workable and legitimate conclusions only from the application of abstracted rules in this field can be seen and understood in Chief Judge Haynsworth's expression of the purpose of the criminal law and its character in *US v Chandler*[73] cited by Gleeson CJ in *Fardon*[74], and in the human tragedies dealt with in the judgments in *Veen (No 1)* and *(No 2)*[75].

These are not new concepts. They are often found in, indeed they pervade, the law. The vain search for definition or explanation of a subject beyond that which the subject will admit can be seen in a wide variety of contexts, from the impossibility of defining constitutional conceptions beyond such phrases as 'direct', 'remote' and 'pith and substance'[76] to the protection of the child from 'unacceptable risk' in family law, to intuitive synthesis in sentencing in criminal law, to the characterisation of the seriousness of breach in contract law, to the central notion of causation in all fields of the law – to wherever one is dealing with a subject which in part is indefinable because of its relationally human or experiential character.

That justice cannot be defined is its inherent strength.

Let me say something of administrative law. I use the expression 'administrative law'. The rules and principles concerned with the exercise of public power are better conceptualised as part of constitutional law. It is a branch of the law whose shape and texture are very much affected by what I have been discussing. This is so for a simple reason that lies at the heart of constitutional and public law – the subject is power: who is authorised to wield it, how should it be exercised and what are its limits? Power is a relational concept informed by consent, by compulsion, by a respect for dignity and by the need to eschew unfairness. Contemplation of these concepts reveals that definitional limits and logical constructs will have their limits.

The notion or conception of jurisdictional error is central to the analysis of the exercise of public power involved in its review under s 75(v) of the Constitution and implicitly identically under state law by the doctrine in *Kirk*.[77] Essential to the application of the notion of jurisdictional error is the process of statutory construction in order that the textual limits of power be understood. But the human and relationally experiential judgment involved in legal unreasonableness does not depend on definitional formulae or some precise verbal expression. The concept under consideration is the exercise of power. Over-categorisation and over-definition lead to lack of clarity and confusion. The sufficient defect for the conclusion to be drawn that the power has not been exercised, that the jurisdiction to exercise the power was lacking, has been variously expressed over the years. All the expressions of principle by the courts, by reference to the contemplation of the circumstances in question, seek to express something human about power: the necessity for a discretion to be exercised according to the rules of reason and justice, not private opinion; according to law, and not humour; and within the limits that an honest and competent person would confine himself that is legal and regular, not arbitrary, vague and fanciful;[78] the illegitimacy of a decision that would not be reached by a reasonable or sensible person.[79] Many expressions have been employed[80], but all are centred on how a human would act, or should act when wielding power. Where one cannot find some known kind of error but one is seeking to make an assessment about the legitimacy of the exercise of the power from the result, one's task is evaluative. It is an assessment framed by any relevant statute, by the nature and character of the decision, its legal context and attendant values of the common law. Within the framework of the supervision of legality, one must assess the decision using descriptive and explanatory phrases of the kind just mentioned. This is to translate the human into the legal; not to impose the legal upon the human, as if the former was logically and abstractedly derived.

Let me finish with the central topic of statutes. We live, at least with much Commonwealth legislation, in an age of detailed deconstructionism. The elemental particularisation of modern day legislation – its deconstructionist form, sometimes arranged more like a computer program than a narrative in language to be read from beginning to end, reflects a modern cast of mind intent on particularity, definition and scientific composition and structure that is dismissive of the implicit, of the unknown and of trust in the judgment of instinct. Yet these latter are powerful human forces and influences – not to be left free to run untrammelled as passion, prejudice and bigotry, but to find their place in a framework of rules and principles, to take their place with rational thought to combine to form reason and human value judgments, sometimes which cannot be deconstructed.

I am not intending by saying anything this evening to devalue the central structural place of rules and principles clearly and fully expressed, where possible in an ordered and logical way (whatever the logic may be). Far from it. Rather, I seek to protect their value by recognising that they are threatened by a failure to accord the place of the wholeness of the human context, or to use Sir Maurice's words, to recognise the law as an expression of the whole personality. Sometimes that failure, with the consequent risk to clarity, can be seen in statutory drafting; sometimes it can be seen in the complexity or rigidity of doctrinal expression. If legislation is to be built on complex and interlocking definitions, or if doctrine is to be ordered minutely in the attempt to express exhaustively the minute reach and particular application of the underlying norm, there comes a point where the human character of the narrative fails, where its moral purpose is lost in a thicket of definitions, exceptions and inclusions. The vice is not just lack of clarity; that is bad enough. Worse, it is a loss of human context, a loss of the expression of the human purpose of the law. Language is vital for the expression of the idea in a way that makes its implicit boundaries, context and meaning understandable. To deconstruct into parts and to attempt to express by the exhaustive expression of all the parts may not give an understanding of the whole because it may hide the implicit in the whole: that which emerges only from the whole, from the expression of the personality.

That the law is drawn in part from an indefinable human source – a source of feeling, of emotion, of a sense of wholeness – gives it a protective strength in the service of human society. That source of feeling and emotion includes a sense of, or need for, order, but order in its human place, and not overwhelmed by abstraction and taxonomy. That partly indefinable sense of wholeness of the law allows it to protect and safeguard the vision of democratic process to which Sir Anthony Mason referred. It provides the systemic antidote to logical reductionism that on its own would see the law as the sharp instrument of those who control power. That justice cannot be defined is its inherent strength and permitted such a great lawyer and legal thinker as Sir Victor Windeyer to say that 'a capacity in special circumstances to avoid the rigidity of inexorable law is of the very essence of justice'.[81]

I have not discussed the great constitutional ideas that Sir Maurice was responsible for launching and moulding. I have preferred to say something about judicial technique and mode of thought this evening. That, however, leads us back to the Constitution and our struggle, as lawyers, with power. Law, after all, is about power, private and public, and its control. And as Sir Maurice's phrase illuminates, in a few lines, the technique of law must be whole and human – to express a personality aided by coherence and reason, but recognising that the whole and the human are not always definable.

Perhaps one might finish with a question: Whose personality? The answer perhaps lies in the balance of the phrase: the personality informed by the values that sustain human societies, not the characteristics that diminish or destroy.

Sydney, 1 November 2017

ENDNOTES

* Chief Justice, Federal Court of Australia

1 I wish at the outset to express my debt to a number of people whose friendship and intellectual engagement have contributed to my thinking in this paper. Paul Finn, Dr Iain McGilchrist, Stephen Margetts, Tim Game, Julia Roy and Kevin Connor have over different times drawn out for me the importance of the human, the complex and the indefinable. Dr McGilchrist's magisterial work *The Master and his Emissary* is a polymathic exploration of the functioning of the brain and its relevance to history and culture (and so the law).

2 Sir Maurice Byers, 'From the Other Side of the Bar Table: An Advocate's View of the Judiciary' (1987) 10 *University of New South*

Wales Law Journal 179 at 182.

3 Geoffrey Lindell (ed), *The Mason Papers* (Federation Press, 2007) at 11-26.

4 Ibid 26.

5 *M v M* [1988] HCA 68;166 CLR 69 at 78.

6 James Allsop, 'Values in Law: How they Influence and Shape Rules and the Application of Law' (Paper delivered at the Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong Hochelaga Lecture Series, Hong Kong, 20 October 2016); James Allsop, 'Values in Public Law' (Paper delivered as the 2015 James Spigelman Oration, Sydney, 27 October 2015).

7 See *Taylor v Johnson* at [1983] HCA 5; 151 CLR 422 at 428-432; *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; 209 CLR 95 at 105 [25]; *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; 218 CLR 451 at 461-462 [22]; *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* [2004] HCA 52; 219 CLR 165 at 179-182 [40]-[46].

8 [1971] AC 1004 at 1026.

9 *Cavendish Square Holding BV v Makdessi; ParkingEye Ltd v Beavis* [2015] UKSC 67; [2016] AC 1172 at 1192 [3] per Lord Neuberger and Lord Sumption.

10 See CJ Rossiter, *Penalties and Forfeiture* (Law Book Company, 1992); AWB Simpson, 'The Penal Bond with Conditional Defeasance' (1966) 82 *Law Quarterly Review* 392; *Cavendish* [2016] AC 1172; *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30; 247 CLR 205; *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28; 258 CLR 525.

11 See, generally, Simpson, *op cit* and Rossiter, *op cit*.

12 See Rossiter, *op cit*; *Cavendish* [2016] AC at 1193-1194 [6]-[7] per Lord Neuberger and Lord Sumption and *Andrews* 247 CLR at 218 [14].

13 See 8 & 9 Will III, c 11 (1696); 4 & 5 Anne, c 16 (1705).

14 *Cavendish* [2016] AC at 1208 [42] per Lord Neuberger and Lord Sumption and *Andrews* 247 CLR at 225 [39]; 226-227 [42] and 227 [45].

15 *Clydebank Engineering & Shipbuilding Co Ltd v Yzquierdo y Castaneda* [1905] AC 6.

16 *Commissioner of Public Works v Hills* [1906] AC 368.

17 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79.

18 Ibid.

19 See discussion of *Dunlop* in *Cavendish* [2016] AC at 1198-1199 [21] per Lord Neuberger and Lord Sumption.

20 Ibid at 1199 [21].

21 *Dunlop* [1915] AC at 87.

22 *Astley v Weldon* (1801) 2 Bos & P 346.

23 *Wallis v Smith* (1882) 21 ChD 243.

24 *Dunlop* [1915] AC at 87 per Lord Dunedin. See also *Cavendish* [2016] AC at 1244 [142] per Lord Mance.

25 James Allsop, 'Characterisation: Its place in Contractual Analysis and Related Enquiries' (Paper delivered at the Contracts in Commercial Law Conference, Sydney, 18-19 December 2015).

26 *Dunlop* [1915] AC at 92-93 per Lord Atkinson.

27 *Hadley v Baxendale* (1854) 9 Ex 341 ; 156 ER 145.

28 *Cavendish* [2016] AC at 1204 [31] per Lord Neuberger and Lord Sumption.

29 Ibid.

30 *Cavendish* [2016] AC 1172.

31 *Parking Eye* [2016] AC 1172.

32 *Andrews* 247 CLR 205.

33 *Paciocco* 258 CLR 525.

34 *Andrews* 247 CLR at 236 [75].

35 Justice Kiefel (with whom French CJ agreed) formulated the test as whether the sum imposed was 'out of all proportion to the interests of the party which it is the purpose of the provision to protect': *Paciocco* 258 CLR at 547 [29]. Justice Keane (in an approach that reflected an important obiter dictum of Mason and Wilson JJ in *AMEV-UDC*) put particular focus on the function of the penalty rule as one that regulated the way in which parties use their bargaining power to impose punishment on other contracting parties. Where the sum was not proportionate or commensurate with legitimate commercial interest, he said, 'the punitive character of the provision stands revealed': *Paciocco* 258 CLR at 607 [256]. Justice Gageler focussed on what smilingly may be described as the yin and the yang of commercial bargains in describing a test where the 'negative incentive to perform' is 'so far out of proportion with the positive interest in performance that the negative incentive amounts to deterrence by threat of punishment': *Paciocco* 258 CLR at 580 [164].

36 In their reasons, Lord Neuberger and Lord Sumption offered the following by way of definition of the 'true test', namely '[W]hether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation': *Cavendish* [2016] AC at 1204 [32]. Lord Hodge (with whom in this respect Lord Toulson agreed) expressed it as 'whether the sum or the remedy stipulated for breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract': *Cavendish* [2016] AC at 1278 [255]. Lord Mance referred to the need to identify any legitimate business interest protected by the provision and whether the provision is extravagant, exorbitant and unconscionable by reference to it: *Cavendish* [2016] AC at 1247 [152]. Lord Clarke agreed with Lord Hodge and Lord Mance: *Cavendish* [2016] AC at 1285 [291].

37 *AMEV-UDC Finance Ltd v Austin* [1986] HCA 63; 162 CLR 170 at 193-194.

38 Lord David Hope, 'The Law on Penalties –A Wasted Opportunity?' (2016) 33 *Journal of Contract Law* 93.

39 In *AMEV-UDC* Finance 162 CLR at 193-194 Mason and Wilson JJ said: 'The test to be applied in drawing [the distinction between compensation and what is unconscionable and oppressive and penal] is one of degree and will depend on a number of circumstances, including (1) the degree of disproportion between the stipulated sum and the loss likely to be suffered by the plaintiff, a factor relevant to the oppressiveness of the term to the defendant, and (2) the nature of the relationship between the contracting parties, a factor relevant to the unconscionability of the plaintiff's conduct in seeking to enforce the term. The courts should not, however, be too ready to find the requisite degree of disproportion least they impinge on the parties' freedom to settle for themselves the rights and liabilities following a breach of contract. The doctrine of penalties answers…..an important aspect of the criticism often levelled against unqualified freedom of contract, namely the possible inequality of bargaining power. In this way the courts strike a balance between the competing interests of freedom of contract and protection of weak contracting parties.'

40 (1760) 2 Burr 1005.

41 Ibid at 1012.

42 [1913] 1 Ch 127 at 140.

43 [1914] AC 398.

44 [1923] 1 KB 504 at 513.

45 See, eg. *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5; 162 CLR 221 at 256-257; *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation* [1988] HCA 17; 164 CLR 662 at 673; *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48; 175 CLR 353; *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; 208 CLR 516 at 543-545 [70]-[74]; *Equuscorp Pty Ltd v Haxton* [2012] HCA 7; 246 CLR 498 at 515-517 [29]-[30]; *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14; 253 CLR 560 at 596 [78].

46 [1987 HCA 5; 162 CLR 221 at 256-257.

47 [1991] 2 AC 548.

48 [1996] AC 669.

49 Peter Birks, *An Introduction to the Law of Restitution* (Oxford University Press, 1989) 20.

50 Ibid.

51 A similar approach has been taken by other English writers including Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 8th ed, 2011) at [1-09]; Andrew Burrows, *The Law of Restitution* (Oxford University Press, 2011) at 26-27 and in Andrew Burrows, *Restatement of the English Law of Unjust Enrichment* (Oxford University Press, 2012). Birks himself described Lord Mansfield's recourse to equitable considerations as involving 'a dangerously high level of abstraction': Birks, *op cit* at 80. For Birks, the 'unjust' in 'unjust enrichment' meant the vitiating factors recognised by the law as giving rise to restitution and did not describe a 'notion of justice': Birks, *op cit* at 99.

52 Lord Steyn adopted this analysis in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 227 (Lord Steyn) and 234 (Lord Hoffmann). Burrows, in fact, describes this academic framework as having been 'expressly approved' by the courts: Burrows, op cit at 27. Later, in *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66; [2016] AC 176 Lord Clarke stated that at 187 [18]: 'In *Benedetti v Sawiris* [2014] AC 938 the Supreme Court recognised that it is now well established that the court must ask itself four questions when faced with a claim for unjust enrichment. They are these: (1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant?'.

53 See James Allsop, 'Rules and Values in Law: Greek Philosophy; The Limits of Text; Restitution; and Neuroscience? – Anything in Common?' (Paper delivered at the Hellenic Australian Lawyers Association – Queensland Chapter Seminar, Brisbane, 29 March 2017) at [27]-[28], discussing *Commissioners for HM Revenue and Customs v Investment Trust Companies (in liq)* [2017] UKSC 29; 2 WLR 1200 at 1214 [41] per Lord Reed and *Lowick Rose LLP (in liq) v Swynson Ltd & Anor* [2017] UKSC 32; 2 WLR 1161 at 1171 [22] per Lord Sumption.

54 *Ford (by his tutor Watkinson) v Perpetual Trustees Victoria Ltd* [2009] NSWCA 186; 75 NSWLR 42.

55 Ibid at 63-64 [85]-[90].

56 249 NY 458 (1928) at 464.

57 230 NY 239 (1921).

58 Ibid at 242.

59 Ibid at 242-243.

60 *Taikato v The Queen* [1996] HCA 28; 186 CLR 454 at 466.

61 *R v Quach* [2010] VSCA 106; 201 A Crim R 522 at 535 [46]; *R v Obeid* (No 2) [2015] NSWSC 1380 at [22] and [111]-[121]; *Obeid v R* [2017] NSWCCA 221 at [60] and [201]-[235].

62 *Competition and Consumer Act 2010* (Cth) Pt IV Div 1 Subdiv B.

63 Ch 2 of the *Criminal Code* is applied by s 6AA of the *Competition and Consumer Act 2010* (Cth) to offences under that Act.

64 *Corporations Act 2001* (Cth) Pt 7.10 Div 3.

65 *Elias v The Queen* [2013] HCA 31; 248 CLR 483 at 494 [27].

66 *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 at 377-378 [51]-[52] per McHugh J.

67 *Wong v The Queen* [2001] HCA 64; 207 CLR 584; *Markarian v The Queen* [2005] HCA 25; 228 CLR 357; *Hili v The Queen* [2010] HCA 45; 242 CLR 520; *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120; *Bugmy v The Queen* [2013] HCA 37; 249 CLR 571; *Elias v The Queen* [2013] HCA 31; 248 CLR 483; *Kentwell v The Queen* [2014] HCA 37; 252 CLR 601; *CMB v Attorney General* (NSW) [2015] HCA 9; 256 CLR 346; *Director of Public Prosecutions v Dagliesh (a pseudonym)* [2017] HCA 41.

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78 *Sharp v Wakefield* [1891] AC 173, 179; *Shrimpton v Commonwealth* [1945] HCA 4; 69 CLR 613 at 620.

79 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 234; *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1064.

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Protecting whistleblowers: A comparative view from the UK

By Sheryn Omeri

For practitioners of employment and discrimination law in England, which includes the law pertaining to whistleblowing, it was extremely disturbing to read, last year, of the cancellation of the contract of psychologist, Paul Stevenson, after he had spoken to the *Guardian* about his experiences when working within Australia's offshore immigration detention centres at Nauru and Manus Island. Even more disturbing was learning that pursuant to s 42 of the *Australian Border Force Act 2015*, Stevenson could have been imprisoned for up to two years for having disclosed apparently any information he had obtained in his capacity as an Immigration and Border Protection worker. It appeared that Stevenson would not necessarily have been protected by the provisions of the Federal *Public Interest Disclosures Act 2013* because his disclosures were made to the press in circumstances where they may have concerned the acts of officials of foreign (i.e. non-Australian) governments and/or Stevenson may not have first made an internal disclosure to his employer. If he had done the latter, it is not clear whether it could be said that any investigation which had been carried out in response was inadequate.

It was encouraging to read, in June 2017, of the announcement of Federal Minister for Revenue and Financial Services, Kelly O'Dwyer, that the Turnbull government wishes to introduce measures to tighten legislation to give compensation and protection to whistleblowers. It was also encouraging to see the publication, even more recently, of the September 2017 Report on Whistleblower Protections of the Parliamentary Joint Committee on Corporations and Financial Services.

The focus however, of both the Minister and the Joint Committee was (perhaps unsurprisingly, given their portfolios) on protecting those who blow the whistle in respect of malpractice in the financial services industry. In reality however, properly drafted whistleblowing legislation has the potential to have a much wider protective effect.

Although *some* consideration was given by the Joint Committee to the protections afforded to whistleblowers in England; in my view, this was somewhat cursory and greater consideration is merited. In England, the rights of whistleblowers are protected by provisions of the same legislation that provide for other causes of action which may be pursued by employees or workers such as unlawful deduction from wages and unfair dismissal; that is, the *Employment Rights Act 1996* ('the ERA', as it is fondly known). In contrast, the Joint Committee appears to recommend that whistleblower legislation remains largely separate from employment-specific legislation. In addition, despite recognising the fragmented nature of whistleblowing legislation in Australia, the Joint Committee nonetheless recommends separate legislation in respect of whistleblowing in the public and private sectors. This adds or maintains an unnecessary layer of complication in a context which will always be inherently, factually and legally complex and which will therefore benefit from as much simplification as possible.

In the English context, the provisions concerning whistleblowing are set out from s 43A of the ERA. In order to benefit from the statutory protection (or compensation in the event of a violation of such protection), employees and workers must satisfy a number of threshold requirements, which enable their disclosures to qualify for protection. The first such set of requirements is enumerated in s 43B, namely that an employee or worker makes disclosures of information which in his or her reasonable belief are in the public interest and which tend to show:

(a) that a criminal offence has been committed, is being committed or is likely to be committed;

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he or she is subject (including an obligation imposed by contract);

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;

(d) that the health or safety of any individual has been, is being or is likely to be endangered;

(e) that the environment has been, is being or is likely to be damaged; or

(f) that the information tending to show any such matter has been or is likely to be deliberately concealed.

Importantly in the case of people like Stevenson, or indeed, those who blow the whistle on malpractice in the financial services industry which has occurred overseas, the ERA specifically states that it is immaterial whether the relevant failure occurs or would occur in the UK or elsewhere and whether the law applying to it is the law of the UK or of any other country or territory.

In 2015, the protection afforded by the whistleblowing provisions of the ERA was broadened through the insertion of an extended definition of the term 'worker' which, in the context of whistleblowing only, now covers agency workers; those who provide services to the National Health Service under a variety of different contractual arrangements which do not fit comfortably within the

more traditional concept of an employment or worker relationship, as well as to those undertaking work experience pursuant to a training program.

It is interesting to note that the Joint Committee, in recommendations 6.1 and 6.2, seeks to broaden protection through extension to former public officials and contractors of the Australian Public Service as well as former staff, contractors and volunteers in the private sector.

In the English context, qualifying disclosures will be protected if they are made to a person's employer. In such cases, the employee or worker need only have a reasonable belief that the information he or she has disclosed 'tends to show' one of the above-mentioned states of affairs. The employee or worker does not need to have sufficient evidence to demonstrate that a criminal offence has in fact been committed for example. Provided the employee's belief in the information tending to show this was objectively reasonable, he or she will be protected even if he or she turns out to be wrong. An employee or worker will also be protected if he or she makes a disclosure to a prescribed person such as the Information Commissioner, if the employee or worker reasonably believes that the relevant failure falls within the remit of that prescribed person. Where an employee or worker makes a disclosure to someone other than his or her employer, a slightly higher state of belief is required; that is, the employee or worker must reasonably believe that the information he or she discloses and any allegation contained in it are substantially true, rather than just that they tend to show one of the above-mentioned states of affairs.

Crucially in many cases, the ERA allows employees and workers to make disclosures to the press where they believe that the information is substantially true, they do not make the disclosure for purposes of personal gain and in circumstances where any of the following matters prevail: (i) they think they will be subjected to a detriment by their employer; (ii) their employer is likely to conceal or destroy evidence of the subject matter of their disclosure; or (iii) they have already made a disclosure of the same information to their employer.

Provided these conditions are met, the employee or worker will be protected from being dismissed and also from being subjected to any detriment short of dismissal. The concept of a detriment which falls short of dismissal has been given a wide meaning by the courts. In relation to remedies, whistleblowing claims are treated like discrimination claims and tribunals are empowered to make (uncapped) awards for compensation which reflect any detriment to which the employee or worker has suffered (including dismissal and inability to find alternative work) and damages for injury to feelings, which are not available in the case of other common claims such as unfair dismissal.

Complaints of whistleblowing are heard in the Employment Tribunal, which was established in order to provide a speedy and more cost-effective resolution for employment-related complaints than the ordinary courts. As whistleblowing claims tend to be fact-sensitive, they are required to be determined by a full bench, comprising an employment judge and two lay wing members, one with a management background and the other with a more employee-focussed (typically union) background, as in the case of discrimination claims (and unlike in the case of contractual claims or claims for unfair dismissal).

"I'm sensing confidence, boldness, and moral sensibility. You're not not going to turn out to be a whistleblower, are you?"

Aaron Bacall / Cartoonstock

It is important to note that s 43B(3) of the ERA confirms that a disclosure of information is not a qualifying disclosure if the person making it commits an offence by doing so. Given that s 42 of the *Australian Border Force Act 2015* renders the disclosure of any information obtained in one's capacity as a Border Protection worker an offence, even a wholesale duplication of the provisions of the ERA may not have been of direct assistance to someone in Stevenson's position. I say 'direct' assistance, because indirectly, the enactment of whistleblowing protections in England and Wales (and their extension to non-traditional workers) has a normative effect which has encouraged a widespread societal respect for whistleblowers and a recognition of the important role they may play in the fields of human rights violations and regulation of the financial services sector, among many others. In such circumstances, legislative provisions like s 42 of the *Australian Border Force Act 2015* may be less likely to be enacted in the first place, given the primacy accorded to the role of the whistleblower.

For those who may be concerned about an increase in protection for whistleblowers (perhaps particularly in the private sector) leading to an opening of the proverbial floodgates, this has not been borne out in the English context. Employment tribunals are faithful to the terms of the legislation which require evidence of a disclosure of information; that is, a conveying of facts which is more than a communication of one's position in negotiations, an allegation or an opinion: *Cavendish Munro Professional Risks Ltd v Geduld* [2010] ICR 325.

In addition, most employees who bring claims for whistleblowing that are ultimately unsuccessful find themselves in such position because there is insufficient evidence of causation, that is, material from which the Employment Tribunal can infer that the employer dismissed the worker because (or at least principally because) he or she had made a protected disclosure. In this regard, the Court of Appeal has been clear that, given the terms of the relevant statutory provisions, it is perfectly lawful for an employer to dismiss a worker for the manner in which he or she makes a protected disclosure or for conduct relating to the making of the protected disclosure rather than the fact of the making of the disclosure. In *Evans v Bolton School* [2007] ICR 641, a high school IT teacher was dismissed for hacking into the school's IT system in order to prove how easy it was to do so about which he subsequently made a protected disclosure. The Court of Appeal held that the word 'disclosure' was not a term of art and was to be given its ordinary meaning which does not extend to the whole course of a worker's conduct and did not, in that case, extend to the employee's conduct in hacking into the school's computer network. This was upheld by the Employment Appeal Tribunal in the more recent case (in which I acted for the employer) of *Barton v Royal Borough of Greenwich* UKEAT/0041/14/DXA.

As a result, when it comes to the drafting of fresh legislation aimed at enhancing the protection available for whistleblowers in Australia in both the public and private sectors, the Turnbull Government might consider that the corresponding English law and jurisprudence on the subject provide at least a helpful starting point.

Vicarious trauma in the legal profession

By Kylie Nomchong SC

Robyn Bradey, a mental health accredited counsellor with over 36 years' experience, commenced her seminar at the NSW Bar Association this year with a few simple questions: 'Do you experience teeth grinding…poor sleep…agitation…rumination…hypervigilance…stress…headaches..?'

There was a steady show of hands in response to each question.

Bradey stated that the nature of barristers' work necessitates deep involvement in cases that may disclose violence, injury, destitution, betrayal, dishonesty, greed, danger and damage. Not only do barristers have to listen to clients describe what, for many of them, has been a devastating life experience, but also, barristers must ask those same clients to re-live it over and again during the trial process by recounting the details to doctors, experts and in court.

Of course, barristers are affected by that process - sometimes unknowingly, sometimes obviously. Bradey warned: 'Without the emotional reaction to the plight of clients, we would be sociopaths – content to view the suffering of others without feeling'.

What is vicarious trauma?

Being traumatised by what we see and observe is known as vicarious trauma. It relates to the experience of a person empathically engaging with the trauma of another person or group of people. Because of their proximity to people and clients undergoing stressful experiences, the people who are most at risk are therapists, counsellors, emergency workers, police officers, medical professionals and lawyers. Particularly for lawyers who work with trauma survivors, vicarious trauma is an occupational hazard that often cannot be avoided.

Vicarious trauma is now a well-recognised phenomenon. The Bar Association audience at Bradey's seminar was intimately familiar with its tell-tale signs: avoiding certain types of matters or clients, engaging in risk-taking behaviour, insomnia, feeling helpless about work tasks and withdrawing from colleagues, friends and family. Closely mirroring the short-term effects of post-traumatic stress disorder, vicarious trauma can lead to nightmares and intrusive imagery, fear for one's safety or the safety of others (family members in particular), resistance to hearing accounts of traumatic events, irritability and emotional numbness.[1] More troubling and profound long-term effects include changes to the core beliefs of the secondarily exposed person and his or her view of self, others and the world.[2]

As Bradey assured those of us who attended her seminar, vicarious trauma is an ordinary part of one's emotional life as an individual, as we all possess a degree of personal vulnerability.[3] It can be thought of as an advanced 'fight-or-flight' response, where the mere

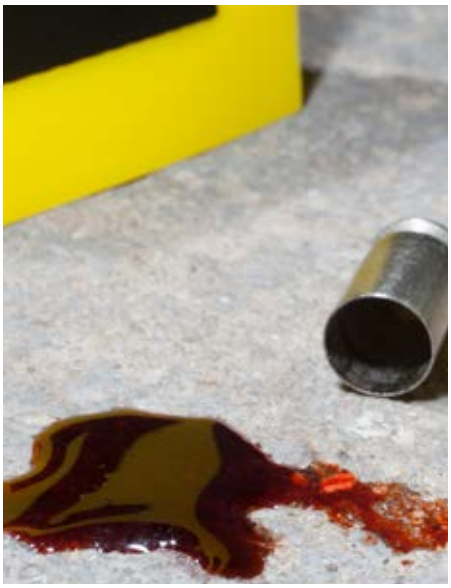

Photo: iStock

thought of something traumatic occurring triggers the feeling of it having occurred.[4]

Vicarious trauma is a cumulative reaction to the experience of secondary trauma borne from a range of interactions with trauma victims or exposure to traumatic content over an extended period.[5]

It has implications for the day-to-day functioning and overall wellbeing of trauma-exposed professionals. It can change a person's sense of personal or professional identity, affect his or her confidence and damage his or her relationships with others.[6] The personal, professional and social effects of vicarious trauma are such that it is important for individuals and workplaces to anticipate the experience of secondary trauma and work to resolve the issues that it can create, in a timely and effective manner. Its real dangers are only now being addressed by the legal profession, which is typically late to integrate wellbeing practices into standard operations.

The exposure of lawyers to vicarious trauma

Vicarious trauma most often occurs through the retelling of a traumatic event by the person that underwent or caused it, or through viewing images of the event or its aftermath. Environmental factors that contribute to the risk of vicarious trauma include the frequency of exposure to traumatised clients, poor systems and procedures for dealing with trauma in the workplace, a lack of formal training in dealing with trauma survivors,[7] and most importantly, the inability (or unwillingness) to de-brief about such matters in an emotionally honest manner.

Though lawyers working in non-criminal jurisdictions may interact with traumatised clients, criminal lawyers have been shown to suffer from greater and more pronounced subjective distress, depression and anxiety than other groups of professionals.[8]

But who has the responsibility to deal with the threat of vicarious traumatisation in the legal profession? Individual barristers can strive to build resilience and as a profession, we can create a workplace that responds more effectively to the dangers posed by vicarious trauma.

There have been several studies in Australia into the wellbeing of law students and practitioners. The most widely publicised of these was released by the Brain and Mind Research Institute in 2009. After surveying 741 students, 924 solicitors and 756 barristers, the Institute found 31% of solicitors and 16.7% of barristers suffered from high or very high distress levels 'severe enough to warrant clinical assessment,' compared to 13% in the general population.[9]

Regardless of whether this study accurately captures the extent and severity of mental illness in the legal profession, the alarming figures instigated the creation of long overdue initiatives, such as counselling services, mental health policies in disciplinary or regulatory actions and workplace policies for bullying and discrimination.[10] But these undertakings by the legal profession may have omitted to pay sufficient attention to vicarious trauma.

A 2016 study by Mitchell Byrne and Grace Maguire of the University of Wollongong speculated that the lack of support for vicarious trauma in the legal profession has manifested in higher levels of symptoms, particularly depression, anxiety and stress, in comparison to mental health professionals – another professional group that deals systematically with trauma survivors.[11]

Byrne and Maguire noted that support services for professionals who may be exposed to trauma victims have traditionally been isolated to the 'helping' professions such as mental health workers and social workers. While barristers also constitute a 'helping' profession, there has been limited study and less action taken to address the deficiency in professional support for the legal profession. Thankfully, the study attributed the greater vulnerability of lawyers to organisation and not individual personality characteristics.[12]

Ways to prevent or control vicarious trauma

Some people are inherently more resilient to secondary trauma due to personal traits, such as conscientiousness, which allow them to overcome feelings of despair or hopelessness that may arise when dealing with a trauma victim.[13] Others, who are more prone to emotional instability or neuroticism, may struggle to cope with successive cases that centre on traumatic experiences.[14]

Members of chambers should be mindful of managing vicarious trauma for themselves, but also in relation to colleagues. Where a colleague appears to be at risk of vicarious trauma, confronting them can worsen the potential effect of the trauma if not approached in a careful and knowledgeable manner. Awareness of the symptoms, effects and manifestations of vicarious trauma is critical to playing a constructive role in its prevention and treatment.

Bradey identified several preliminary methods of dealing with traumatic content, such as marking files with a warning, restricting access to the file and taking scheduled breaks from working. Bradey also counsels in favour of erecting physical boundaries such as not taking traumatic files home or at least designating a specific room for working on those files, so that traumatic content is physically, and, it is to be hoped, also mentally, separate from personal spaces for relaxation, sleep or spending time with family and friends.

Bradey further identifies processes that can be employed in anticipation of matters likely to trigger vicarious trauma, such as effective and continuous mentoring, speaking with colleagues, wellbeing checks administered by mental health professionals, and managing workloads.

NSW Bar Association initiatives

BarCare is an independent professional counselling service designed to assist members of the New South Wales Bar to manage emotional and stress-related problems, such as marital breakdowns, drug or alcohol dependency and practice pressures. Go to the website at http://barcare.org

The Tristan Jepson Memorial Foundation (TJMF) is an independent, volunteer, charitable organisation whose objective is to decrease work-related psychological ill-health in the legal community and to promote workplace psychological health and safety. The TJMF Best Practice Guidelines for the Legal Profession are designed to protect and promote psychological health and safety in the legal workplace. The Guidelines have been endorsed by the NSW Mental Health Commission, which was one of 26 inaugural signatories, as were the College of Law and the university law schools. There are currently over 140 signatories to the TJMF Guidelines including the NSW Bar Association.

The TJMF Guidelines have been modified for use in Chambers and a Mental Health and Wellbeing Policy was developed by 6 St James. Both the Modified TJMF Guidelines and the Mental Health and Wellbeing Policy are available from the Wellbeing Committee of the NSW Bar Association.

The seminar given by Robyn Bradey in March of this year can be viewed at https://www.nswbar.asn.au/for-members/health-and-wellbeing

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The Barristers' Benevolent Association

The Barristers' Benevolent Association of New South Wales was established as a scheme whereby financial assistance may be provided to persons who are (or have been) members of the New South Wales Bar and who have practised predominantly in NSW.

There are no fixed circumstances in which such assistance may be provided save for it being directed to 'necessitous and deserving cases'. It provides a fund for those who are suffering from hardship either in the short term or long term.

The funding is an important part of the collegiate life of the bar and how we look after each other.

Case study one

I was in my first few years at the bar when I felt a crushing pain in my chest. I was to begin a two-week trial the following Monday, and wanted to dismiss the pain as an expression of anxiety, or indigestion. Luckily, my partner persuaded me to call an ambulance.

I had suffered a major heart attack. I received great care, but I was unable to work for a significant period of time, and a substantial tax bill was due.

A concerned colleague contacted the Bar Association's Benevolent Fund on my behalf. The fund provided an unsecured loan which gave me the breathing space I needed to concentrate on my recovery, and the time I need to return to good health.

Case study two

My eight year old son suffered a catastrophic accident which left him requiring full-time care. As a result, I had to stop work to care for him full-time over several years. As a result, our family went into substantial debt, and were under significant stress.

After several years, I wanted to return to practice but did not have the resources to fund my return. I contacted the Bar Association's Benevolent Fund. The fund agreed to make a short-term contribution to the cost of accommodation in chambers, which was enough to allow me to re-establish myself in practice.

For information on the Barristers' Benevolent Association of New South Wales, go to https://www.nswbar.asn.au/for-members/benevolent-association

New Barristers Committee

From left to right: James Mack, Duncan McCombe (Chairman UK Bar Council Young Barristers' Committee), Rachel McMillan (Chair Northern Ireland Young Bar), Sonia Stewart (Bar Association New Barristers' Committee), Hugh Kam (Hong Kong Bar Association, Chairman of Standing Committee on Young Barristers).

The focus of the New Barristers' Committee this year is twofold.

First, to foster a greater sense of collegiality amongst new barristers. Second, to promote the economic interest of new barristers by raising their collective profile. To this end, the NBC is planning a series of joint-CPD and networking events, to be attended by new barristers, solicitors and in-house counsel, to be held at locations away from the Common Room. These events will be an opportunity for new barristers to engage with an increasingly dynamic legal profession.

The members' Common Room will still hold a place in the heart of the NBC. The NBC is planning to utilise the space for a "long lunch", for new barristers. Attendance by senior members of the bar or the judiciary will be by invitation only. It is hoped that the long lunch will provide an opportunity for new barristers to catch up with colleagues from their respective Bar Practice Courses.

The NBC has also commenced a dialogue with its equivalent bodies in Hong Kong, the United Kingdom and Northern Ireland. Representatives of the NBC met with "Young Barrister" representatives from these bars during the recent International Bar Association (Sydney) Conference to share common and differing experiences. The NBC is also engaged in discussions with the Administrative Appeals Tribunal to trial a pro-bono assistance scheme in the AAT.

The NBC is keen to ensure that the interests of new barristers from chambers outside of Sydney CBD are represented. To this end, the NBC recently held a breakfast in Parramatta and intends to hold further events in areas outside the Sydney CBD.

New barristers with any concerns or ideas are invited to contact the chair of the NBC, James Mack (Level 22 Chambers).

A 'new barrister' is a barrister of under six year's call.

James Mack

Crossing the line: Behaviour that gets barristers into trouble

… the Bar cannot be the last bastion where sexual harassment and assault is countenanced in the workplace"[1]

by Kate Eastman SC, Sophie Callan and Aditi Rao

High standards are required of legal practitioners. The relationships between legal practitioner and client, between legal practitioners, and between legal practitioner and court are those which carry with them mutual respect and trust in the performance of professional functions. There must be confidence in the public and in those engaged in the administration of justice that legal practitioners will properly perform these functions.[2]

Such high standards have – in line with modern recognition of proscribed behaviour in the workplace – found particular articulation in *Legal Profession Uniform Conduct (Barristers) Rules* 2015. Rule 123 provides that a barrister must not, in the course of practice, engage in conduct which constitutes discrimination, sexual harassment or workplace bullying.

Sexual harassment may involve a single or one-off incident or ongoing persistent behaviour.

Our focus is sexual harassment. For the purpose of Rule 123 'sexual harassment' is defined by reference to 'the applicable state, territory or federal anti-discrimination or human rights legislation' (Rule 125).

What is sexual harassment?

In New South Wales, the *Sex Discrimination Act 1984* (Cth) (SDA) and the *Anti-Discrimination Act 1977* (NSW) (ADA) apply. Section 28A of the SDA defines sexual harassment as follows:

Meaning of sexual harassment

> *(1) For the purposes of this Division, a person sexually harasses another person (the person harassed) if:*
>
> (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
>
> (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;
>
> in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.
>
> (1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:
>
> (a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
>
> (b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
>
> (c) any disability of the person harassed;
>
> (d) any other relevant circumstance.
>
> (2) In this section:
>
> ***'conduct of a sexual nature'*** includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

Section 22A of the ADA provides:

> For the purposes of this Part, a person sexually harasses another person if:
>
> (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person, or
>
> (b) the person engages in other unwelcome conduct of a sexual nature in relation to the other person,
>
> in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.

The SDA and ADA do not exhaustively define the type of conduct amounting to sexual harassment. Sexual harassment may involve a single or one-off incident or ongoing persistent behaviour. There is an endless array of behaviour that may constitute sexual harassment from comments, taunts, invasive questioning, email, texts, to physical contact, touching and sexual assault.

Unwelcome conduct

If the conduct of a sexual nature is welcome or there is mutual attraction there is no sexual harassment. Anti-discrimination laws should not be taken to discourage consensual sexual conduct whether in the workplace or elsewhere. As Mathews DCJ said in *O'Callaghan v Loder* (1984) EOC ¶92-024 at 75,516:

> '....equal opportunity legislation does not extend to impugn sexual approaches from one person to another merely because they are in disparate positions in the work-force. The object of the legislation is not to sterilise human relationships, but to encourage their development on a free and equal basis.'

Unwelcome conduct is essentially any sexual conduct that is not invited or reciprocated by the woman. This is the subjective element and turns on the reaction of the woman to whom the conduct is directed. The woman is not required to reject the advances expressly or tell the perpetrator it is unwelcome in order for the conduct in question to be unwelcome.

Reasonable person test

Not all unwelcome conduct will amount to sexual harassment. There are some additional elements. First, the conduct in question must be capable of offending, humiliating or intimidating the recipient. The expressions offend, humiliate and intimidate bear their ordinary meaning. Generally, an unwelcome sexual advance or unwelcome sexual conduct will offend or humiliate or

intimidate the recipient but not always. If the unwelcome sexual advance or conduct results from a misunderstanding but causes no offence, then there is no unlawful sexual harassment.

However, it is important to note that the question is not how the reasonable woman should have reacted to the unwelcome sexual conduct. So claims that the sexual conduct was a joke, done while under the influence of alcohol or was inadvertent or should not have caused offence are misplaced. The perpetrator's motives and reasons for engaging in the conduct are irrelevant. Rather, the question is focussed on how the reasonable bystander appraised of all the circumstances assesses the situation. The key question for the SDA is whether a reasonable person, having regard to all the circumstances, would have anticipated *the possibility* that the woman to whom the sexual advance or conduct was directed *would* be offended, humiliated or intimidated. Section 22A of the ADA requires more than the possibility. For the ADA the question is whether the reasonable person would have anticipated that the woman concerned *would* be offended, humiliated or intimidated.

There are no defences to sexual harassment. The perpetrator's motives and intentions are not relevant.

For the SDA, s 28A(1A) sets out the factors that are relevant to applying the objective test. These factors focus on the power disparity between the parties, their relationship in the context of the workplace or particular setting and whether the recipient of the conduct has any particular vulnerability.

In *Filas v Fourtounis* (1996) EOC ¶92 -780, the allegations of unwelcome sexual conduct concerned invitations for sex, questioning about private and sexual matters and physical contact. Ms Filas said she was 'revolted' but she was not distressed or intimidated by the perpetrator's conduct. She thought that such behaviour by men was 'normal'. In finding the elements of s 28A were satisfied, the Commissioner observed:

Unwelcome conduct is essentially any sexual conduct that is not invited or reciprocated by the woman.

> 'It is a sad comment on the workplaces in which Ms Filas has been employed if she finds such totally inappropriate behaviour normal. It demonstrates that Australian society still has a long way to go before women can go to work knowing that they can focus on the tasks which they have to do, and not be bothered by men who do not have the decency and professionalism to treat them with the respect and courtesy that all work colleagues, irrespective of their gender, deserve.'(at 78,797)

Sex-based harassment

Persistent unwelcome and offensive sexualised conduct may fall short of the definition of sexual harassment. However, such conduct may amount to unlawful sex discrimination because exposure to a hostile work environment subjects women to detriment in their employment or as recipients of services. It may also amount to bullying. An example is in *Hill v Water Resources Commission* (1985) EOC ¶92-127, where the New South Wales Equal Opportunity Tribunal upheld a complaint of sex discrimination where the complainant was exposed to sexual harassment and sex-based harassment. The incidents of harassment were as follows:

- receiving telephone calls where no-one spoke or where an offensive recorded message was played, including one from a sexual health clinic;
- cartoons and sexually offensive material sent anonymously in the mail;
- sexist comments being directed to her;
- throwing cartons at the complainant with unnecessary force;
- general taunting and teasing;
- advertisements for brothels and other offensive notices placed on notice boards; and
- being subjected to practical jokes.

For the purpose of Rule 123, sexual harassment must be 'in the course of practice'.

In that case, the EOT noted the great number of incidents which occurred over a prolonged period. Clearly some of the incidents did not amount to sexual harassment as defined by s 22A of the ADA, but did constitute a form of harassment of Ms Hill because she was a woman. Male employees in a similar situation did not experience such treatment.

Defences

There are no defences to sexual harassment. The perpetrator's motives and intentions are not relevant. Likewise, claiming that the offensive conduct was intended to be a joke or humorous is not an excuse.

In the course of practice

For the purpose of Rule 123, sexual harassment must be 'in the course of practice'. This phrase bears its ordinary meaning. For barristers, this is not limited to a particular place (i.e. chambers) or to particular persons (i.e. employees or colleagues). The question is whether the conduct is referable to the barrister's professional work.

In *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279 Spigelman CJ (Mason P and Handley JA agreeing) discussed the distinction between personal misconduct and 'professional misconduct' noting that professional misconduct may not be limited to conduct that is 'directly' referable to professional work. At [56] he said:

> 56 There is authority in favour of extending the terminology 'professional misconduct' to acts not occurring directly in the course of professional practice. That is not to say that any form of personal conduct may be regarded as professional misconduct. The authorities appear to me to suggest two kinds of relationships that justify applying the terminology in this broader way. First, acts may be sufficiently closely connected with actual practice, albeit not occurring in the course of such practice. Secondly, conduct outside the course of practice may manifest the presence or absence of qualities which are incompatible with, or essential for, the conduct of practice. …

If a question of the proper interpretation of the expression 'in the course of practice' arose with respect to Rule 123, a tribunal may be assisted by considering the way the SDA has been interpreted when questions arise whether sexual harassment has occurred 'in connection' with employment. The line between the private domain and work may be blurred.[3]

Experience of sexual harassment and sex-based harassment at the bar

Over the past 20 years, women barristers have consistently reported experiencing sexual harassment at the bar.

In 1995 the Keys Young Report on *Gender Bias in the Legal Profession* identified a number of areas where women legal practitioners did not have the same opportunities as men in the profession. Keys Young Report noted alarming reports of sexual harassment for women barristers.[4] The women barristers reported sexual harassment by clients, solicitors, fellow barristers and members of the judiciary. The women concerned did not make any formal complaint to address the conduct.

On 2 June 1995, the Bar Council resolved to implement an equal opportunity policy in response to the Keys Young Report. The Bar Council condemned all forms of sexual harassment, discrimination on the grounds of sex or sexual preference and sexist be-

haviour of any kind. It resolved to address equal opportunity at the Bar. It established a Gender Issues Committee.

In Victoria in 1998, Hunter and McKelvie published *Equality of Opportunity for Women at the Victorian Bar: A Report to the Victorian Bar Council* (1998).[5] The research was not confined to sexual harassment but reported on the experience of women barristers. Women described the courtroom was being 'sexualised' with respect to the manner in which they were addressed and treated. They noted the expressions some magistrates or judges had used to address women barristers, such as 'girlie', 'love', 'young lady', or 'having a cat fight are we ladies?'.

More than one in ten (12%) of all respondents reported having experienced sexual harassment while at the Bar.

In October 1999, Regulations 69B and 69C were introduced as part of the *Legal Profession Regulation 1994* (NSW).[6] Regulation 69B provided that: A legal practitioner must not, in connection with the practice of law, engage in any conduct, whether consisting of an act or omission, that constitutes unlawful discrimination (including unlawful sexual harassment) under the *Anti-Discrimination Act 1977*. Regulation 69C required legal practitioners to undertake mandatory continuing education in the areas of equal opportunity, discrimination and occupational health and safety. These regulations applied in substance up to the introduction of uniform practice rules in 2015.

In 2004, the Bar Council approved the Model Sexual Harassment and Discrimination Policy. The objective of the Model Policy was that each set of chambers would adopt the policy.

On 6 January 2014, Rule 117 of the Barristers Rules came into effect. It proscribes sexual harassment, discrimination and workplace bullying. Rule 117 is the predecessor to the present Rule 123.

In February 2014 the Law Council of Australia released the *National Attrition and Re-engagement Study Report* (NARS Report). Sexual harassment was identified as a significant barrier to women's participation in the profession. The results of the NARS Survey were disturbing for the bars. In summary, the NARS Report said:

- 80% of women barristers experienced bullying or intimidation:
  - 84% discrimination due to gender;
  - 55% discrimination due to age;
  - 40% of discrimination due to family responsibilities;[7] and
- Women barristers were twice as likely as those in private practice or in-house roles to believe they have *ever* experienced sexual harassment at their workplace;
- With respect to the harassment, 56% of women did nothing;
- Not one woman lodged a formal complaint.

In response to the NARS Report, the then president of the New South Wales Bar Association Jane Needham SC established a working group. Together with the Equal Opportunity Committee and Women Barristers Forum, the response to the NARS Report included the adoption of the four new Best Practice Guidelines (BPGs). The Best Practice Guidelines on *Harassment, Discrimination, Victimisation and Vilification* (which superseded the 2004 Model Sexual Harassment and Discrimination Policy) and on *Bullying* provide strong statements that such conduct is unacceptable. They deal with acceptable standards of conduct and engagement in barristers' daily professional lives. The Harassment, Discrimination, Victimisation and Vilification BPG recognised that barristers' workplaces extended beyond chambers to the courts, tribunal, participation in Bar Association and other practice related activities.

The Grievance Handling BPG was designed to provide a procedure for handling complaints of offending conduct confidentially, impartially, and promptly. The BPG set out the appropriate procedure to be adopted by complaint contact officers in chambers and at the Bar Association.

The 2015 New South Wales Bar Association Practicing Certificate Renewal Survey asked about sexual harassment and the experience of NSW barristers. The results of the survey revealed:

- More than one in ten (12%) of all respondents reported having experienced sexual harassment while at the Bar;
- Three quarters (73%) of this group were women;
- The majority (85%) of women who experienced sexual harassment indicated that the source of harassment was a fellow barrister
- Male barristers who experienced sexual harassment were more likely to report the source of harassment as a client or solicitor;
- Over half (56%) of females and close to half of males (49%), took no action. A minority raised the issue with a colleague or a clerk;
- Not one person (male or female) made a formal complaint of sexual harassment.

While a practitioner should advocate fearlessly on behalf of the interests of their client, that is not an excuse for discourtesy.

Sexual harassment and sex-based harassment as professional conduct

Sexual harassment in a professional context is not unique to Australia. In comparable overseas jurisdictions there have been some high profile cases.

In 2004, a practitioner described as a 'veteran Toronto litigator' was the first Ontario lawyer to be disbarred for sexual harassment of two women in the mid-1990s. The ruling was later overturned and a 12-month suspension imposed.[8]

In 2006, New Zealand barrister Christopher Harder was struck off with respect to allegations involving sexual harassment.[9] He admitted making suggestive and inappropriate comments to a female lawyer and that he made suggestive and persistent phone calls to her and that this amounted to misconduct.

In 2011, a former municipal court judge in Arizona (who resigned from the bench following allegations of sexual harassment) was suspended from practising as a lawyer for two years and was prohibited from serving on the bench in the future. Mr Ted Abrams was alleged to have 'engaged in a prolonged and relentless effort to sexually harass an assistant public defender' who appeared in his court. It was alleged that during a 14-month period, Mr Abrams (when a judge) sent the woman at least 28 voice mails and 85 text messages, many of which were sexually suggestive. At least one he admitted was 'obscene'. He repeatedly pressured the woman for sex, made slurping noises and at one point fondled her buttocks.[10]

More recently in Singapore, a lawyer was disbarred for sexually harassing an employee: *Law Society of Singapore v Ismail bin Atan* [2017] SGHC 190.[11] In explaining the order to strike off the practitioner, the chief justice said:

> 18 We turn then to the question of the appropriate sanction in this case. We begin with the observation that the respondent's conduct was egregious. He had abused a junior colleague after leading her to a confined space under the pretext of carrying out work on a case. He had also abused the dominance he exercised over her by virtue of the position he held in the firm and then engaged in conduct that constituted a serious criminal offence upon her person. Furthermore, the offence appears to have been premeditated with a considerable degree of planning, and involved multiple unsolicited advances. Additionally, the respondent was a senior lawyer, having been in practice for about 16 years at the material time, and it is well established that the more senior an advocate and solicitor, the more damage he does to the integrity (and therefore the standing) of the legal profession.

"Remember the good ol' days when sexual harassment wasn't such a big deal."

Farris / Cartoonstock

Australia

There are few reported cases in Australia.

In 2004, a Victorian barrister was suspended from practice for six months for making sexual advances toward a client during a pre-trial conference. The Legal Profession Tribunal found the barrister guilty of unsatisfactory conduct. The barrister was also reprimanded.[12]

In *Legal Profession Complaints Committee v in de Braekt* [2013] WASC 124, the barrister's conduct included (a) knowingly misleading the Magistrates' Court; (b) persistent discourtesy to the Deputy Chief Magistrate; (c) sending discourteous and offensive emails to a police officer; (d) sending a discourteous, offensive and threatening email to another officer; (e) behaving in a discourteous and abusive manner to an officer of the Central Law Courts complex – including racist, abusive, and possibly sexist remarks. In ordering that the barrister be struck off, the Full Bench of the Supreme Court of Western Australia observed that the importance of courtesy in the legal system, and in the relationship between the legal profession, the court system, and general public should not be understated. While a practitioner should advocate fearlessly on behalf of the interests of their client, that is not an excuse for discourtesy.[13] From 'the point of view of a profession which seeks to maintain standards of decency and fairness, it is essential that the privilege, and the power of doing harm which it confers, should not be abused'.[14]

the Bar cannot be the last bastion where sexual harassment and assault is countenanced in the workplace.

This case highlights that courtesy, civility and restraint of power is fundamental to the character of the legal profession – reflecting respect for the dignity of every participant in the administration of justice (regardless of the individual's position). Viewed in this light, Rule 123 embodies an obvious dimension of values which have always been present in the regulation of barristers' conduct.

In *PLP v McGarvie and VCAT* [2014] VSCA 253 a solicitor engaged in persistent acts of sexual harassment toward a person undertaking legal practical training with him, including: sexual comments and advances to her; showing her a pornographic video of a prostitute performing a sexual act on him; sending her a photograph of him naked; giving her an unwelcome massage; having his partner tell her that if the complainant did not sleep with the applicant he would not sign off on her training; on one day engaging in no fewer than 78 requests to have sexual intercourse with her. When relations soured, the solicitor terminated her position.

VCAT (Garde J) found the solicitor had sexually harassed the complainant on 11 separate occasions, and awarded the complainant $100,000 compensation.[15] In subsequent disciplinary proceedings, VCAT (Judge Jenkins) found each of the 11 occasions constituted professional misconduct, cancelled the solicitor's practising certificate for eight months and ordered he not be eligible to regain his certificate unless he satisfied a set of conditions.

The Court of Appeal recognised that the conduct was serious, '[t]o treat a woman under his training in that fashion was unquestionably despicable unprofessional conduct',[16] but considered the risk to the public of repetition of the conduct was low. The court set aside the penalty – finding the $100,000 imposed by Garde J was a significant sanction likely to provide specific and general deterrence, and protection against reoffending could be achieved by a condition that he not employ any women in legal trainee positions. However, because he was a sole practitioner the cancellation of his practising certificate was another significant financial burden that would diminish the goodwill of his practice and put his livelihood at risk.

If an allegation of sexual harassment is made to a colleague, clerk, head of chambers or the Bar Association, there is an obligation to report.

In *Legal Services Commissioner v Nguyen* [2015] QCAT 211, Mr Nguyen, a barrister, twice sexually assaulted a legal secretary who was instructing him at court on a sentencing hearing. He pleaded guilty to two charges of sexual assault, for which he was initially convicted and sentenced to three months' imprisonment, suspended. On appeal the sentence was reduced to a fine of $2000 with no conviction recorded.

The Legal Services Commission pursued disciplinary proceedings on grounds including that Nguyen had engaged in sexual harassment in breach of the Queensland equivalent to Rule 123.[17] It was the first case of this kind.[18] His conduct was described as 'near the lowest possible edge of seriousness for such offences'[19] and reference is made to Mr Nguyen's 'mistaken belief … that his flirtatious behaviours were not unwelcome'. The tribunal found he had engaged in unsatisfactory professional conduct,[20] rather than professional misconduct. By the time of the disciplinary hearing, Mr Nguyen had addressed his 'identified deficiency in … perceptual awareness, and thus his ability to communicate and respond appropriately to women,'[21] obviating the need for any prospective conditions.

Mr Nguyen was publicly reprimanded and fined ($20,000), with general deterrence a significant consideration in the punishment imposed: 'the Bar cannot be the last bastion where sexual harassment and assault is countenanced in the workplace. Whilst it is not suggested that this is the case, such conduct must be strongly deterred.… [Sexual harassment and sexual assault] is conduct which must be discouraged.'

Other consequences

Society's growing consciousness of the degrading effect of sexual harassment, discrimination and workplace bullying has resulted in a perceived willingness to speak out. There is greater awareness of a person's rights to make a complaint to regulatory bodies such as the Australian Human Rights Commission and Anti-Discrimination Board. When

complaints become the subject of litigation, the courts have expressed the view that damages awards should reflect community values: see *Richardson v Oracle Corporation Australia Pty Ltd* (2014) 223 FCR 334.

In *Richardson* the Full Court confirmed that compensation requires an evaluation of the actual, subjective harm inflicted upon the victim, observing that whether a victim of sexual harassment (in this case, in the workplace) or a victim of (workplace) bullying and harassment lacking a sexual element, in both types of case the victim may suffer psychological injuries and distress of a comparable kind.

The impact on victims can be significant. For example, in *Tan v Xenos* (No 3) ([2008] VCAT 584, Dr Tan was a neurosurgical registrar. She came to develop a supportive professional relationship with Dr Xenos and to discuss her progress with him. Over the period from January 2005, Dr Xenos commenced inviting her to his private rooms which were adjacent to the hospital, for extra tuition. In early 2005, she accepted an invitation him to meet him at his rooms. Dr Tan was assaulted. Her reaction to the incident was profound.[22] Dr Tan pursed a complaint alleging sexual harassment. She was successful in VCAT. She was awarded $100,000 in damages – at the time one of the highest awards for a sexual harassment claim.

...a bystander may be liable for a failure to act to prevent circumstances where another person is at a known risk of sexual harassment.

Criminal issues

Barristers should also be aware of s 316(1) of the *Crimes Act 1900* (NSW). If an allegation of sexual harassment is made to a colleague, clerk, head of chambers or the Bar Association, there is an obligation to report. A person who fails to report conduct which amounts to a serious indictable offence is liable to imprisonment for two years.

The elements of the section are:

- a person (including a company) has committed a serious indictable offence;
- another person (including a company) knows or believes that the offence has been committed
- that other person has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender; and
- that other person fails, without reasonable excuse, to bring that information to the attention of a member of the Police Force or other appropriate authority.

A serious indictable offence is an indictable offence which is punishable by imprisonment for life or for a term of five years or more. It is not necessary that the person know the relevant conduct amounts to a serious indictable offence, only that it is an offence.

In NSW, a serious indictable offence can include sexual harassment that involves sexual assault.

Bystanders and accessory liability

The former Chief of Army Lieutenant General David Morrison famously said 'the standard you walk past is the standard you accept.'[23] For barristers we should ask whether walking past sexual harassment in chambers, court or our professional endeavours means a tacit acceptance of inappropriate conduct.

Section 52 of the ADA makes it unlawful for a person to cause, instruct, induce, aid or permit another person to do an act that is unlawful by reason of a provision of this Act.

Section 105 of the SDA does not apply to sexual harassment but it does apply to discrimination (including sex-based harassment). The reach of the accessory liability provisions is illustrated in the Federal Court decision of *Elliott v Nanda* (2001) 111 FCR 240. The issue was whether the Commonwealth Employment Service (CES) was an accessory to sex discrimination when it placed a job seeker with an employer who had been the subject of complaints. Justice Moore held that CES had permitted the unlawful conduct to take place. Its knowledge of previous complaints of sexual harassment about the employer should have alerted the CES to the possibility that any young female sent to work for the employer was at risk of sexual harassment. At [163] Moore J said:

> In my opinion, a person can, for the purposes of s 105, permit another person to do an act which is unlawful, such as discriminate against a woman on the ground of her sex, if, before the unlawful act occurs, the permitter knowingly places the victim of the unlawful conduct in a position where there is a real, and something more than a remote, possibility that the unlawful conduct will occur. That is certainly so in circumstances where the permitter can require the person to put in place measures designed to influence, if not control, the person's conduct or the conduct of the person's employees.[24]

In summary, a bystander may be liable for a failure to act to prevent circumstances where another person is at a known risk of sexual harassment.

ENDNOTES

1 *Legal Services Commissioner v Nguyen* [2015] QCAT 211 at [64].
2 *Legal Services Commissioner v Nguyen* [2015] QCAT 211 at [18], citing *New South Wales Bar Association v Murphy* (2002) 55 NSWLR 23 at 52 (per Giles JA).
3 See *Lee v Smith & Ors* [2007] FMCA 59, (2007) EOC ¶93–456 *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402; *Smith v The Christchurch Press Company Limited* [2001] 1 NZLR 407; *Chief Constable of the Lincolnshire Police v Stubbs* [1999] ICR 547; [1999] IRLR 81, Hely B 'Open All Hours: The Reach of Vicarious Liability in 'Off-Duty' Sexual Harassment Complaints' [(2008) 36(2) *Federal Law Review* 173.
4 Keys Young, *Research on Gender Bias and Women Working in the Legal System*, Report (6 March 1995). See also NSW Government, Department for Women, *Response to Gender Bias and the Law - Women Working in the Legal Profession in NSW* (October 1995) and NSW Attorney-General's Department, Department for Women, *Gender Bias and the Law: Women Working in the Legal Profession - Report of the Implementation Committee*, 1 October 1996. See also Bourke, 'Gender Bias in the Legal Profession' *Law Society Journal* February 1997, p.52 and Hennessy N '*Solicitors' obligations as employers under anti-discrimination laws*'(1995) 33 (4) *Law Society Journal*, 'Sex Discrimination and Sexual Harassment. Should there be a professional conduct and practice rule' *Law Society Journal* December 1995, p.48.
5 See also Justice Kenny *Women's Law Collective: Experiences of Women in the Courtroom* www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-kenny/kenny-j-20030811
6 http://www.austlii.edu.au/au/legis/nsw/num_reg/lpar19991999562350.pdf
7 See NARS Report at p.80.
8 http://www.lawtimesnews.com/author/na/court-overturns-neinsteins-disbarment-8778/
9 https://www.lawyersweekly.com.au/news/1640-nz-criminal-defence-lawyer-learns-hard-lessons
10 https://www.leagle.com/decision/inazco20110804001.xml
11 http://www.tnp.sg/news/singapore/lawyer-disbarred-sexual-harassment
12 http://www.theage.com.au/articles/2004/04/25/1082831435141.html. See also http://www.olsc.nsw.gov.au/Documents/civility_professionalisam_standards_courtesy.pdf
13 at [28]-[30].
14 *Clyne v New South Wales Bar Association* (1960) 104 CLR 186:
15 *PLP v McGarvie and VCAT* [2014] VSCA 253. See other examples of practitioners being ordered to pay damages - In *McAlister v SEQ Aboriginal Corporation* [2002] FMCA 109, Ms McAlister was sexually harassed by Mr Lamb, a legal practitioner. Mr Lamb attended her home to provide legal advice regarding her divorce. An issue arose as to whether the conduct occurred in the course of Mr Lamb's employment. The court ordered that Mr Lamb compensate Ms McAlister in the order of $5,100.
16 At [87].
17 Rule 127 of the Barristers' Rules 2004 (Qld).
18 *Legal Services Commissioner v Nguyen* [2015] QCAT 211 at [66].
19 at [19].
20 at [37]-[40].
21 at [44].
22 http://www.theage.com.au/victoria/surgeon-caroline-tan-breaks-silence-over-sexual-harassment-in-hospitals-20150311-141hfi.html
23 https://www.youtube.com/watch?v=QaqpoeVgr8U
24 (2001) 111 FCR 240, 292-293 [163].

Cancellation fees

by Mark Brabazon SC

You have been working on a big case for months. It is listed for hearing with an estimate of six weeks. You have set that time aside and refused other work. The case is due to start on Monday 16th. It settles on Friday 13th. Your family is pleased to have you to themselves for the weekend. You return to chambers on Monday. There is a large gap in the diary. What can you fairly and properly claim in your bill?

Uniform Law and costs assessment

The answer to that question is not determined solely by the terms of your fee agreement. Section 172 of the *Legal Profession Uniform Law* of New South Wales and Victoria says that '[a] law practice must, in charging legal costs, charge costs that are no more than fair and reasonable in all the circumstances' having regard to the matters set out in the section. Existence of a compliant costs agreement is no more than *prima facie* evidence that the costs for which it provides are fair and reasonable (s 172(4)); the principal obligation is not abrogated. Section 207 has the effect that a contravention of that requirement is capable of constituting unsatisfactory professional conduct or professional misconduct by a barrister.

...the term 'cancellation fee' has no current technical meaning.

Unlike previous New South Wales legislation which focussed on the fairness of a costs agreement, the Uniform Law focusses on fairness of fees actually claimed. It is clear that a fee will not be fair if it exceeds what a barrister is contractually entitled to claim but, if a barrister claims less than a contract permits, it is the claimed amount with which s 172 is concerned.

Costs assessors in New South Wales are used to dealing with claims for cancellation fees in the context of both party/party and practitioner/client (including barrister/solicitor) assessments under the Uniform Law and under the *Legal Profession Act 2004*. The number of practitioner/client assessments under the Uniform Law is still quite small because transitional provisions preserve the old law where first instructions were given before 1 July 2015.

The assessors approach such claims on the usual basis, i.e. by determining whether the claim is fair and reasonable having regard to the relevant facts and circumstances of the particular case.[1] They treat the question as one that they can determine in the ordinary way by the application of their professional judgment and expertise to those facts and circumstances. Some claims are allowed, some are disallowed, and some are allowed in part. The cases in which the assessors see claims for more than the first hearing day (i.e. other than claims that resemble the old fee-on-brief concept) tend to involve large cases listed for long hearings.

The approach of the costs assessors accords with judicial opinion in *Wilkie v Gordian Runoff Ltd* [2005] NSWSC 873 and *Levy v Bergseng* (2008) 72 NSWLR 178, 198–204, which are considered below.

Judicial statements, history, context

So what have the judges said about cancellation fees? Different things in different circumstances, as it turns out. Because of the importance of history and context, it is best to approach the case law chronologically.

It is also important to appreciate that the term 'cancellation fee' has no current technical meaning. It is not used in legislation or professional rules relating to legal costs or the practice of barristers in New South Wales. It does not have a fixed factual meaning. Some people appear to use the term to refer to any charge referable to a day when an expected hearing does not proceed, without further qualification. Others use the term in a more restricted sense. It used to be distinguished from a fee-on-brief, which was generally payable even if the relevant action settled before trial. That was the position before 1 July 1994, when fee deregulation began.[2]

Razzi (1991)

It is obvious that Wilcox J had the more limited meaning in mind in *Commissioner (AFP) v Razzi (No 2)* (1991) 30 FCR 64, 67. A criminal case that had been expected to run for some weeks lasted only four days because, not long before the trial date, two of Mrs Razzi's co-accused decided to plead guilty and an agreement made between her representatives and the prosecutor limited the evidence that would be needed. On her application for a costs order against the prosecutor on a solicitor-client basis, it appeared that 'some sort of agreement' had been made that she would pay her counsel '"cancellation fees" in respect of some or all of the time which was originally expected to be needed for the case but was not in fact required.' Wilcox J said that, in his 21 years at the bar (1963 to 1984), he 'never heard of such fees being asked' and that, as he understood the usual situation, any disadvantage to the barrister from a case ending early 'had to be balanced against the advantage conferred by the rule which permits barristers to charge a full fee on a matter settled after delivery of the brief but before any hearing.' That practice, which his Honour expressly contrasted with a cancellation fee, clearly involved a charge referable to an expected hearing that does not occur.

His Honour's observations about 'cancellation fees' were, strictly speaking, obiter, and were to the following effect:

> At a time when legal fees are so onerous as to exclude from significant litigation all but the wealthy and the legally-aided, any new practice which further increases costs requires meticulous justification. I am not aware of any attempted justification of 'cancellation fees'. It seems to me that it would be desirable for Bar Councils and Law Societies to examine such fees, and perhaps issue a ruling or some guidelines, before the practice becomes firmly entrenched.

The old practice described by Wilcox J is no longer used to any appreciable extent, if at all. It contemplated a 'fee-on-brief' that covered the first day of a trial and general preparation. If a trial lasted longer than a day, a 'refresher' was conventionally charged for each extra day at 2/3 of the fee-on-brief. A trial would ordinarily take more than half a day to prepare, and a long trial considerably more, so the fee-on-brief and refresher both reflected a combination of in-court advocacy and corresponding preparation. The old practice has generally been replaced by explicit charges for hours and days of a barrister's professional time, effort and commitment.

Bar Rules in the 1990s

The Barristers Rules included a provision

dealing with cancellation fees as rule 85A from 1992 to 30 June 1994. The text of the rule has proven difficult to verify. Secondary sources indicate that it was in these terms:

> (a) When a case is settled, adjourned or not reached, or the hearing date is vacated, a barrister shall not be entitled to a cancellation fee in addition to the normal Brief on Hearing fee except by agreement with the instructing solicitor.
>
> (b) If a cancellation fee is sought at the time of retainer or within a reasonable time of the notification to the barrister of the date fixed for hearing, but is not agreed to by the instructing solicitor, the barrister shall be at liberty to decline the retainer or return the brief.

There was also a jointly agreed statement by Bar Council and the Law Society:

> When a case is settled, adjourned or the hearing date is vacated counsel will not be entitled to a cancellation fee in addition to the normal Brief on Hearing Fee unless agreed.
>
> Where counsel has set aside days for the hearing of a case and if counsel desires to charge a cancellation fee counsel must in writing notify the solicitor within a reasonable time after delivery of the Brief and a reasonable time before the date fixed for hearing that a cancellation fee will be charged.
>
> It will be the responsibility of the solicitor to notify his or her client of the proposed cancellation fee and, after receiving his client's instructions, to communicate to counsel as to whether the cancellation fee is accepted.
>
> If the cancellation fee is not accepted counsel shall be at liberty to return the brief.
>
> If counsel receives a fee for the hearing of a case or cases on days for which the cancellation fee was applicable and no prior agreement has been reached to cover that situation it is expected that counsel will act fairly to the solicitor and the solicitor's client by adjusting the cancellation fee accordingly, particularly when the cancellation fee has been agreed upon an indemnity basis.[3]

It is also understood that Bar Council issued a guideline to barristers concerning rule 85A during the life of that rule and subsequently endorsed the view that the spirit of the guideline survived repeal of the rule.[4]

Wilkie (2005)

The question of cancellation fees was considered in a more modern context by McDougall J in *Wilkie v Gordian Runoff Ltd* [2005] NSWSC 873. The facts arose during the time of the *Legal Profession Act 1987* and after deregulation. Mr Wilkie had been charged with offences, and the High Court had held that his insurers were liable to pay his defence costs. The trial would be long – six to twelve weeks – and his counsel, senior and junior, would have to work full time on preparing the trial for two to four months beforehand. He had entered into costs agreements with his defence counsel. Each required

> payment in advance of an amount equal to 20 days' fees, on the basis that the amount would be payable regardless of the duration of the hearing (or, indeed, regardless of whether the hearing proceeded at all).[5]

The insurer objected to this term, which was referred to in the judgment (presumably reflecting its treatment by the parties – the description does not appear to have been contentious) as a cancellation fee.

A cancellation fee could also be described as a commitment fee.

The legal question in this insurance context was whether it had been reasonable for Mr Wilkie to agree to such a term. His Honour decided that it had been reasonable to agree to a cancellation fee, and referred the question whether its quantum (in effect, the 20 days) was reasonable for the report of a referee with expertise in the assessment of legal costs. His Honour's conclusion on the question of principle appears at [17]; it is useful to read that passage together with the two preceding paragraphs:

> [15] In circumstances where counsel do not have the ability to require the solicitor to pay their fees, it is to be expected, I think, that they would require some assurance for the payment of their fees. Since they do not look to the solicitor, that assurance cannot come from having money on account of their fees in the solicitor's trust account. It is therefore not surprising that, as they may now do, counsel require payment in advance of some part of their fees.
>
> [16] Particularly where counsel are retained to defend criminal charges, it is hardly surprising that they require some security for the payment of their fees. They cannot hold fees in trust, because they cannot operate trust accounts. But they can be paid in advance. That is what has happened here. It is hardly unreasonable; quite the contrary.
>
> [17] Equally, it is a fact of life that *where counsel are retained to work exclusively on one matter*, they must reject all other offers for work during the currency of that retainer. Even with capable counsel, it is not always possible to go out and find other work in replacement if such a retainer comes to an end abruptly, unexpectedly and early. Thus, *it is common for counsel retained in such matters to require an agreement to pay some sort of cancellation fee. Whether or not that practice is reasonable depends, I think, more on the amount of the fee demanded, and the events by reference to which it is payable, rather than the concept.…* (emphasis added)

Martiniello (2005)

In *R v Martiniello* [2005] ACTSC 109 [9], a short *ex tempore* judgment in a criminal case, Connolly J was 'not aware of any practice in the civil side of [the ACT Supreme Court] where cancellation fees are generally regarded as appropriately caught within a general

form of costs order' but noted a different approach in the Northern Territory. His Honour also referred to *Razzi,* declined to 'make an order pursuant to a cancellation fee basis', and stood the matter over for negotiation between the parties. No reference was made to *Wilkie*, which had been decided a few months before.

KK v JV (2006)

In *KK v JV* (12 April 2006, unreported, Family Court of Australia), a judgment concerning a claim for costs between adverse litigants, Faulks J expressed the view at [113] that 'the charging of cancellation fees in family law matters at least is not to be encouraged' and at [118] that, if an indemnity costs order had been appropriate in the case, he would not have been 'prepared to endorse or approve the application of any agreement about cancellation fees'. The judgment does not make clear which of the potential meanings his Honour attached to the expression 'cancellation fees', other than a pejorative characterisation at [108] as 'fees payable to the barrister for not attending Court'. His Honour cited *Razzi* with approval, but did not mention *Wilkie*.

A barrister should never charge a cancellation fee without consciously considering whether it is fair to the client to do so and whether the amount charged is fair.

Levy v Bergseng (2008)

Razzi, Wilkie and *Martiniello* were considered by Rothman J in *Levy v Bergseng* (2008) 72 NSWLR 178, an appeal from a review panel under the *Legal Profession Act 1987* arising from an assessment of costs between Levy SC and his instructing solicitors in a complex medical negligence case. The ultimate costs agreement provided that counsel would act on a speculative basis including a 25 per cent uplift and cancellation fees. Pre-trial preparation was extensive; the plaintiff and her family now resided in Greece, and counsel travelled to that country and to England in the course of preparing the case. The cancellation fee structure was set out in a letter of 10/9/2004, sent at a time when the case was listed to start on 7/2/2005 with an estimate of six weeks. It provided for two weeks' fees if the case should settle by 30/11/2004, three weeks if it should settle between 1/12/2004 and 4/2/2005, and otherwise the remaining time set aside for the trial, subject to offset if counsel obtained other court work in the relevant period. The starting date was put back and, after a single day's hearing, a date was appointed to take evidence in Athens with an estimate of eight weeks. Twelve days before that was to happen, the case settled at mediation. Counsel claimed a cancellation fee equal to 20 days, i.e. half the estimated eight weeks.[6] A costs assessor allowed the claimed cancellation fee to the extent of 15 days, without uplift. The solicitors applied for review, and a review panel reversed. Rothman J restored the determination of the costs assessor. His Honour's judgment should be understood against this somewhat complex factual background.

One other aspect of the case should be mentioned. The review panel had decided that the costs agreement was unjust under s 208D of the 1987 Act. Rothman J held that this was *ultra vires*, as that section only applied to a costs agreement with a client. His Honour also concluded, however, that '[n]o other reason provided would satisfy me that the fees charged were unreasonable or unjust …. If it be necessary, I independently come to the view reflected in the Costs Assessor's Determination.'[7]

Rothman J declined to follow the approach of Wilcox J in *Razzi* on the basis of subsequent factual changes in the nature of a barrister's practice, increased specialisation, and the fact that, while a significant number of barristers had not embraced 'cancellation fees', the phenomenon of barristers demanding such fees 'is a not uncommon practice'.[8] His Honour embraced the 'more modern view of cancellation fees' in *Wilkie*.

His Honour rejected an argument that the agreement, including the cancellation fee, was not a costs agreement within the meaning of the legislation on the basis (as it had been put) that the cancellation fee was for work *not* done. The agreement was 'still a cost for the provision of the work in question'.[9] This, with respect, was correct. A client derives a real benefit from a barrister's commitment to expected trial dates. A cancellation fee could also be described as a commitment fee. The language and structure of the present legislation are different and some argument might be made about that, however his Honour's reasoning would point to the characterisation of Mr Levy's fees as 'legal costs' as defined in the *Legal Profession Uniform Law* (NSW) s 6.

The reasons that led Rothman J to conclude that the cancellation fee was reasonable appear at 72 NSWLR 201 – 202. In substance, they relate to the speculative nature of the case (including the fact that counsel had an offer of other work when he committed to the subject case), specialisation of counsel, opportunity cost, the fact of agreement, the lead time that would have been involved in getting other court work, the graduated basis on which the cancellation fee was to be calculated in the event of pre-trial settlement, and the offset provision. His Honour's conclusions appear at 203 [110] – [111]:

> [110] To the extent available in these proceedings, and to the extent that the Court is entitled to deal with this issue, the charging of cancellation fees was reasonable, was part of the agreed costs arrangements and is not rendered unjust by any factor adumbrated by the Appeal Panel.
>
> [111] Nothing in this judgment should be taken as a general proposition that all counsel in all cases can reasonably and justly charge cancellation fees. In most cases, and for most counsel, cancellation fees would be unjustifiable. This judgment deals only with this appeal, relating as it does to senior counsel engaged 'on spec' in particularly specialised work for which the lead time is lengthy and during which he has, in fact, foregone other paid court work.

Hoffman (2014)

Razzi, Wilkie and *Martiniello* and *Levy v Bergseng* were considered by Neilson DCJ in *Commissioner of Police v Hoffman* (2014) 18 DCLR (NSW) 320; [2014] NSWDC 113, an unsuccessful application for leave to appeal from a review panel which, being divided in opinion, had affirmed the decision of a costs assessor. The costs assessor had allowed as party/party costs a barrister's fee for 'brief on hearing' at his daily rate where a one day case in the Special Statutory Compensation List of the District Court had settled 11 days before the listed hearing date. His Honour declined to regard this as a 'cancellation fee', treating that expression as referring to a fee where a case is adjourned or does not last as long as expected.[10] His Honour rejected the submission that the barrister had not done 'any relevant "work" which entitled him to charge a fee-on-brief' by holding himself available for the hearing and concluded that the barrister was 'entitled to charge a fee for a brief on hearing when the matter settled when it did.'

Cancellation fees are not for everybody, and they are not for every case.

Levy v Bergseng and *Hoffman* both rejected the view that the possibility of a barrister doing chamber work on a cancelled hearing day (in contrast to replacement court work) should preclude or reduce a cancellation fee.

Other statutory rules

Other statutory rules may have a bearing on the propriety of cancellation fees. Two will be mentioned here, without elaboration.

The Legal Profession Uniform Conduct (Barristers) Rules 2015 says: 'A barrister must not in any dealings with a client exercise any undue influence intended to dispose the client to

benefit the barrister in excess of the barrister's fair remuneration for the legal services provided to the client.'

The Australian Consumer Law Part 2-2 (ss 20 to 22A) contains prohibitions on unconscionable conduct in trade or commerce. Other provisions might also conceivably be relevant, such as the avoidance of unfair terms in consumer and small business contracts under Part 2-3 (ss 23 to 28).

What is to be done?

Cancellation fees are not for everybody, and they are not for every case. Many barristers never charge a cancellation fee, at least in the narrower sense of that term. Whether it is called a cancellation fee or a fee-on-brief, the least contentious is probably a claim for a single day's fee when a case settles shortly before hearing. The other situation where a cancellation fee might be justified is the long, all-consuming case. The current state of New South Wales law is reflected in *Wilkie* and in *Levy v Bergseng*. The most important parts of those judgments are the monitory words, which remind practitioners of their fundamental professional obligations now expressed in the Uniform Law s 172.

In the present regulatory environment, a barrister should not claim a cancellation fee in any sense of that term unless it is covered by fee disclosure and is within the terms of any applicable costs agreement. Members can find advice about this on the costs and billing page of the Bar Association website.

Cancellation fees can be particularly contentious. A barrister should never charge a cancellation fee without consciously considering whether it is fair to the client to do so and whether the amount charged is fair. If one is minded to do so, it is good practice to discuss the matter with the instructing solicitor first. If there is any doubt about fairness or amount or if the claim is for more than the first day, it is also good practice to talk to an experienced and objective colleague who understands the relevant area of practice.

ENDNOTES

1 The statutory criteria in a practitioner/client context are now set out in the *Legal Profession Uniform Law* s 200.
2 1 July 1994 was the commencement date of most of the provisions of the *Legal Profession Reform Act 1993*, including substitution of Part 11 of the *Legal Profession Act 1987*.
3 See (1997) 35 (6) *Law Society Journal* 28.
4 The writer has not yet succeeded in locating primary records of these. They are referred to in correspondence held by the Bar Association.
5 [2005] NSWSC 873 [13].
6 The terms of the costs agreement would have entitled him to charge the full eight weeks.
7 72 NSWLR 178, 209 [138], [139].
8 72 NSWLR 178, 199 [95].
9 At 200 [99], [100].
10 The barrister's costs agreement provided a daily rate for hearings and an hourly rate for chamber work, but did not separately refer to pre-trial preparation as a separately billable item; this may have played a role in the particular case by reference to the old fee-on-brief concept.

Equitable briefing

By Brenda Tronson

Since the Bar Association adopted the Law Council of Australia's National Model Gender Equitable Briefing Policy (the policy), the Diversity and Equality Committee of the Bar Association and the Women Barristers Forum have been working together to promote awareness of the policy and to take steps for its implementation by the Bar Association.

The aims of the policy include driving cultural change within the legal profession, supporting the progression and retention of women barristers and addressing the significant pay gap and underrepresentation of women in the superior courts. Read more broadly, the policy is a vessel by which unconscious bias may be consciously addressed by those responsible for selecting counsel. The policy is available for adoption by any briefing entity, including organisations and counsel, in addition to clients.

Based on the New South Wales Bar Association website as at August 2017, women constituted just over 20 per cent of all barristers, and approximately 10 per cent of silks. Further, approximately 33 per cent of barristers of 10 years standing or under are women, and approximately 15 per cent of barristers with over 10 years' seniority are women.

The policy itself, together with more information and the Law Council of Australia's online register of adoptees, are online.[1] The Bar Association adopted the policy in 2016. At the time of writing, 75 NSW barristers had adopted the policy, together with five NSW chambers and a large number of important briefing entities, including law firms of all sizes, government agencies and corporations.

What steps has the Bar Association taken?

During 2017, the Diversity and Equality Committee of the Bar Association and the Women Barristers Forum, through a joint working group, have taken steps towards the implementation of the policy by the Bar Association.

1. We have presented a number of seminars to build awareness of the policy among barristers and to assist barristers in understanding their (not onerous) obligations once they adopt the policy.
   On 9 March 2017, we held a CPD seminar entitled 'Gender Equitable Briefing – Making it Happen: The Solicitor's View'. A panel of solicitors from a range of firms and agencies provided their perspective on gender equitable briefing and what barristers can do to help firms fulfil their own obligations. This CPD was well-attended and received positive feedback.
   During the February-March 2017 CPD season, members of the Diversity and Equality Committee attended regional CPD conferences and presented seminars informing members about the policy.
   On 16 August 2017, we made history by running the first NSW Bar Association live-streamed CPD seminar: 'Reporting under the National Model Gender Equitable Briefing Policy: A practical guidance seminar'. The in-person audience was highly engaged; another 200 viewed via the live stream.
   We presented a session on 19 September 2017 to provide information and support for those wishing to present a seminar on equitable briefing to their own floors.
   Many of the seminars we run are available to barristers to view on the Bar Association CPD Online website.[2]
2. We have developed resources to support barristers who have adopted the policy, or who wish to learn more, including FAQs, a Guide to Reporting and a worksheet and report template.[3] We welcome any feedback.
3. We have produced a three year Strategic Implementation Plan for the Bar Association,[4] which was adopted by Bar Council on 11 May 2017.

The Bar Association's strategic goals are divided into two phases, Phase 1 ('Awareness, Adoption and Facilitation') and Phase 2 ('Reporting, Monitoring and Evaluation'). The two phases are not completely temporally distinct. Once we have analysed the information presented to us through barristers' reports, you will see more Phase 2 activities, and we will continue to work on the Phase 1 objectives throughout the life of the Strategic Plan.

Bar Association's report

In September 2017, the Bar Association released its report as a briefing entity. From 1 September 2016 to 30 June 2017, the Bar Association briefed 10 barristers (seven men and three women) in 11 matters. The Bar Association is pleased to report that the figures show women were selected for 25 per cent of the briefs and account for 55 per cent of the value of all brief fees paid. Of the senior barristers, women account for 30 per cent of all briefs to senior barristers, which meets the 1 July 2018 target of 20 per cent. Neither of the two junior barristers briefed were women.

More information?

If you require more information about the policy and its implementation at the NSW Bar, please contact Ms Ting Lim, policy lawyer, at the Bar Association.

ENDNOTES

1 https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/national-model-gender-equitable-briefing-policy
2 https://www.nswbar.asn.au/for-members/cpd
3 https://www.nswbar.asn.au/coming-to-the-bar/equitable-briefing
4 https://www.nswbar.asn.au/coming-to-the-bar/equitable-briefing

Innovation and technology at the NSW Bar

A step towards safeguarding the future of the profession

By Ting Lim, policy lawyer at the Bar Association

In May 2017, Bar Council resolved to establish the Innovation and Technology Committee in a response to a perceived need to articulate, consider, and strategically respond to the effect of fundamental and disruptive changes brought about by new technologies to legal practice and the administration of justice.

The committee consists of a small number of members – 6 to be precise (Michael Green SC (Chair), Dominic Villa, Catherine Gleeson, Anton Hughes, James Mack and Anna Spies) and in its first iteration, all members were selected by the President rather than by application.

The committee's terms of reference is as follows:

- To identify, investigate and monitor new technological advancements that may change the nature of a barrister's work and their practice;
- Educate members on the latest technology and ensure members are properly equipped to use and embrace developments that may boost efficiency and productivity;
- Assist members with incorporating the latest technology into their practice;
- Ensure members are aware of digital security requirements and guard against potential breaches of data security;
- Promote and ensure the ethical use of digital devices and services including social media, cloud based file sharing, data security, storage and deletion, hardware and software; and
- Provide advice to Bar Council on matters relating to technology as requested.

In addition to keeping abreast of gadgets and digital developments – the 'technology' – the committee will also aim to understand the impact of technology on the evolving environment of legal practice and how the 'market' is changing, which in turn has the potential to alter the manner of legal practice, the place of the New South Wales Bar in the legal profession and how justice is done and seen to be done.

Earlier in the year the NSW Law Society published its *Future of Law and Innovation in the Profession* report, also known as the 'FLIP' report, which made a number of recommendations on the areas the Law Society needed to focus on to assist the legal profession.[1] None of the recommendations involved improving the manner in which barristers, solicitors and clients would work together in an increasingly changing and technological legal environment.

While the 'technology' aspect of the committee's name denotes a sense of modernism, it is the 'innovation' part of the committee's name where the most interesting work will be undertaken. Innovation suggests an element of experimentation. To the New South Wales Bar Association, it is an opportunity to better understand the bar's place among the legal profession now and into the future against the backdrop of technological developments, the precise impact of which is currently unknown.

The ever-growing number of solicitors in NSW and the shift from traditional forms of advocacy to a preference by clients and courts for alternative dispute resolution methods has caused a redistribution of the legal work within the profession. This has altered the place and ultimately the role of a barrister in legal disputes. The extent of the alteration and whether it will continue is unclear.

Over the next 12 months the committee intends on commencing collaborative relationships with academics to conduct research and analysis on the changes in society that affect the administration of justice and the delivery of independent legal services. This involves understanding the current state of particular aspects of legal practice at the bar which can be divided into four distinct work areas:

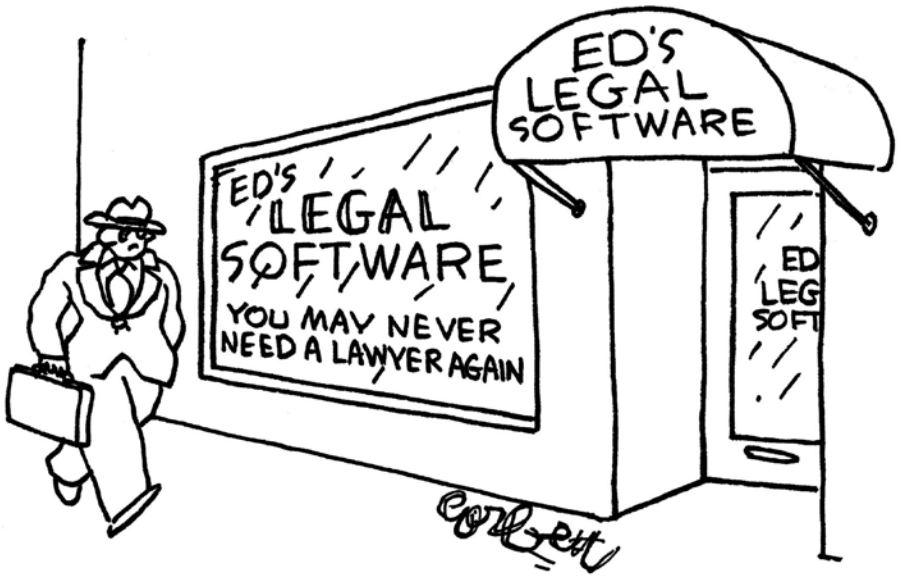
1. investigating the changing demand for legal services;
2. identifying client needs and opportunities for practice in the evolving technological landscape;
3. considering how barristers might engage with technology in their practice and use it to better meet their clients' needs and expectations and the administration of justice; and
4. formulating strategies and improvements for practice which enhance the competitiveness of the independent Bar while meeting clients' needs and maintaining a conscious concern for the rule of law.

The committee intends on organising educational seminars for members some of which include topics on facial recognition, privacy, data security and confidentiality within the online environment.

If you have any topic areas or suggestions on the subject matters the Innovation & Technology Committee should focus on, please feel free to contact the Innovation & Technology chair, Michael Green SC or the policy lawyer at the Bar Association, Ms Ting Lim.

ENDNOTES

1 The Law Society of NSW, Commission of Inquiry, FLIP: The future of Law and Innovation in the Profession' 2017 (available at: https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1272952.pdf)



The paperless barrister: no longer an oxymoron

By Ingmar Taylor SC

September 2017. It was day one of a two week trial in a matter where the brief constituted 12 lever arch folders (yes, I know, a small case), yet I was going to court with nothing more than a slim folder of notes and an iPad. My junior arrived every day with a laden trolley, plus authorities. Every document and all the authorities were on my iPad, marked up. I was smugness personified.

By day three of the case both my instructing solicitor and the client had bought iPads. In the two months since, four juniors that I have worked with have each bought iPads.

There is nothing new about being able to read documents on a screen. And tablets have been around for some time. The big difference is that you can now write on and highlight the documents as well as you can write on paper – better in fact. For me that made the difference. Like others, I had often said that I cannot properly read something on a screen. But I found once I could mark up the document I could read and absorb material on the screen as readily as on paper.

My major concern was that I would have difficulty locating documents quickly in court. I found I located the relevant page of the exhibits and affidavits a lot faster than those reaching for folders and locating the pages manually.

There are advantages beyond the fact that you can take the whole brief home without needing a large wheely-bag. It is easier to be briefed. Solicitors love being able to send and update the brief electronically. No more sweating couriers banging on the chambers door at 6.01pm with documents for the next day. No more having to manually rearrange (or indeed construct) briefs, or battle with broken folders. No more having to arrange to return bulky briefs.

Second, in electronic form the text of the documents can be searched; including my handwritten notes. Third, the saving on printing: my printing bill is now 10 per cent of what it was. The iPad will pay for itself over its lifetime.

Some tips

Before I bought the iPad I spent some time quizzing others who got there before me, including David McLure SC and Ian Roberts SC, and doing some research.

For those who are keen to swap paper for a tablet, here are my tips.

The device

I had thought I would buy a Microsoft Surface Pro. It is a full laptop, but with the capacity to remove the keyboard and write on it with a pen. David McLure was using one but then moved to an iPad. It was his view that the Surface is fine as a laptop but not good as a tablet – at least for reading and marking up cases and documents. I agree.

There are other tablets. The iPad Pro however is currently most barrister's preference. It comes in two sizes. The larger size (12.9 inch) allows you to read an A4 page at almost the correct size. The 256GB storage option will be large enough for almost everyone, and I found there is no need for cellular data. I download everything before going to court using wifi, and find there is no need for the extra cost of buying monthly cellular data. When I really need it I can use my mobile phone as a hotspot. And surely it won't be too long before the Supreme Court matches the Federal Court and provides wifi.

Apps

You need a good pdf reader application. Ian Roberts and I use GoodNotes. David McLure uses Goodreader. Readdle make PDF Expert, which is popular with US attorneys. Each allows you to download and then read and note up documents and back them up to your computer.

With GoodNotes I create a folder for each matter with subfolders that reflect the sub-categories of a brief: i.e., Pleadings, Applicant evidence, Respondent evidence, subpoena materials, authorities etc. Within each sub-folder the documents appear as icons, with the first page visible. Click on the document and it opens to the page I looked at last. The notes and highlighting are permanently on the documents, but you can edit them as your thoughts evolve.

Microsoft now have apps for all their Office products which makes them function almost like the full program does on your computer, allowing you to use the iPad to create or edit documents in Word or Excel (although I do not use the iPad for that myself).

Receiving the brief

It surely won't be too long before there is a briefing app. In the meantime I ask solicitors to create a Dropbox folder with all the documents in pdf format, arranged in subfolders as they would a brief. It is then a matter of a minute for me to open that Dropbox folder on the iPad and select every document to download into the corresponding folder in GoodNotes. Thereafter the solicitor need only email to say the Dropbox folder has been updated and I can download the new document. Alternatively, I can open emails on the iPad and move the attached documents into a GoodNotes folder. That is a little slower, but still quicker than printing a hardcopy, holepunching and putting it in a folder (especially when the printer is playing up).

Obtaining authorities works much the same way. I find or get someone to save to Dropbox pdf versions of the authorised report from Westlaw or Lexis, or unreported decisions from Austlii, and then load them onto the iPad in the same manner.

David McLure tells me Goodreader syncs directly with all the various cloud services, such as Dropbox, OneDrive etc and continues to sync with them, so that as new documents are added to Dropbox they get automatically added to the iPad.

Barrister with hard copy brief talking to barrister with the same brief on iPad. (Photo: D Elder)

Accessories

The pen is not magnetic, and so is easy to misplace. There are various accessories that you can buy to solve that, including a rubber sleeve with a magnet that allows you to attach the pen to the iPad.

There are a great variety of cases. My own choice is a single piece of leather, from Pad & Quill. Apple sell a keyboard that attaches to the iPad. I have found that for what I use it for (reading and marking up documents) that is an additional weight I do not need. If I do travel I take a wireless Apple keyboard with me, which is easier to use. I used a matt screen protector called Paperlike that has a slightly rough feel that makes writing feel more like writing on paper.

The paperless future

The paperless electronic courtroom is not unknown, but is currently the exception, usually reserved for the largest cases or inquiries. That will change. The Land and Environment Court has conducted paperless trials. If they can do that with A2 size planning documents, it can be done in every case.

Electronic filing is the forerunner of the change. Courts will next develop protocols so all documents to be used are catalogued in a way that allows the parties to access them in court without printing them. By then barristers will need to be used to reading them electronically. It is the future. Embrace it. Feel smug.

Sir Frederick Jordan's brushes with 'degenerate art'

By Keith Mason[1]

Jordan was a Balmain boy, the immigrant son of a shopkeeper.

At Dr John Bennett's urging, I am researching the life of Sir Frederick Jordan who was Chief Justice of New South Wales between 1934 and 1949.

When I started, I knew something about the man's brilliant judgments that are more widely cited than any other of his generation, with the *possible* exception of Sir Owen Dixon. But I had grossly underestimated Jordan's humanity. Sir Maurice Byers once wrote that 'the Bar was firmly convinced that [Jordan] had no human passions'.[2] In like vein, my legal miscellany *Lawyers Then and Now* recycled old stories about 'Frigidaire Freddie', the man who could be relied upon to deliver a few 'well-frozen words' on official occasions; and who was said to give his wife a cold whenever he got into bed.

As Jordan's enthusiastic biographer, I have now gained entre into many of his intimately-shared experiences on literature, music and art. Jordan is almost certainly the most widely read judge to have occupied the bench of any Australian Court. He had a vast knowledge of the English classics, but he also read literature in Greek, Latin, French, German and Italian. He collected or borrowed books voraciously and returned to his favourites many times over.

Not overlooking World War II, the pressures of judicial life in the 1930s and 40s appear very different to nowadays. The caseload was a lot smaller. Chief justices were not expected to attend law conferences or give speeches and papers. Jordan used to catch the 5.15pm tram from Queens Square, and he took it going west towards its terminal so as to guarantee a seat on the way back to Vaucluse, allowing him to plunge into a beloved book. Sir Frederick and Lady Jordan were not blessed with children and television lay yet in the future.

Arthur Fleischmann's life-size sculpture of Sir Frederick Jordan in an exhibition.

Fifty per cent of the stuff on the walls looked like the efforts of untrained inebriates.

Jordan did not wear his heart on his sleeve. But his opinions on art, music, literature and popular culture were strong by any standards. Unlike some judges, he kept them largely to himself. But fortunately for his biographer, he shared a lot in writing with his intimate friend Lionel Lindsay. At Lindsay's urging, Jordan resolved to go into print after retirement from the bench, but he died in office. So Lindsay then took up the task and produced the book called *Appreciations*[3] that contains Jordan's insightful pieces on many topics. I have also accessed the correspondence of the two men, at the State Library of New South Wales where Jordan worked as he put himself through university as a part

time student. It is unlikely that biographers of modern judges will have such advantages in the world of the ephemeral email.

The 'modern art' controversies of Jordan's era

In the 1930s and 40s there were huge controversies about 'modern art'. Paintings that were abstract or non-representational were decried because they shunned beauty and promoted often unpleasant messages. Galleries were chided for their readiness to display such unpatriotic trash. Artists maligned each other and their works. Politicians and press magnates weighed into the conflict. Art prizes like the Archibald became the stuff of bruising litigation.

A typical remark from one public figure of this era was:

Perhaps...the Art Gallery is accumulating a Chamber of Horrors, in which to display the sort of rubbish that managed to attract attention through incompetent criticism.[4]

As we shall see, these words might have come from Robert Menzies, or Lionel Lindsay, or Josef Goebbels, or Adolf Hitler. But it was Sir Frederick Jordan in a letter written in 1940. He too used the term 'degenerate' to describe those who practised this modern art.[5]

Arthur Fleischmann working inside his Sydney studio during the 1940s surrounded by many of his sculptures. In the centre of the image is a small version of the sculpture of Sir Frederick Jordan.

Nazi Germany witnessed an extreme version of the phenomenon when the works of particular artists - some Jewish, many not - were attacked for being unpatriotic. Two exhibitions were organised simultaneously in Munich in 1937. *The Great German Art Exhibition* was designed to show works approved of by Hitler and Goebbels. The two men also organised a concurrent exhibition, down the road, labelling it 'Degenerate Art' (*Entarte Kunst*). In it, artists including Klee and Kandinsky were chaotically hung, accompanied by text labels deriding their works. Movements such as Bauhaus, Cubism, Dada, Expressionism, Impressionism and Surrealism were panned. The *Degenerate Art* exhibition attracted the bigger crowds, probably because Hitler drew such attention to it when opening the parallel event. In his speech, the failed artist turned Fuhrer condemned galleries that had had the effrontery to display:[6]

> pictures submitted for exhibition [by men whose eye] shows them things different from the way they really are. There really are men who can see in the shapes of our people only decayed cretins: who feel that meadows are blue, the heavens green, clouds sulphur-yellow....
> In the name of the German people I only want to prevent these pitiable unfortunates, who clearly suffer from defective vision, from attempting with their chatter to force on their contemporaries the results of their faulty observations, and indeed from presenting them as 'art'.

...our national galleries are controlled by men who suffer from an intense abhorrence of anything that has been done since 1880.

Australia experienced a parallel controversy in the 1930s and 40s[7] with leading public figures enlisting in the culture war. Robert Menzies, when federal attorney-general, and Herbert Vere Evatt, when a High Court justice, entered the fray on competing sides. So too the giants of the media as well as leading artists and art teachers. None more vigorously than Lionel Lindsay, the confidante of both Menzies and Jordan.

Menzies had been greatly disappointed with an exhibition of cubist and surrealist art that he visited in London in 1935. He recorded in his diary:[8]

> Do they really reject anybody's work? Fifty per cent of the stuff on the walls looked like the efforts of untrained inebriates.

The following year the attorney-general ignited a smouldering controversy in the Melbourne art world between a traditionalist establishment and artists who were seeking inspiration from 'modernist' work abroad.[9] He spoke out decrying 'the singularly ill-drawn pictures of 'modern' art, described by their authors as having a symbolic value unintelligible to the unilluminated mind.' Menzies set about founding a 'Royal' Australian Academy of Art. This project would be announced in 1936 by Sydney Ure Smith, himself a close friend of the Jordans.

Rather than establishing an accepted medium for promoting art in Australia, these moves exacerbated tensions within the art world. According to Menzies' biographer, Professor A W Martin:[10]

> ...by early 1937 a variety of dissensions had become evident. The conservative-modernist controversy lay behind some but by no means all of them. A tangle of personal, institutional and interstate jealousies was also involved. The Sydney committee resented what it saw as Melbourne's arrogance.

The Contemporary Art Society would be founded in Melbourne in 1938, in reaction to Menzies' proposal.

These activities would open a new front in the long war between Robert Gordon Menzies and Herbert Vere Evatt.

In retrospect, the years up to the end of World War II were Evatt's glory days, before his many reverses stemming from the ALP/DLP split and Menzies' skill at exploiting his political naivete. But in the 1930s Evatt the jurist had the upper hand. Never more so than when repeatedly thwarting Menzies' efforts to exclude Egon Kisch from landing on these shores.[11] Kisch was a Jewish communist who had already suffered under Hitler. In 1934, he came to Australia with a message of world peace and warnings about the threat of Nazism. But the Melbourne establishment was not yet ready for such views. Indeed, their chief spokesman Menzies would return from Germany in late 1938 with admiration for what he had seen there.[12]

Mr Justice Evatt was as strong a supporter of modern art as Attorney-General Menzies was its opponent. When opening an exhibition of paintings by Adrian Lawlor in June 1936, Evatt proclaimed that 'Australia lagged far behind the standard of art in England, America and Europe'. This he attributed 'chiefly to the fact that our national galleries are controlled by men who suffer from an intense abhorrence of anything that has been done since 1880'.[13] Evatt's wife Mary Alice was herself an accomplished artist of the 'modern' bent and her brother in law, Clive Evatt KC[14] would appoint her a trustee of the New South Wales Art Gallery just in time to cast a favourable vote in the controversial Archibald prize competition of 1943 to which I shall return.

Menzies would stick to his anti-modernist guns both publicly and privately. In 1946 he told Lionel Lindsay that he entirely favoured the abolition of the Archibald Prize.[15] He regarded 'ninety percent [of the competitors] as rank imposters; some of them refugees who have discovered the art racket since their arrival in Australia and have become executants without first being students'.

Incidentally, Menzies (as prime minister) wanted Jordan to take Evatt's position when the latter retired from the High Court in 1940 to re-enter politics. But we learn from Sir Owen Dixon's diary that, when sounded out by his former pupil master, Sir George Rich, at Menzies' request, he turned down the proposal in emphatic terms.[16] The disruption of travelling around Australia may have been a reason, but I suspect that the baleful presence of Sir Hayden Starke on the High Court had a lot to do with Jordan's decision not to leave a happy band of Supreme Court colleagues for a very unhappy one in the High Court.[17] Whatever Jordan's reasons, Menzies had consulted with his revered pupil master Owen Dixon, then senior puisne justice on the High Court, before making the indirect approach to Jordan. And he would have learnt the response before turning to Jordan's former pupil, Dudley Williams, to fill the Evatt vacancy. At his retirement as chief justice in 1964, Dixon (in Menzies' presence) chose to publish a different story about Jordan's non-appointment, gently chiding the government for the appointment not taking place.[18] Since it is very unlikely that Dixon would have misremembered the critical detail of something he chose to speak about, I suspect that he was fibbing. But why he would have done so in Menzies' presence remains a mystery.

Lionel Lindsay on modern art

Lindsay had first encountered Jordan at the State Library of New South Wales where Jordan worked as a library assistant during his university days. Jordan was a Balmain boy, the immigrant son of a shopkeeper. He got to Sydney Boys High School on a public scholarship and then studied both Arts and Law part-time at Sydney University. Lionel Lindsay was an accomplished artist and an art critic who wrote for *The Bulletin*. He and Jordan shared their views on literature, religion and art over many years. (So too Lindsay and Menzies who frequently corresponded and dined together during Menzies' fallow years in the 1940s.)

Lindsay had a horror of Surrealism, Expressionism or any art that explored what he called 'the dark night of the soul'.[19] It was this art that he described as 'Modern' and he felt it was being foisted on a gullible Australian public especially by the Fairfax family through their publications and support. Lindsay's continuing dislike of the *Sydney Morning Herald* was encouraged by Menzies, who had his own reasons, both political and personal, for resenting Warwick Fairfax.[20]

In October 1940, the *Sydney Morning Herald* published a letter from Lindsay in which he attacked the aesthetic influence of 'the German degenerates'. He proclaimed that:[21]

> The Australian public is perhaps yet unaware that modernism was organised in Paris by Jew dealers, whose first care was to corrupt criticism, originate propaganda – in this infinitely superior to Goebbels, for it worked – and undermined accepted standards so that there should be ample merchandise to handle.

This sentence was edited out by *The Daily Telegraph* when it published the same letter. It has been speculated that the S*ydney Morning Herald* included the offending sentence in order to set Lindsay up for the fire storm that ensued. There was certainly a strong reaction in letters published in response, accompanied by an editorial probably penned by Warwick Fairfax himself.[22] The secretary of the Contemporary Art Society, Peter Bellew, suggested that, whatever Lindsay's purposes in writing:[23]

> it is unlikely to achieve any more than an enthusiastic 'heil' from the inmates of our internment camps, and maybe an autographed watercolour from Hitler.

Less than three months later, Lindsay would receive a knighthood, on Menzies' recommendation, in the New Year's honours of 1941. Jordan was present at the investiture, as New South Wales' lieutenant-governor, but not before he warned Lindsay to avoid greeting him as 'Fred'.

In 1944, Vic O'Connor published a piece called 'Art and Fascism' in *Australian New Writing*.[24] In it he attacked Lindsay for thinking and speaking like Hitler and for being both a 'vague historian [and] also a very dishonest one' who attempted to 'cover his racial prejudice [against Jews] with the innocent garb of 'defending his art'.'

Much of Lindsay's vomit was also spewed out in his letters to Jordan. Whatever his personal views on Lindsay's outpourings, Jordan assisted Lindsay in the project that came to light in 1942 with the publication of a book called *Addled Art*. In it Lindsay attacked 'modernism' in all its forms, including cubism, fauvism and surrealism, describing them all as 'pretentious inventions deliberately practised and marketed for their sensation value.' Lindsay described modernism as 'the exploitation of novelty, a demented reaction to academic art, a refuge of charlatans who cannot draw and disdain to study.'[25] One chapter of *Addled Art* decried *The Cult of Ugliness*.

Another chapter was entitled *The Jew in Modern Painting* and in it Lindsay focussed on 'who' was organising the whole deception, especially in France. Picasso got special attention in a diatribe against the Jewish domination of the art market, that Lindsay labelled a 'racket'. The chapter ended with a flourish: 'Art, bow your diminished head to the only true god, the Calf of Gold.'

Lindsay also attacked the work of female modernists on the additional ground that 'they have more leisure, and the superficial nature of modern living attracts their light hands; picture or hat, all is one.'[26]

Although published in Sydney by Angus & Robertson, *Addled Art* was strangely silent about the Australian scene with which Lindsay had embroiled himself over many years. The closest he came was in the Preface asserting that for over 40 years he had seen Australian art as 'undefended, threatened by the same aliens, the same corrupting influences that undermined French art, both supported by powerful propaganda'. This lacuna was reluctant but deliberate, because the chapter on modernism in Australia was dropped on Jordan's strong recommendation. Jordan warned his friend not to put his fate in the hands of jurors in a likely defamation action. For good measure, he added that the offending portions seemed 'to give some miserable individuals an importance which they have not got and do not deserve'.[27]

After examining a second draft of the whole book, Jordan opined that it contained nothing defamatory.[28] He also tendered some copyright advice. Lindsay was so grateful for this assistance that he gave Jordan a Rembrandt etching entitled '*Adoration*',[29] telling him that 'if [*Addled Art*] annoys the Herald and all the modernists I shall be gratified'.[30]

Publication of Addled Art at a time when Australians were discovering the horrors of the Holocaust would cement Lindsay's reputation for anti-semitism and lose him many supporters even in an art milieu used to extreme language. (Incredibly, Lindsay republished *Addled Art* in England after the War without in any way tempering its message or language.)

On 28 August 1942 Jordan sent Lindsay the galley proofs of his recent judgment in *Gardiner v John Fairfax & Sons Pty Ltd* on the subject of fair comment. The acerbic art critic might have been less than pleased to see a significant win by the Fairfax company. But one passage in the reasons seems almost to have been written for his benefit. Jordan wrote that:[31]

> Whistler obtained his verdict, not because Ruskin had accused him of 'flinging a pot of paint in the public's face', but because he was injudicious enough to call him a coxcomb into the bargain and to suggest that he was guilty of wilful imposture....A critic is entitled to dip his pen in gall for the purpose of legitimate criticism; and no one need be mealy-mouthed in denouncing what he regards as twaddle, daub or discord. English literature would be the poorer if Macaulay had not been stirred to wrath by the verses of Mr Robert Montgomery....

Lindsay wrote back saying that he was 'fascinated by [Jordan's] wisdom and delicate discriminations and particularly rare humour.'

Jordan's own attitude to modern art

I am not suggesting that Jordan held all of the views that his friend Lindsay shared with him. But, in a letter to his friend, Jordan called *Addled Art* 'a most important contribution to the history of the pathology of art' and he labelled the current artistic era as decadent, and populated by 'degenerates'.[32] While omitting any whiff of the Jewish art conspiracy theory, Jordan's reasons for attacking modernism root and branch closely mirrored the views of contemporaries I have already mentioned.

In a note on modern art later published in *Appreciations*, Jordan recorded that:[33]

> The chief reason for the decadence of the artistic period through which we are now passing is unwillingness of many who profess the arts to submit themselves to the discipline necessary to acquire an adequate technique. They want the prize without the toil.

For Jordan, it was 'no new thing' to abandon form and structure if one recognised that writers such as Carlyle and Joyce had chosen formless styles.[34] But while they had also written to attract attention, a talent to write properly had been demonstrated in their earlier works. By contrast, 'Modern Art' was, to Jordan:[35]

> the work partly of young men desirous of attracting attention to themselves as artists but who, being either too incompetent or too idle to learn the elements of drawing, colour or perspective, are content to exhibit shapeless daubs, and partly of artists who, conscious that they will never be more than second-rate, seek to distract attention from their technical deficiencies by deliberate distortion or craziness of subject.

To Jordan, the greater part of 'Modern Art' was the product of 'people who are mentally unstable, and by charlatans who, being either too incompetent or too idle to learn the alphabet of artistry, prefer to mimic the off-scourings of imaginations which are mentally diseased.' Their work was nevertheless 'welcomed for public exhibition by... fellow degenerates in company with similar productions of their own.'[36]

These words might have tripped from the tongue of Goebbels or Hitler.

But Jordan never descended to Lindsay's anti-Semitism poured out in the correspondence between the two men and in *Addled Art*. Though not a religious believer, Jordan was very familiar with the Old and New Testaments and he shared with Lindsay his views and readings on the origins of Christianity, adding 'Needless to say, this does not represent my official views on the matter.'[37] Much of Lindsay's vomit against Jews was spewed out in his letters to Jordan. But, to mix metaphors, Jordan tended to return service with a straight bat. The closest he came, in my researches to date, was to describe the book and song *The Last Time I Saw Paris* as 'the worst types of American-Jewish greasy sentimentality.'[38]

Jordan described as 'meretricious rubbish' the *Herald* Exhibition of Contemporary Art of 1939 that was on display in Sydney at the David Jones department store.[39] This was the Melbourne *Herald* newspaper run by Keith Murdoch, Rupert's father. There were paintings by Picasso, Cezanne, Gauguin and Dali and the exhibition toured Australia during the war, because it was too unsafe to return the exhibits to Europe. This event re-stoked the fires of the modernist controversy. For example, J S MacDonald, the director of the National Gallery of Victoria who would offer the strongest of evidence against William Dobell in the Archibald litigation, declared that the work was that of 'degenerates and perverts'.[40] Jordan's response to the *Herald* exhibition was: 'It may be Contemporary, but why call it Art? You might as well call sleeping in a ditch 'contemporary architecture".[41]

I have already set out Jordan's remark that 'Perhaps...the Art Gallery is accumulating a Chamber of Horrors, in which to display the sort of rubbish that managed to attract attention through incompetent criticism.' Lindsay in reply[42] agreed heartily, adding that 'the truth is that the *Herald* has done immense harm to Australian art, and the public in Melbourne – We can thank Murdoch for his three years propaganda of Modernist follies for this.'

The two portraits of Jordan and their linkage with the Archibald Prize controversies

There are two portraits of Sir Frederick Jordan as he appeared late in his life. Both were commissioned by the New South Wales Bar Association but that is about all they have in common.

The official portrait displayed in the Banco Court, along with that of all other chief justices of New South Wales, was commissioned after Jordan's death (for 700 guas) and painted from a photograph. The artist was Sir William Dargie CBE who also painted Jordan's successor, Sir Kenneth Whistler Street.[43] The painting depicts a robed judge, seated and looking intently past the artist into the middle distance. The spectacled eyes betoken self-assurance without arrogance. There is no smile, but certainly more warmth than Jordan's caricatures. The featured long-fingered hands justify the comment made by Jordan's associate and private secretary John (later Mr Justice) Slattery: 'He had long fingers and he might have been a pianist I suppose, a certain softness about them.'[44]

Photo: Fairfaxphotos

Mary Edwards, Victoria Square Courts, 23 October 1944.

Painting from a photograph, rather than from life, would have disqualified Dargie from entering the portrait in the prestigious Archibald Prize that he would win eight times. At least, that was the controversial ruling of Justice Helsham, CJ in Eq, in 1983 in one of four court cases[45] involving the contested scope of the Archibald trust. Helsham's decision[46] was tellingly criticised by the editor of the *Australian Law Journal*

on the basis that 'If a live sitting were the primary criterion, there would be difficulty in accepting as portraits the self-portraits of Rembrandt and Rubens [which] must have been painted on the basis of images in a mirror: is there any distinction of significance between a photographic image and a mirror image?'[47]

Had Jordan been sitting on appeal from Helsham, posthumously and in breach of the rules of ostensible bias, there might have been the additional issue whether a painting based on a photo of a living person effected after that person's decease would have involved a 'live sitting'. But in those days Equity judgments in the Supreme Court were almost invariably taken on appeal to the High Court or Privy Council.

When engaged to do Jordan's portrait, Mary Edwards was already a controversial figure in the Sydney art scene.

There were, however, several actual links between Jordan and the Archibald Prize. Most of them are associated with Mary Edwards, the woman who painted the earlier portrait of Jordan that currently sits in the back corridor that the judges pass through before entering the Banco Court. That portrait depicts Jordan, robed and standing, with more than a hint of a smile on his face. Unlike Dargie, Edwards had the advantage of a living 'sitter' to produce her portrait of the (standing) judge. She chose to locate him out of doors, al fresco as Jordan would say in the famous *Spilstead* divorce case.[48] Her means of portraying this would cause a big kerfuffle.

In August 1947, Edwards was commissioned by the Bar Association to paint Jordan for an agreed fee of £750.[49] When the artist enquired whether a judge ever appeared outside the courtroom in his red robes, she was told that this might occur on ceremonial occasions, presumably during circuits. So she added the sprig of greenery that traverses the bottom left of the picture. The Bar Association objected to this addition and, when the artist dug in her heels, refused to take the portrait or pay the agreed price. I have it on the authority of two chief justices of the High Court (Garfield Barwick, who told Murrray Gleeson) that Jordan himself rejected the portrait because the greenery suggested a laurel wreath, with the connotation of a Roman triumph.

Edwards had been put in touch with the Bar Association by one of its members, Mrs Ann Bernard. Back in the 1920s, Bernard had gone to Fiji to work for the governor there. But after her husband died from a war injury, she went to England to study law at Oxford and then qualify as a barrister at the Inns of Court. She was admitted to the Sydney Bar in 1941 and practised there through the 1940s.[50]

One of several notable cases in which she appeared was *Ex parte Walsh*.[51] The former suffragette Adela Pankhurst Walsh had been detained under the National Security Regulations by order of the minister for the army who recited his satisfaction that this was necessary to prevent her acting in a manner prejudicial to the public safety or the defence of the Commonwealth. Speaking for the Full Court, Jordan CJ reluctantly upheld the validity of the detention and refused *habeas corpus*. But he declined to award the Commonwealth its costs. This would be a comparatively rare win for the Commonwealth in Jordan's court in a National Security Act case and the chief justice made it clear that his freedom to decide otherwise was reluctantly curtailed by High Court and House of Lords precedents.

When engaged to do Jordan's portrait, Mary Edwards was already a controversial figure in the Sydney art scene. Jordan (who would have endorsed the choice of artist) and the Bar Association were playing with fire right from the beginning. Edwards had been the Archibald runner-up in 1942, losing out to William Dargie. In those days, there was what lawyers call a reasonable expectation that the runner-up one year would win the next.[52] In the meantime, however, Mary Alice Evatt had been appointed to the trustees of the New South Wales Art Gallery by her brother-in-law. Described by Lionel Lindsay as 'an ardent supporter of modernism in every shape', Mary Alice Evatt in 1943 would vote (with Lindsay) for Dobell in what would be a seven to three vote decision that preferred Dobell's portrait of Joshua Smith to Joshua Smith's own portrait of Dame Mary Gilmore. (In the following year, Edwards' entry would get to the shortlist of nine, but no further. The normal pattern of events would be resumed the following year when Joshua Smith got the prize.)

Edwards and Joseph Wolinski went to Equity to challenge the trustees' decision, suing as 'relators' in the name of the attorney-general. They engaged Garfield Barwick KC, leading Ann Bernard. It was asserted that Dobell's startling exaggeration and distortion of Joshua Smith was a caricature, thereby (it was contended) precluding the picture from being a 'portrait'. The painting was described by one witness as representing 'the body of a man who had died in the position and [had] remained in that position for a period of some months and had dried up'. [53]

Roper J would, however, recognise a sufficient likeness and unsurprisingly conceded considerable (artistic?) licence to the trustees as judges of the prize. Most commentators see the case as doomed from the outset, but Edwards had several supporters in the divided art world. The case was lost with a blaze of negative publicity. Both William Dobell and Joshua Smith were scarred for life over their painful brush with the law.

When Edwards and Wolinski appealed to the High Court the proceedings in the attorney-general's name were discontinued. Solicitor-General Weigall KC advised that there was no question of general public importance and that the appeal was devoid of merits. The relators protested mightily, asserting 'political intervention' and claiming to have a favourable opinion on prospects from Barwick KC.[54] Ann Bernard picked up the tab for the costs awarded against her client.

The portrait of Ann Bernard

Writing privately to Jordan, Lindsay described Dobell's portrait of Smith as 'admirable, although a work of extreme decadence, a sort of belated rococo statement – Rembrandt emasculated and a cocaine addict!'.[55] Lindsay was, in his own words, 'extremely exercised' about Roper's decision, but the ever proper Jordan did not respond on this topic.

It is, nevertheless, fascinating to speculate what might have happened if Jordan had himself heard the case or sat on an appeal from the decision of his close friend David Roper.[56] In March 1946, after a walk to the Art Gallery 'to get a little sun', Jordan announced that he was 'depressed by the systematic ugliness of the Dobells and the Russell Drysdales'.[57] He told Lindsay that:[58]

> I can't understand how the Art Gallery allows itself to be bluffed into buying the rubbish of Drysdale and Dobell. Drysdale's pictures haven't even got bad drawing, there is no attempt at drawing at all, and the colouring is

> lurid and hideous. Dobell's stuff is mere caricature and rather indifferent caricature.

Coming, as it did, a little over a year after Roper J's still controversial ruling, Jordan's use of the phrase 'mere caricature' was extremely pregnant. Had Jordan been the trial judge, it is far from clear that he would have taken the position adopted by Roper. But it is equally clear to me that he would have recused himself anyway in light of his own hostility towards Dobell's paintings.

Scarred like almost every other participant in the Archibald controversy, Edwards made another of her many name changes.[59] She later retreated to the Pacific islands, where (dubbed 'the painter of the South Pacific') she executed many portraits of the native people of Fiji, Java, New Caledonia and Tahiti. Further unhappy distancing from the Australian artistic establishment ensued in 1945 when her portrait of Dame Enid Lyons was rejected as 'unsatisfactory' by the federal government's Historic Memorials Committee. As would later occur with the Jordan portrait, that commission would be transferred to William Dargie.

But back to Edwards' portrait of Sir Frederick himself that the Bar Association refused to accept or pay for. Jordan certainly knew of Edwards' role in prosecuting the case against Dobell whose paintings he (Jordan) detested. So, was his initial endorsement of Edwards as his portraitist a message of support for the battered loser in her litigious tilt against modernism? Quite likely, in my opinion.

When the standoff occurred, Mrs Bernard paid the artist the agreed fee and acquired the picture for herself. Edwards entered the portrait for the Archibald Prize and it was exhibited in early 1948. But it did not win. For a time the painting was displayed at the Sydney University Law Library. It was then taken to Fiji by Bernard when she returned there in 1954. As a barrister, she gained a reputation for taking on unpopular causes. She would return to Sydney in retirement in the 1960s and died in 1973. Her own portrait by Mary Edwards now hangs in the Bar Common Room.

In art circles, Kenneth Handley is best known as the father of David Handley, the entrepreneur behind *Sculptures by the Sea*. But in legal circles, Ken is revered for his service as an outstanding and longstanding appellate judge, both here and in the South Pacific. Ken grew up in Fiji and served on that country's Supreme Court for several years. Eager to recover the Jordan portrait for posterity, Handley contacted Ann Bernard's adopted daughter, Angela Davis, in about 2003. She put him in touch with her mother's executor Karam Ramrahka, a Sydney solicitor of Fijian origin. After failing to persuade Handley to buy the painting, Ramrahka yielded to the judge's request to *donate* it to the Supreme Court. (To date this transaction has not been challenged as the outcome of undue influence by a person in authority; and the Limitation Act has now added its protective embrace. My capacity to express any opinion as to the application of the recipient limb of *Barnes v Addy* is further compromised by me being one of the original recipients, as a member of the Supreme Court at the time, not to mention some well-known 'seriously considered' dicta of the High Court.)

In recognition of Jordan's service in the Full Court that had been the predecessor to the Court of Appeal, the portrait was unveiled in the President's Court at a celebratory event in 2003.[60] On this occasion, Mr Justice Roddie Meagher, himself a prolific art collector never shy of making controversy, conceded that the painting was not without merit. But, in customary voice, he added that 'it was a touch too pretty and feminine, but better than the usual academic rubbish which passed muster in Sydney portrait painting circles'. Roddie's chief objection, however, was that the Edwards' work did not 'portray, or even hint at, Sir Frederick's notorious iciness'.

That iciness may have been Jordan's public persona, but it was by no means his true personality. For further particulars of this statement readers will have to await the publication of my biography of Jordan.

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Jordan sculpted by Arthur Fleischmann

Fleischmann was a Slovak-born sculptor who left Central Europe in 1937. Spending two years in Bali en route to Australia, he converted from Judaism to Catholicism with the encouragement of a Dutch missionary. Between 1939 and 1948 he was a tenant at 'Merioola', a Victorian-era mansion in Woollahra. It hosted a bohemian artistic centre occupied by what was variously called the 'Merioola Group' or the 'Sydney Charm School'. Mary Edwards was another tenant there.

During his stint in Sydney, Fleischmann sculpted several prominent public figures including Cardinal Gilroy, Governor-General Lord Gowrie, Sir Percy Spender, Clive Evatt and Jordan himself. At some stage, the small Jordan sculpture was acquired by the lawyer-cum-politician, Edward St John QC. When he retired in about 1972, the sculpture passed to Rick Burbidge QC when he bought St John's 12th Selborne chambers 'lock, stock and barrel'. Burbidge's move to State Chambers atop the State Bank Building would, ironically, put Sir Frederick back into the face of another art controversy – a really bitter one, in which the word 'degenerate' may have been the only harsh word not uttered by either side.

Photo: Chris Winslow / New South Wales Bar Association

Sir Fredrick Jordan

Photo: Darren Covell / Bar Association

Throughout the 1990s the New South Wales Bar Association was wracked by a brawl about a Geoffrey Proud painting that its principal donor, Roderick Pitt Meagher QC (as he then was),[61] called 'an untitled Renoiresque lady'. It portrayed a woman sitting naked, legs apart, with her right hand either resting or moving (depending on one's imagination or sensibilities) near her dark panties. Clive Evatt Jnr described the sitter as 'unaware of section 576 of the Crimes Act, dealing with

indecent exposure'.[62]

Years of controversy within the Bar Council would deeply affect three of its presidents (each of whom shared the Court of Appeal Bench with me for a stretch). Roddie Meagher resigned his membership of the Bar Association for a time in protest against what he saw as feminist-induced political correctness; Murray Tobias threatened to sue the ABC for defamation in a 'mockumentary' called *The Naked Lady Vanishes*; and Ruth McColl led a finally successful push that saw a majority of the Bar Council voting to remove the painting from Bar Common Room.[63] This occurred not long before Mary Edwards' painting of Ann Bernard would become the first but not the last true heroine of the New South Wales Bar to be honoured by being hung in the Common Room.

But what was the Bar Council now to do with Geoffrey Proud's controversial 'naked lady'? After coming down from public display, she was stored in a basement. But howls of protest saw her partial restoration, at least so far as the office occupied by Babette Smith, the chief executive officer. Then, for several years, Rick Burbidge generously agreed to let her sojourn in his State Bank Chambers.

There the naked lady was positioned so that she and Sir Frederick eyed each other. I wonder what each of them thought about this? All we know for certain is neither of them blinked. According to Sir Garfield Barwick, Jordan always 'liked a warm joke'. So perhaps he would have been amused at the whole situation, whatever he thought about the Renoiresque, Modernist artwork.

ENDNOTES

1 The Hon Keith Mason AC QC is currently a visiting professorial fellow at the University of New South Wales. A version of this paper was presented on behalf of the Francis Forbes Society for Australian Legal History in the Banco Court on 10 October 2017.

2 Sir Maurice Byers, Recollections of Sir Frederick Jordan' *Bar News*, Winter 1991, p 13.

3 A limited edition of the book (150 copies) was published by Ure Smith in 1950.

4 Letter from Jordan to Lionel Lindsay 24 October 1940.

5 See text associated with fn 32 below.

6 Hitler's speech at the Opening of the House of German Art in Munich (18 July 1937). English translation from Benjamin Sax and Dieter Kunz eds, *Inside Hitler's Germany: A Documentary History of Life in the Third Reich*, Heath & Co, 1992.

7 See generally Bernard Smith, *Place, Taste and Tradition A Study of Australian Art since 1788*, 2nd ed rev, 1979, OUP, chap 8; Joanna Mendelssohn, *Lionel Lindsay An Artist and His Family*, Chatto & Windus, 1988, pp 189-205 ('The Great Modernist Debate 1936-1943'); Eileen Chanin and Steven Miller, *Degenerates and Perverts. The 1939 Exhibition of French and Contemporary Art*, The Miegunyah Press, Melbourne, 2005; Ann Stephen, Andrew McNamara and Philip Goad, *Modernism & Australia. Documents on Art, Design and Architecture 1917-1967*, The Miegunyah Press, 2006. James McDonald, appointed Director of the National Gallery of Victoria in 1936 with the active support of conservative politicians, described all non-academic art as 'gangrened stuff which attracts the human blowflies of the world who thrive on putrid fare' (Notebook, quoted in Mendelssohn, *op cit*, p 192).

8 Menzies's Diary, 3 May 1935 (see Martin, *Robert Menzies A Life,* vol 1, p 195).

9 Mendelssohn suggests (*op cit*, pp 194-5) that Menzies 'saw himself as a cultural leader as much as a political one.... Menzies wished to encourage the same association with the conservative tastemakers. He ultimately failed in this objective because he did not understand the complex network of loyalties, rivalries and enmities that made up the politics of Australian art.'

10 Martin, *op cit*, p 196.

11 See Keith Mason, *Old Law, New Law A Second Australian Legal Miscellany*, The Federation Press, 2014, pp 154-9.

12 In a letter to his sister Belle dated 6 August 1938 Menzies noted that 'this modern abandonment by the Germans of individual liberty and of the easy and pleasant things of life has something rather magnificent about it....The Germans may be pulling down the churches, but they have erected the State, with Hitler as its head, into a sort of religion which produces spiritual exaltation that one cannot but admire.'

13 AW Martin, *Robert Menzies A Life*, pp 195-6, quoting Argus, 3 June 1936. See also Evatt's Opening Address, First Exhibition of the Contemporary Art Society, 1939, reproduced in Stephen, McNamara and Goad, *op cit*, pp 392-6.

14 The father of 'Young Clive' Evatt who still practises at the Sydney Bar in his 80s.

15 Menzies' lengthy letter is set out in Stephen, McNamara and Goad, *op cit*, p 483 ff. Menzies also told the secretary of Sydney's Contemporary Art Society: 'I never liked French art, it was always decadent and the fall of France proved it' (Richard Haese, *Rebels and Precursors: The Revolutionary Years of Australian Art*, Penguin, 1988, p 110).

16 See Philip Ayres, *Owen Dixon*, 2003, The Miegunyah Press, citing Owen Dixon, Diary 5 September 1940.

17 See Clem Lloyd, 'Not Peace But a Sword – The High Court under J G Latham' (1987) 11 *Adel L Rev* 175. See also Starke's gratuitous insult of Dixon, Evatt and McTiernan JJ in *Piddington v Bennett* and Wood Pty Ltd (1940) 63 CLR 533 at 550. In 1935, Dixon himself declined an invitation to dine with the Jordans when he learnt that Starke had been invited (see Ayres, op cit, p 69 ('He had invited Starke so I wrote I hoped to go to Melb for the week end')).

18 See 110 CLR x, xi.

19 Mendelssohn, *op cit*, p 192.

20 Mendelssohn, *op cit*, p 193.

21 *Sydney Morning Herald*, 16 October 1940. See further 'On Prejudice (Modern and Not So)' *New Matilda* 24 September 2007.

22 Mendelssohn, *op cit*, p 202.

23 Letter from Peter Bellew, Hon Sec of the Contemporary Art Society, *Sydney Morning Herald*, 17 October 1940.

24 *Australian New Writing*, no 2, 1944, pp 47-52, reproduced in Stephen, McNamara and Goad, *op cit*, p 458 ff.

25 *Addled Art*, flyleaf.

26 *Addled Art*, p 53. The chapter is reproduced in Stephen, McNamara and Goad, op cit, at p 417 ff.

27 Letter from Jordan to Lindsay 19 December 1941.

28 Letter from Jordan to Lindsay 18 August 1942.

29 Lindsay gave Jordan a second Rembrandt etching and it was later gifted by Jordan or Lady Jordan to Mr and Mrs Vrisakis.

30 Letter from Lindsay to Jordan 29 April 1943.

31 *Gardiner v John Fairfax & Sons Pty Ltd* (1942) 42 SR (NSW) 171 at 174.

32 Letter from Jordan to Lindsay 19 December 1941.

33 *Appreciations*, p 44.

34 Carlyle had adopted a 'formless style, composed of jerks, squawks and ejaculations' and Joyce had produced in *Ulysses* 'a work which in structure and content resembles nothing so much as a dunghill' (*Appreciations*, p 45).

35 *Appreciations*, p 45.

36 *Appreciations*, p 49.

37 Letter from Jordan to Lindsay 24 June 1941.

38 Letter from Jordan to Lindsay 28 August 1942.

39 See generally Eileen Chanin and Steven Miller, *Degenerates and Perverts. The 1939 Exhibition of French and Contemporary Art*, The Miegunyah Press, Melbourne, 2005. See also Mendelssohn, *op cit*, p 197.

40 Chanin and Miller, *op cit*, p 88.

41 Letter from Jordan to Lindsay 24 October 1940.

42 Letter from Lindsay to Jordan 23 August 1943.

43 J M Bennett, *Portraits of the Chief Justices of New South Wales 1824-1977*, pp 5, 42 (where the Jordan portrait is reproduced), 46 (where the Street portrait is reproduced).

44 The Hon John Patrick Slattery AO QC, interview by Justice Kenneth Carruthers, 20 September 1993, transcript in Supreme Court Library, p 41.

45 See further Keith Mason, *Lawyers Then and Now*, pp 205-8.

46 *Bloomfield v Art Gallery of New South Wales*, unreported, 23 September 1983. The case involved a 'portrait' of John Bloomfield by Tim Burstall.

47 J G Starke, 'Literary and Artistic Competitions' (1984) 58 *Aust Law Jo* 52.

48 See *Spilstead v Spilstead* (1944) 44 SR (NSW) 242 at 245-6.

49 Information about the commissioning and rejection of Edwards' portrait of Jordan and the later travels of the painting comes from *The Merioola Group*, *David Jones Art Gallery Catalogue*, 1947; *Sydney Morning Herald* 28 May 1948 (Column 8) and 2 June 1948 (Column 8); Karam Ramrahka, 'Memoir of Ann Bernard, transcribed 19 July 2010 and accessible via the NSW Bar Association Women Barristers Forum mentioned in the next footnote; Michael Pelly, 'The picture of a perfect Sydney gentleman' *Sydney Morning Herald* 29 August 2003; *Bar News* 2003/2004 p67 (which contains a picture) and from the writer's interview with the Hon Kenneth Handley AO QC.

50 There is a lot of fascinating biographical material about Bernard accessible online at *NSW Bar Association*, *Women Barristers Forum*, *Pioneering Women of the NSW Bar*.

51 (1942) 42 SR (NSW) 125.

52 According to Joanna Mendelssohn, *Lionel Lindsay An Artist and His Family*, p 209.

53 See Scott Bevan, *Bill. The Life of William Dobell*, Simon & Schuster, 2014; David Marr, *Barwick*, pp 38-42; Keith Mason, *op cit*, pp 205-8 for further details about the Joshua Smith portrait litigation.

54 *Sydney Morning Herald* 3 March 1945.

55 Letter to Jordan 28 January 1944. See also letter to James McGregor 24 January 1944.

56 Dixon's Diary records Jordan telling him on 7 April 1941 that 'Kitto not strong personality Roper best – he thought, if a vacancy occurred or Judiciary Act enlarged [the number of High Court justices, as would occur in 1945].'

57 Letter from Jordan to Lindsay 19 March 1946. Jordan was also highly critical of Dobell's portrait of Lord Wakehurst in a letter to Lindsay dated 22 December 1944 with which the latter agreed in spades.

58 Letter to Lindsay 20 August 1943.

59 According to the online lists of Archibald entrants, she was also known as Edwell Burke, Mary Edwell and Mary Edwell-Burke.

60 See Pelly, *op cit*.

61 The painting was gifted in 1975. Much later, Meagher JA spoke at the hanging of the Edwards' portrait of Jordan in the President's Court (see above). He also 'judged' the 'retrial' of the Dobell Case, delivering reasons that were more amusing than those of Roper J, but with the same outcome (see (1999) 73 *Aust L J* 710).

62 Clive Evatt, 'The Artful Bar', *Bar News*, Summer 1988.

63 I give an account of the controversy in Keith Mason, *Lawyers Then and Now,* An Australian Legal Miscellany, The Federation Press, 2012, pp 208-212.

The strange resignation of a chief justice – Lord Trevethin

by Geoffrey Watson

Photo: Elliot & Fry

On the morning of Friday 3 May 1922, the lord chief justice of England, Lord Trevethin, was reading *The Times* while preparing himself for that day in court. One article – quite understandably – caught his eye: it was titled 'Retirement of Lord Trevethin'. Much to Trevethin's surprise, the journalist recounted: 'The king has been pleased to accept the resignation of the Rt Hon Lord Trevethin from the office of lord chief justice of England'.

Until he read the article, Trevethin had no idea that this had transpired.

How did this happen?

Who was Lord Trevethin?

Alfred Tristram Lawrence was born in 1843, and read law at Trinity College, Cambridge. He was called to the Middle Temple in 1869 and took silk in 1897. In 1904, he was appointed to the High Court, sitting in the King's Bench Division where he was an affable, serviceable, and utterly unexceptional judge.

Upon the resignation of Lord Reading, on 15 April 1921 Lawrence was appointed to the office of lord chief justice of England and Wales and elevated to the peerage, taking the rather ornate title of Baron Trevethin of Blaengawney. This appointment was a surprise appointment to many: although Lawrence was 77 years old, he was not the most senior of the puisne judges,[1] and had not been a standout performer.

But Trevethin's appointment, as you will see, was not an appointment based on merit.

The office of lord chief justice

Strangely, the office of lord chief justice of England and Wales is relatively new.[2] The office was only invented after the three ancient common law courts (King's Bench, Common Pleas and Exchequer) were folded into High Court in 1875. And then it was only in 1880, once two of the presiding judges in those courts had died or retired, that a single chief justice was appointed – Sir Alexander Cockburn.

The office quickly became a political gift – six of the next seven chief justices after Cockburn had been politicians and had served as attorney-general. In fact, a practice developed under which it was accepted that if the position of chief justice became free, the attorney-general of the moment had a *right* to claim the office. This led to some poor appointments of unsuitable types and under-skilled lawyers.

This practice was well-entrenched by the time Rufus Isaacs KC[3] was appointed attorney-general in H H Asquith's Liberal government.

Isaacs had taken silk in 1898 and was a genuine leader of the bar, rated as one of the leading advocates of his day, with a large and very lucrative practice. His parliamentary career was much less successful, and he and David Lloyd George had been very badly damaged from the fallout from the Marconi scandal – in which both were implicated in insider trading by purchasing shares in a company with which the government was about to do business.

So, when Lord Alverstone retired as chief justice in 1913, Isaacs claimed his entitlement. By this time Lloyd George had replaced Asquith, and the new prime minister immediately appointed his friend Isaacs – who was relabelled as Lord Reading.

It was quickly apparent that the new Lord Reading had little interest in the work of the court. In fact, he spent little of his time sitting as a judge, or even in the United Kingdom. He headed the Anglo-French war loan mission to America in 1915, stayed on as high commissioner, and he even took an appointment as ambassador to the USA from 1917 to 1919 – all while he was chief justice.

Trevethin's appointment, as you will see, was not an appointment based on merit.

In 1920, Lord Chelmsford's tenure as viceroy to India was drawing to an end. Reading made it known to Lloyd George that he wanted the Indian job, but he had a problem. Although he had made a lot of money at the bar, he had also spent a lot of that money (something which might resonate with readers of *Bar News*). Sir Edward Carson KC[4] happened to be present at a dinner when Reading explained all of this to Lloyd George. Carson recalled Reading as saying that 'he had lived expensively and had not made sufficient provision for the future' and explaining to Lloyd George that he could not leave for the viceroyalty (which carried no pension) as he had not served long enough to attract a judicial pension. Carson listened in horror as the two close friends then hatched a cunning plan. The viceroyalty was for a fixed five year term, and that old schemer Lloyd George blurted out an idea – he said to Reading he could appoint 'an elderly judge as stop-gap', while Reading was in India, and then 'Rufus can come back, resume the chief justiceship, and earn his pension'.

Now while that is not the way things worked out, it was the first step toward the Trevethin resignation.

Things get complicated

On 2 April 1921, Reading was appointed the viceroy to India, thus opening the position of chief justice – but a complication arose when, in accordance with the accepted protocol, the attorney-general, Gordon Hewart KC, claimed the top job.

This placed Lloyd George in a difficult position in two different ways. One problem was the arrangement he had with Reading (not that breaking promises was ever a matter which troubled Lloyd George). Hewart was in his early 50s and would not easily be shifted when Reading returned. Lloyd George's other problem came from the fact that his Liberal government was struggling, and Hewart had been one of his most effective parliamentary performers. So Lloyd George explained to Hewart that he could not afford to let him go, and then let Hewart know about the 'elderly judge' ruse. But Lloyd George then came up with a refinement: he would not rely merely upon the judge's age – in return for the stop-gap appointment, Lloyd George would acquire a signed and undated resignation from the new chief justice on the understanding that it could be deployed at any time.

Hewart agreed to forego his 'right' to the chief justiceship on those conditions.

Lloyd George would acquire a signed and undated resignation from the new Chief Justice on the understanding that it could be deployed at any time.

The lord chancellor of the time was the Lord Birkenhead – not exactly a soft and compliant character.[5] When he was told of the plan, Birkenhead exploded. He wrote two swingeing letters to the prime minister, pointing out just how disgraceful this proposal was. Each point Birkenhead made was well-made. Birkenhead said that Lloyd George's scheme made the chief justice a 'creature of political exigency' and that, given the government was a regular litigant in the chief justice's court (commonly represented by the attorney-general), in any such proceedings the case would be heard and decided 'with the knowledge in the minds both of the judge and of the advocate that the latter could at any time displace the former from his seat and occupy it himself'.

Lloyd George, of course, ignored that, and just went ahead and did what he wanted.

The selection and rejection of Lawrence

Birkenhead had predicted in one of his letters to Lloyd George that it would be difficult to find a suitable candidate willing to accept an appointment on such terms, and then went further to denigrate the abilities and capacity of each of the most senior judges, including disparaging the abilities of Lawrence.

It is not now known if or to whom Lloyd George offered the position apart from Lawrence; all we know is that Lawrence accepted the terms and took the appointment. On 15 April 1921, Lawrence was sworn in as the sixth chief justice and was rebadged as Lord Trevethin.

Trevethin did not last long in the job. By early 1922, it was clear that the Liberals were floundering and would lose the election due later that year. Hewart pressed for fulfilment of the promise and Lloyd George acceded.[6]

It was in those circumstances that Lloyd George submitted Trevethin's resignation to King George V. Lloyd George did so without even taking the time or courtesy to tell Trevethin.

Poor old Trevethin sidled off into retirement and obscurity.[7]

The new chief justice

So what did all this intrigue produce? One can only hope it was worth the effort.

Well, no. On 8 March 1922 Baron Hewart of Bury was sworn in as the seventh chief justice.[8] He is, of course, the author of the famous aphorism insisting that justice must also be seen to be done[9] – a standard which Hewart constantly failed to meet.

Professor Richard Jackson described him as 'biased and incompetent' and said Hewart was 'the worst English judge within living memory'. C P Harvey QC claimed he lacked only one quality as a judge – 'that of being judicial'. Professor Robert Heuston said Hewart was 'perhaps the worst chief justice since the seventeenth century', but Lord Patrick Devlin said that Heuston was not being 'quite fair. When one considers the enormous improvement in judicial standards between the seventeenth and twentieth centuries, I should say that, comparatively speaking, he was the worst chief justice ever'.

Hewart was chief justice for 18 years; he retired in 1940.

ENDNOTES

1 The most senior was Justice Darling, who although senior to Lawrence on the bench was two years younger. Stung by being overlooked, Darling joked that he had been bypassed because, at 75, he was regarded as too young for the job.

2 It is interesting to observe that the office of Chief Justice of New South Wales is substantially older – 77 years older.

3 Rufus Daniel Isaacs: b 1860; d 1935. Called to the Bar 1887; QC 1898; MP 1904-1913; solicitor-general 1910; attorney-general 1910-1913; lord chief justice of England 1913-1921; viceroy of India 1921-1926

4 Edward Henry Carson: b 1854; d 1935. Called to the Irish Bar 1877; QC 1889; MP 1892; solicitor-general of Ireland 1892; solicitor-general for England 1900; attorney-general 1915; lord of appeal in Ordinary 1921-1929. Carson was the outstanding advocate of his time, perhaps most famous for his cross-examination of Oscar Wilde in Wilde's criminal libel suit against the Marquis of Queensbury.

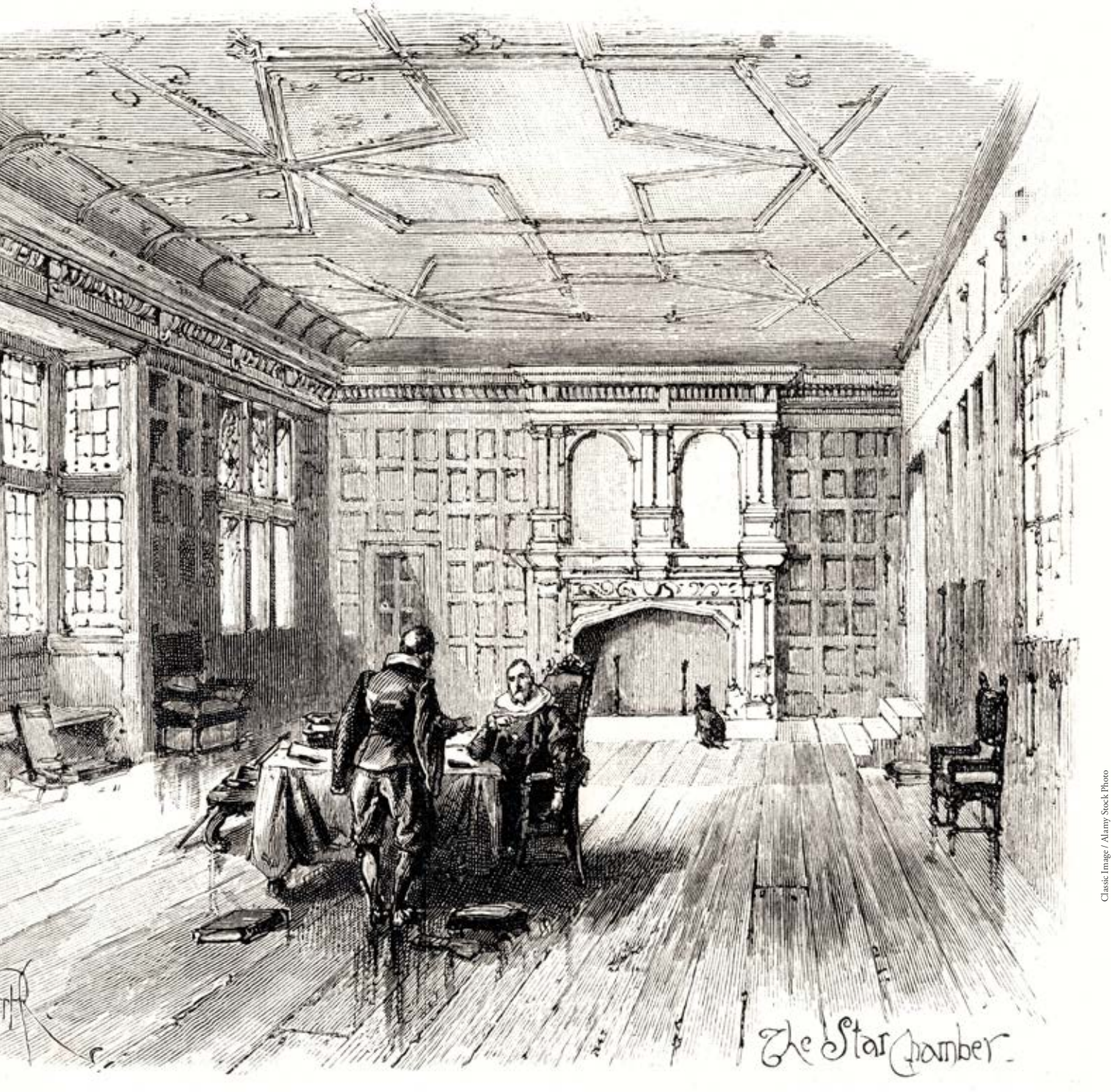
5 Frederick Edwin Smith: b 1872; d 1930. Called to the Bar 1899; MP 1906; KC 1908; solicitor-general 1915; attorney-general 1915-1919; lord chancellor 1919-1922. Smith was one of the leading barristers of his day, notorious for his acid tongue. He was a very effective conservative politician.

6 I suppose that Lloyd George could relieve himself of the burden of his concurrent promise to Reading – because, he could have plausibly said, he would be out of office at the time Reading returned from India.

7 At least his son, Geoffrey Lawrence, was able to recover the family dignity. Geoffrey became a distinguished judge, presiding at the Nuremberg trial, and eventually elevated to the House of Lords as Lord Oaksey.

8 Gordon Hewart: b 1870; d 1940. On paper Hewart had a stellar career in law and politics: called 1902; KC 1912; MP 1913-1922; solicitor-general 1916-1919; attorney-general 1919-1922; lord chief justice 1922-1940.

9 *R v Sussex Justices; ex p McCarthy* [1924] 1 KB 256.



Classic Image / Alamy Stock Photo

The Star Chamber

By Kevin Tang

The Star Chamber's gruesome confines within the labyrinth of corridors which comprised the palace at Westminster were known for more than a century before the statute of 1487 purportedly established it. Originally, it was a special tribunal to try particular legal issues and matters of public order. This was a court of the King's Council, the members of which sat, without reference to civilised practice and procedure, and were hardly ever legally trained. This aberrant conciliar court has fired the imagination of common law lawyers throughout the ages.[1]

Origins

The chamber was originally used for sittings of the King's Council. The Star Chamber was first referred to in 1398 as the *Sterred Chambre* and by 1422 as *Le Sterne Chamere*.

The legend spread over the channel into Norman France and it was called *La Chambre Etoilée* and in Latin *Camera Stellata*.

The court was established to ensure the fair enforcement of laws against the privileged English upper classes (those likely to be born above the law or those so powerful and infamous that the ordinary courts could not convict them of monstrous crimes). It was understood to be a jurisdiction which countenanced morally reprehensible misdemeanours but which were not necessarily a violation of the letter of the law. It had a wide-ranging jurisdiction, it could punish a defendant or an accused for any action which the court felt should be unlawful, despite being technically lawful. By 1529, when Cardinal Thomas Wolsey was chancellor, it became a regular court of law. Sir Edward Coke (1552-1634) described the Star Chamber grandiloquently as 'the most honourable court (our Parliament excepted) that is in the Christian World both in respect of the judges in the court and its honourable proceeding'.[2]

The procedure was simple: a prosecution was brought before the court upon referral by the Attorney-General and any defendants were tried summarily in the absence of a jury and without witnesses.

Cognoscenti

In 1540, the court of the Star Chamber and the Privy Council became formally separate entities. Before and after that date, however, the judges who sat in the Star Chamber were all Privy Councillors. Most of them, however, were not legally qualified. During the 16th century, the Privy Council was a select and secret institution. It was a band of the king's own private advisers, chosen for their knowledge and 'know-how' in relation to government policy and administration.

Perhaps surprisingly, the Star Chamber from the first quarter of the 16th century exercised a mainly civil jurisdiction. Like the Chancery, the relief granted concerned mainly matters of real property. However, unlike Chancery, the petitioners to the court usually complained of riot, unlawful assembly, forced entry and oppression; matters of public disorder which gave the council its impetus to act in such matters.

Unlike the Chancery, the Star Chamber was not a court concerned with conscience.

In reality, many of the allegations and claims made before the court were probably fictions. The real reason for the Privy Council deciding these issues was essentially to decide title. However the statutes of Edward III prohibited the council from deciding issues in relation to freeholds – these were known as the statues of due process and precluded such actions – resulting in these issues being determined by Privy Councillors sitting as judges of the Star Chamber. At its height, Charles I used the Star Chamber as a de-facto parliament in the years 1628-1640, when he refused to call parliament. The Privy Council's identity as an appellate court came about by the 17th century.

Jurisdiction and procedure

Generally, the chamber's opaque and indeterminate nature (as to practice and procedure) gave rise to despotic and totalitarian characterisations of its own jurisdiction. Its jurisdiction was untrammelled. This was the age of civil unrest, lengthy wars and anarchy. As Thomas Hobbes said in *Leviathan* (1651), '[Man lived in] continual fear, and danger of violent death; and the life of man [was] solitary, poor, nasty, brutish, and short.'

A Star Chamber judge sat without jury and wholly out of the public gaze. This fired the imagination of the public. Another court which approached the terrifying and perverse descriptions of the Star Chamber's practice and procedure was the Court of High Commission, which was the pope's own private court, the quintessential ecclesiastical court.

In Stuart times, the Star Chamber dealt with criminal causes, and after conviction in the Star Chamber, only the king was able to pardon wrongdoers. By the 16th century, those cases had almost ceased to be referred. The procedure was simple: a prosecution was brought before the court upon referral by the attorney-general and any defendants were tried summarily in the absence of a jury and without witnesses. A private petitioner or aggrieved citizen could also seek that a cause be referred to the chamber or to another court, usually by indictment.

Noted in Star Chamber procedure was the *ex officio* oath where, as a result of their high positions, accused individuals would be forced to swear to answer truthfully any questions asked of them. Then, beset by hostile interrogation, the accused was forced into the 'cruel trilemma' - having to incriminate themselves, to face charges of perjury if they answered unsatisfactorily, or be held in contempt of court, if no answer was forthcoming.

Unlike the Chancery, the Star Chamber was not a court concerned with conscience. There was no development of any equitable jurisdiction. It was a Common Law court.

During the 17th century, the Star Chamber awarded damages to its claimants – a matter hitherto unknown to the Chancery.

Court of law or lore

The Star Chamber was so much the Law, that it became lore itself. In this procedurally opaque jurisdiction, the Crown had an enormous advantage in prosecutions. It tried citizens who had fallen from public favour, unfavourable or notorious litigants and accused persons. The court was used to suppress sedition and to discourage political activism and similar. The activist William Prynne (1600-1669) who published treatises against religious holidays and Christmas was known to have 'lost his ears' twice (by degree) by order of the Star Chamber. He was brought before the Star Chamber for his religious libels in the Puritan context.[3] William Noy (1600-69), the attorney, referred the matter into the chamber. The church fathers condemned Prynne's infamous views and searing criticism against stage plays and his assiduous railing against the monarchy. In addition to earlier orders causing the loss of his ears Prynne was sentenced to the pillory and publicly humiliated. The chief justice ordered him to be branded on the cheeks 'S L' a 'Seditious Libeller'. Prynne preferred his own Latin formulation of those letters 'stigmata laudis' – signs of praise, claiming it a higher honour.

The activist William Prynne (1600-1669) who published treatises against religious holidays and Christmas was known to have 'lost his ears' twice (by degree) by order of the Star Chamber.

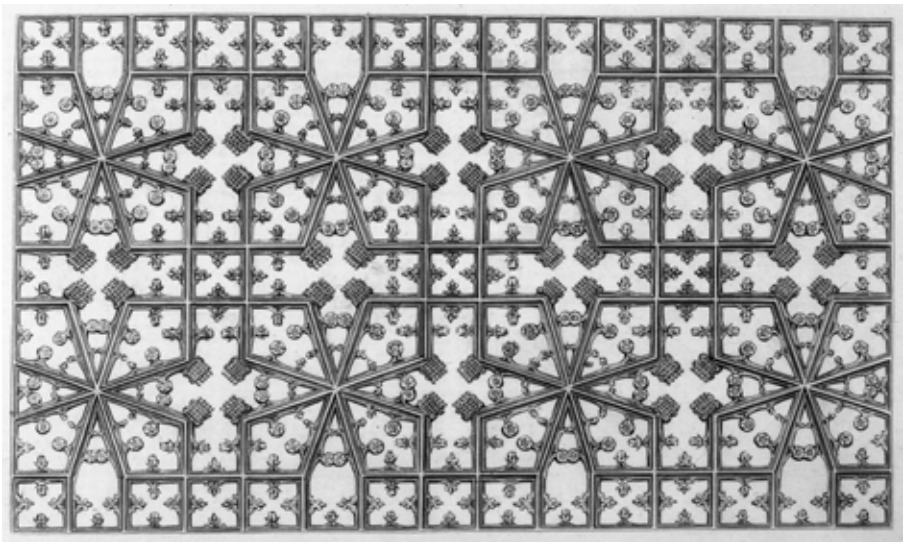
In the aftermath of the treatment of Prynne and other politically active individuals, the Long Parliament (1640-1660) abolished the Star Chamber by introducing the Statute of Habeas Corpus in 1640. The Star Chamber by then was a legend in its own right for arbitrary procedure and chilling cruelty.

During its existence, the Star Chamber developed the law of misdemeanours. Its hallmark, however, became its terrifying brutality and imaginative punishments for misdemeanours, for example the slitting of noses, severing of ears and public humiliation, although it did not order death. The more gruesome punishments became a feature in the last 10 years of its life. Constitutional principle precluded felonies from being tried in the chamber – a man could only be tried for his life by a jury of his peers.

Punishments for misdemeanours that were unfixed at Common Law at that time, allowed the Star Chamber to decree whippings and the pillory in lieu of a pecuniary fine. The chamber had morphed into favouring cruel and unusual punishments – perversity became its signature.

The Star Chamber heard cases of criminal libel, forgery, perjury, subornation perjury, conspiracy and attempts to commit crimes. It has been said that it was a jurisdiction for criminal equity, however, that overstates the equitable nature of the court, if it ever existed. By the time of the abolition of the Star Chamber, it had commenced creative work which the other courts developed.

On the demise of the Star Chamber, the King's Bench claimed to have inherited some aspect of equitable function of developing the criminal law to meet particular or new circumstances that might have presented. Sir Edward Coke however urged that any creativity of the jurisdiction or ability to deal with the novelties which might have presented were not desirable in penal matters. It is understood that any such equitable jurisdiction, or room for it to develop was abandoned in the interests of certainty. The Bill of Rights of 1689 prohibited cruel and unusual punishment.



Chronicle / Alamy Stock Photo

Fabled decor

The Star Chamber took its name from the golden stars painted on its blue ceiling. Notably, the ceiling was painted in cerulean blue, *ultramarino (Latin* beyond the sea), which was a coveted colour in decoration in Medieval and Renaissance times. It rivalled the colour of murex favoured of the Ancients in rarity and expense. That colour blue was made by grounding to a fine powder lapis lazuli from Afghanistan, then mixed with other compounds. It was otherwise used for the robes in depictions of the Virgin Mary, the serene colour being symbolic of holiness and humility. The gold stars were a popular motif at the time and applied directly onto the blue ground. Such ceilings are observed in buildings which date to the time; for example, La Sainte Chappelle in Paris, built in 1240 for Louis IX – the king's own private chapel within the Palais de Justice on the Ile de la Cite.

Its hallmark, however, became its terrifying brutality and imaginative punishments for misdemeanours, for example the slitting of noses, severing of ears and public humiliation, although it did not order death.

In light of its décor, the likely source of the Star Chamber's name comes from Ovid's *Metamorphoses* 'soe called of the serpent stellio…For the form of the said serpent was in colour blewe, al to be speckle with spots shyneigne in the night bright like unto starres'.[4] Ovid was a popular reference in Elizabethan England, and this description concerns punishment which became the chamber's signature.

The Star Chamber room was demolished in 1806, long before the great fire which destroyed that part of the palace in about 1830. The décor, however, was salvaged. The door of the chamber room hangs in the well-known Westminster school nearby. That fabled Star Chamber ceiling with its bright gold stars on the blue ground was taken to the Leasowe Castle on the Wirral Peninsula in Cheshire directly from the demolition site. There were four tapestries of Flemish origin that covered the chamber's four walls – arrases which insulated for sound and heat. The arrases were gifts to the British Royal family from a Netherlandish royal house and depicted the four seasons. Those tapestries were removed to the great house Knole, the seat of the Sackville-West family since the 1450s, in Sevenoaks in Kent. It was the traditional holding venue for obsolete furniture of royal and government houses. According to one source, the workmen dismantling the old chamber noticed mysterious black encrustations similar to flecks of dried blood at intervals as they were lowered, on the green blue tapestries, having borne witness to chilling forms of brutality over the centuries.

Vernacular

In the 1980s and 1990s, Baroness Thatcher was known to hold private ministerial meetings at which disputes between the Treasury and certain government departments were argued and resolved. These high level question time meetings, held at 10 Downing Street, went into the night and were often termed 'Star Chamber sessions', due to their impromptu nature and unsubtle advice from the top.

The Star Chamber is an expression that has become synonymous with disregard of personal rights, liberties and the abuse of power. The term 'the Star Chamber' has entered the English vernacular and is referred to in many judgments which observe the aberrant and invasive procedures of authority. It is memorialised in English case law, by reference to interrogations, Kafkaesque procedures, and inquisitorial procedures, as Lord Dyson noted in a case about disclosure and closed material procedure *Al Rawi & Ors v Security Service* [2011] 3 WLR 388 at [37].

Scott LJ in *Bayer v Winter & Ors (No.2)* (1986) 1 WLR 540 at 544 made the following remarks concerning an application for orders permitting the applicant the right to conduct an interrogation without limit in an action for Anton Pillar orders: 'Star Chamber interrogatory procedure has formed no part of the judicial process in this country for several centuries. The proper function in my opinion of a judge in civil litigation is to decide issues between parties. It is not, in my opinion, to preside over an interrogation'.

ENDNOTES

1 Sir John Baker *An Introduction to English Legal History* London (2nd ed.) Butterworths 1979

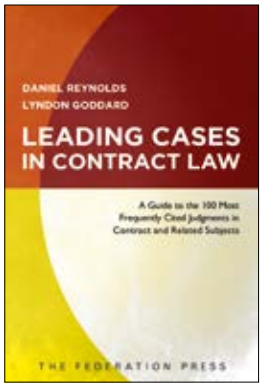
2 Edward P. Cheyney. *The Court of Star Chamber*. The American Historical Review, Vol. 18, 4 (July 1913) at 745

3 Losing the lobes of one's ears was a signature punishment known to be done by degrees in the chamber.

4 See Ed. Hutson *Oxford Handbook of English Law and Literature* Oxford University Press (2017)

Leading Cases in Contract Law

By Daniel Reynolds and Lyndon Goddard | The Federation Press | 2017



This work is the sibling of the authors' previous publication, *Leading Cases in Australian Law*. It presents a collection of the 100 most frequently cited judgments in contract law and allied concepts (such as restitution and estoppel) each accompanied by a statement of principle and a short note. It belongs to a genre of legal work with considerable legacy by reference to the popularity in its time of the 13 editions of Smith's *Leading Cases on Various Branches of the Law with Notes* (1837 to 1929).

One could not find a better summary of principle or place in law of any of the featured cases in this work. The statements of principle range from the straightforward (*Hoyt's Pty Ltd v Spencer* (1919) 27 CLR 133, 'A collateral contract is enforceable if it is consistent with the main contract') to the nuanced (*Koompahtoo Local Aboriginal Land Council v Sanpine* (2007) 233 CLR 115, in relation to intermediate terms); they are all succinct and, in the view of the reviewer, accurate. The case notes are divided into a statement of facts; the determination of the Court, or the *relevant* determination where the case deals with aspects of law outside contract; a collection of commonly cited passages; and the author's commentary on the decision and its place in relation to the other cases featured. The authors manage this task in two pages for each judgment.

Leading Cases in Contract is accompanied by an appendix containing, in alphabetical order, each of the cases attached to the applicable one-sentence proposition of law. The appendix alone justifies its position in the chambers of any commercial barrister or, even better, within easy reach on the bar table.

These estimable practical features should not obscure the startling experience of reading *Leading Cases in Contract* cover to cover. Like *Leading Cases in Australian Law,* it applies what the authors describe as a 'mechanistic' methodology to assembling a compilation of 100 cases. This involves a strict organisation by order of the frequency of citation in later decisions, determined with the assistance of LexisNexis Australia. Differing from any of its predecessors, it is not a generalist work but contained to a defined field of law. The absence of curation results in the persistent themes of contract rising and falling with an unpredictable tempo. The effect, read through, is something akin to seeking an understanding of the evolution of dinosaurs by reference to exhibits at the Australian Museum ordered by popularity. To take the most apparent example, notable and not always consistent authorities dealing with aspects of construction appear in the first half of the work at #1 (*Codelfa*), #3 (*Toll*), #5 (*BP Refinery*), #12 (*Pacific Carriers*), #29 (*McCann*), #39 (*Woodside*) and #43 (*Maggbury*). Despite the best efforts of the authors in reconciling and cross-referencing these cases in their commentary, the result is disorienting.

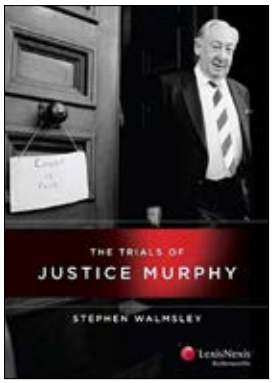
Nonetheless, approaching the work in this way offers for those reasonably acquainted with the field a refreshing insight into the controversies that have animated contract law in Australia. Even the most jaded reader might find awakened a long-dormant desire to discuss with any unfortunate colleagues in reach the historically, if not recently, vexed questions of ambiguity and estoppel. This peculiar aspect, and the value of *Leading Cases in Contract* as a reference work, make it a valuable addition to the contractual corpus.

Reviewed by Alexander H Edwards

The Trials of Justice Murphy

By Stephen Walmsley | LexisNexis Butterworths | 2016

Despite competition from other states, New South Wales remains home to Australia's greatest judicial controversy: the allegation that a justice of the High Court, Lionel Keith Murphy, twice attempted to pervert the judicial power of the Commonwealth. This controversy is the subject of Stephen Walmsley's excellent book, *The Trials of Justice Murphy*.



In late 1984, Murphy, then a sitting High Court judge and a former Senator and federal attorney-general, was charged with two counts of attempting to pervert the course of justice. In one count, the prosecution alleged that in early 1982 he attempted to induce NSW Chief Magistrate Briese to intervene in committal proceedings in respect of forgery and conspiracy to forge charges laid against a solicitor, Morgan Ryan, that were before another magistrate. It was alleged that Murphy had a close association with Ryan and that he had cultivated Briese by telling Briese that he would advance the cause of independence for NSW magistrates with the state government. Murphy was accused of suggesting that Briese return this favour by helping Ryan when he spoke to Briese in January 1982, saying 'And now, what about my little mate?' Murphy consistently denied that he was as close to Ryan as suggested by the prosecution. He said that it was Briese who lobbied him about guarantees of independence for magistrates and that it was Briese who first mentioned Ryan's case, not him. He denied he said those famous words (or ever used the word 'mate') or made any request of Briese about the Ryan case.

The other charge against Murphy was that he attempted to influence District Court Judge Paul Flannery who was to preside over Ryan's trial. The prosecution alleged that Murphy also cultivated Flannery and that, during a dinner on the Saturday night before Ryan's trial, Murphy implicitly suggested that Flannery should help Ryan when he complained to Flannery about the practice of prosecutors laying conspiracy charges when a substantive offence was available (as had supposedly occurred in Ryan's case). Flannery said Murphy referred to a recent High Court decision on that topic (*R v Hoar* (1981) 148 CLR 32). Ryan's trial was not mentioned at the dinner. Murphy denied that he cultivated Flannery, denied that he knew Flannery was the trial judge for Ryan, and said that it was Flannery who introduced the general subject of conspiracy charges at dinner.

(Spoiler alert.) At his first trial in 1985, Murphy was acquitted of the Flannery charge but convicted of the Briese charge. On appeal, he secured a retrial (*R v Murphy* (1985) 4 NSWLR 42). He was acquitted of the Briese count in April 1986. Murphy died of cancer six months later. In the meantime, a dispute had broken out over his entitlement to return to sit at the High Court. An inquiry into his conduct was commenced and then wound up while in its infancy. What became of that is now publicly available.

Murphy's two trials are the focus of Walmsley's book but they are only the middle chapters of a saga that the author lays out in a page-turner that begins with a dinner in 1979 attended by Briese, Ryan, Murphy, the Police Commissioner and Briese's pre-

decessor as Chief Magistrate, who was later convicted of corruption. Walmsley follows the story from the dinner which coincided with an illegal phone tapping operation that focussed on Ryan, and traces it through the two Senate inquiries that preceded the trial. And as legal sagas go, this one had everything: high political scandal, underworld figures, a prosecutor who later sat on the High Court with two of Murphy's character witnesses, a premier convicted of contempt, some complex points of law, an interview with the foreman of the first jury on talkback radio which revealed the jury's deliberations, references to a judge's sexual drive, a who's who of the best advocates of the 1980s, a misconstrued suggestion that the High Court would go on strike, and eight Supreme Court judges who were involved in the trials and appeal writing to a Crown witness (Briese) to assure him that Murphy's acquittal did not warrant any action being taken against him as had been suggested by the premier.

... as legal sagas go, this one had everything: high political scandal, underworld figures, a prosecutor who later sat on the High Court with two of Murphy's character witnesses...

One revelation from the book is the doozy of a question posed by the jury to the trial judge at Murphy's first trial, namely that '[w]e have no evidence concerning the probity, legality or otherwise of whether or not a Judge, High Court or otherwise, is permitted to discuss current matters before another judge with that other judge. Please comment'. This question went to the heart of this tale, and it is perhaps its only continuing relevance. How this question was dealt with at the trial and the ensuing debate about whether that involved a misunderstanding of the question are well covered in the book. But it is a topic that warrants serious thought and I would have been interested to read the author's view on the jury's question. (After judgment has been delivered, the following conversation often takes place between judges. Judge 1: 'Have you read my [implicitly fabulous] judgment in [totally forgettable case]? Judge 2: 'No'.)

Does the Murphy family have their own 'untold story' that never came out?

Not surprisingly, Walmsley's coverage of the trials is the strongest part of the book. Drawing on the original sources and having spoken to many of the players, he explains the course of the trials and the tactics in a style that is accessible for practitioners and non-practitioners alike. We learn that Ian Barker QC, who appeared for Murphy at the second trial, banned trolleys, folders and documents from the courtroom. No frills. Unlike the first trial, the defence case in the second trial was over in two hours: Murphy gave a short dock statement, there was some brief evidence from his secretary and no character witnesses. The focus was left firmly on the Crown case. Walmsley also refers to a wide array of press commentaries to paint the atmosphere in the courtroom during the trial, even allowing for the fact that a number of them had skin in the game. From that, the prosecutor (Ian Callinan QC) emerges as someone to avoid being cross-examined by.

My only grumble with the book is the perspective of the chapters that precede the first trial. The author tells us early on that he is Flannery's son-in-law and he admired Briese as a whistle-blower. Still, these chapters take it from their perspective, so we start by thinking that Murphy did it and then we learn how he beat the charges. Whole chapters are devoted to Briese and Flannery respectively. Mini-portraits of their personalities are littered throughout the book. Murphy only exists through his actions. Walmsley tells that when Flannery was thinking of speaking up, he was in a 'moral dilemma' and concludes that '[u]ltimately [Flannery] chose the truth'. In this search for truth, we are told no less than three times that Flannery's son received a call in Sydney from Murphy seeking his father's contact details at a hotel in Brisbane, even though this was never adduced in evidence at the trial. The author tells us that Flannery did not want his son called as a witness. What are we to make of this apparently 'new evidence'? Was it investigated or tested? Does the Murphy family have their own 'untold story' that never came out?

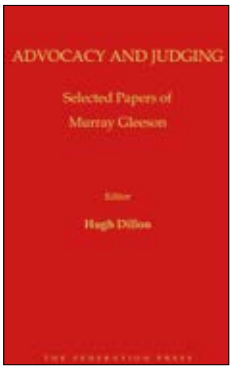
In the end, we learn a lot about what happened to Murphy but not much about who he really was. Despite all that has been written about Murphy including this excellent book, he remains elusive. A realistic assessment of Murphy appears stuck in the no-man's land between, on the one hand, the odd combination of (once) radical journalists whose certitude that he was a crook never waivers and those who despised Murphy and anything he stood for, and tribal warriors who have canonised the avowedly atheistic Murphy on the other. The scenario that Murphy was a gregarious but undisciplined personality who simply would not stop talking about current cases that were before a judge but did not intend to nobble them appears to have been a case theory that no one had an interest in running or writing about. [1]

Read the book over summer. Make your own mind up, or maybe just let the jury verdicts stand.

Reviewed by Robert Beech-Jones

Advocacy and Judging: Selected Papers of Murray Gleeson

Hugh Dillon (Ed) | The Federation Press | 2017



This work contains 33 papers authored by the Honourable Murray Gleeson AC during the period 1979 to 2015, covering a range of legal topics relevant to the practice of barristers and Australian law more generally.

As the title of the compilation suggests, many of the papers principally focus upon aspects of advocacy or the role and work of judges. These papers address topics such as the function and method of advocacy, cross-examination, judicial method, judicial selection and training, the nature of the judiciary, qualities necessary for judicial activity, the impact of the Constitution and legislation upon such activity and the importance of public confidence in the judiciary.

Aside from those papers that address those subjects as their principal focus, all of the selected papers address topics fundamental to the work of barristers and judges. The rule of law and the nature of the adversarial system are constant undercurrents in most of the papers. This selection includes papers on fundamental principles of the common law, such as legality, finality and legitimacy, and in relation to the criminal justice system, the presumption of innocence. Several papers address matters which are intrinsic to the work of lawyers and judges, such as legal interpretation and contractual interpretation. These papers provide a thorough foundation in an easily digestible format for those principles, the legal reception of which can often be assumed and therefore taken for granted. These works contain a valuable exposition of the basis of such principles.

Many of the papers consider aspects of constitutional law and several take the Constitution as their principal focus, including one on the constitutional decisions of the Founding Fathers, and another on section 74 of the Constitution, which prohibits appeals to the Privy Council from the High Court on constitutional matters. Other

areas of law have not been forgotten: most are of general application to multiple areas of law, and one addresses the significance of *Donoghue v Stevenson*[1]. There is a wealth of material to satisfy those interested in legal history, including a paper on 'Magna Carta – History and Myth', as well as papers considering the history of the High Court and the Privy Council, particularly as regards Australia.

Most, if not all, of the papers were delivered as oral addresses or speeches. The audiences of those addresses varied, ranging from solicitors at the Australian Government Solicitor's Office, readers and junior barristers practising in New South Wales, Australian judges, legal practitioners, academics and law students in Australia, members of the public, and the members of the Singapore Academy of Law. The range of audiences means that the papers contain differing amounts of introductory material and assumed knowledge depending on their target audience. While some papers were delivered to experienced lawyers and judges on whose part a reasonable level of knowledge on the relevant topic could be assumed, others were not, and the resulting paper could easily be appreciated by non-lawyers, or lawyers unfamiliar with the Australian legal tradition. For example, 'Australia's Contribution to the Common Law' was an address given to the Singapore Academy of Law on 20 September 2007. In it, Mr Gleeson highlighted particular High Court decisions in areas of importance in criminal law, equity, contract, tort and administrative law, where the Court could be seen to be 'acting sometimes creatively and sometimes traditionally, sometimes boldly and sometimes cautiously, but in all cases consistently in the application of a judicial method … in the mainstream of the common law tradition'.[2] That paper traverses years of the High Court's body of work across many areas of law that would be of interest to those new to Australian law as well as Australian lawyers interested in a summary of significant matters in Australian jurisprudence.

Each paper addresses the issues with which it is concerned in depth, yet concisely, and in an entertaining style. In 'The Centenary of the High Court: Lessons from History', Mr Gleeson described a judgment of Sir Samuel Griffith, then chief justice, in *Baxter v Commissioner of Taxation* (NSW) (1907) 4 CLR 1087 as being 'the most vitriolic judgment in the Commonwealth Law Reports'.[3] Elsewhere,[4] in addressing aspects of judicial style, Mr Gleeson referred to a letter from Professor Harrison Moore to Andrew Inglis Clark written in 1906, in which Professor Moore complained that during three and a half days of addressing the High Court, counsel 'never got a clear five minutes speaking', due to judicial intervention. Mr Gleeson stated in his paper (which was delivered in 2003, during his tenure as chief justice of the High Court) 'No counsel would be given three and a half days now, and a clear five minutes speaking would only happen if all the Justices walked off the Bench'.[5]

This book is an indispensable resource for Australian lawyers, particularly barristers, and will also be welcomed by those with an interest in Australian legal history or the judiciary.

In 'A Changing Judiciary', an address delivered to the Judicial Conference of Australia Colloquium, Uluru, on 7 April 2001, Mr Gleeson emphasised the importance of institutions having a 'corporate memory' to safeguard against error in declaring an existing state of affairs essential or fundamental without adequate knowledge of what has occurred in the past, or what occurs in other places. He stated:[6]

> People may be surprised to learn that what they regard as an indispensable part of the natural order of things is, in truth, a recent development, or may be quite different from the way things are done, by respectable people, elsewhere. They may be alarmed by aspects of current practice which are not really new, but are simply a response to problems that have been around for a long time.

Given that the earliest of these papers was delivered 38 years ago, and many of the papers contain a careful recitation of the historical and legal development of the relevant topic, the book in and of itself will contribute to the safeguarding of a collective memory in respect of the issues with which it is concerned.

This book is an indispensable resource for Australian lawyers, particularly barristers, and will also be welcomed by those with an interest in Australian legal history or the judiciary.

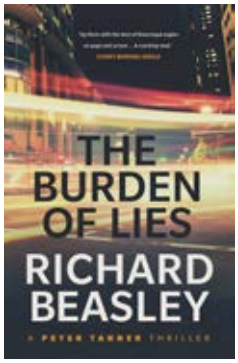
Reviewed by Victoria Brigden

ENDNOTES

1 [1932] AC 562.
2 *Advocacy and Judging: Selected Papers of Murray Gleeson* at 101.
3 Id at 133.
4 'The Centenary of the High Court: Lessons from History', in *Advocacy and Judging: Selected Papers of Murray Gleeson* at 132.
5 Id at 145.
6 Id at 53.

The Burden of Lies

A Peter Tanner Thriller
By Richard Beasley | Simon & Schuster | 2017



We first meet Peter Tanner, the barrister protagonist in Richard Beasley's *The Burden of Lies*, in the Downing Centre, where he is defending a racist. Tanner is a senior junior at the criminal bar and racial vilification, we learn, is not his bread and butter. Instead, he prefers 'not to get out of bed unless blood had been spilt'. Yet while Tanner proudly makes a living defending the low-lifes of Sydney, his sense of moral outrage at the crimes his clients commit is keenly felt. This much is made clear when Tanner asks the magistrate hearing the racial vilification charge to 'add a couple of zeros' to the $550 fine his client receives for spray-painting a racial slur on the front wall of an Islamic primary school. And clearer still when in conference later that day with a different client – a 'hedgefund sociopath' who was not, to Tanner's mind, showing sufficient remorse for his actions – Tanner smashes the client's smartphone to smithereens, using a cricket bat. It would seem that Tanner is struggling not only with his clients' choices but also some of his own. The (thrilling) backstory to some of these choices can be found in the first book of this series, *Cyanide Games*, but it is not necessary to read it to know that Tanner is more than a little bit broken and badly in need of some time off. However, in the fine tradition of the bar, rather than take the year off that his shrink has urged upon him, Tanner throws himself into his next big brief, a juicy murder trial defending a property developer charged with killing her banker. Of the trial, Beasley writes:

> The victim was an ex-high-flying banker who did nearly six years for coke distribution. He was not long out of prison when someone had fragmented his kneecaps to bits of bloody gravel and then removed the back of his head with a close-range shot. The accused was an attractive and once successful businesswoman in a man's game who'd been ruined by the dead guy and the financial leviathan he'd once worked for. There was a young hitman, and another

crown witness with a criminal record and overtones of the underworld. There was nothing the press didn't like about *R v Athina Leonard*.

The Leonard trial, together with Tanner's unorthodox but punctilious preparations for it, provide Beasley with all the vital ingredients for a fast-paced legal thriller. The story that unfolds as Tanner prepares for and appears in the trial is also very much of its time and place. The glamour and greed and the successes and excesses that make Sydney are centre-stage. There are the greedy property developers carving up the last available slices of Sydney's harbourfront real estate, the greedier banks funding all the development, and corrupt cops are thrown in for good measure. Tanner has his work cut out for him, both in terms of uncovering the various levels of corruption at play and in weaving a plausible case theory about who might have killed his client's banker, if not she. Along the way, Beasley slips in enough wry observations about the wealthier echelons of Sydney society, as well as about the quirks of the legal profession as it exists today, to make this book more captivating and relevant than your standard work of crime fiction.

While the facts of the trial and its denouement make for a real page-turner on their own, it is the character Beasley has created in Tanner that is most enthralling. He is successful, yet troubled. Conspicuously flawed, yet eminently likeable. He is smart, and a good lawyer. His performances in the courtroom are enormously entertaining. Conveniently (for plot purposes), he is widowed, giving him a whiff of tragedy and also making him available for dalliances with the women with whom he comes into contact.

The frequency with which Tanner reminds those around him that he has devoted his life to representing the truly repellent members of society reminds one of Rumpole of the Bailey. His risk-taking and obvious allure for the women whom he encounters is more reminiscent of Rake's Cleaver Greene. But mention of those two fictional advocates is not to suggest that Tanner is in any way derivative. Tanner is his own self. He is a workaholic, but values his family above all else. He clearly loves being a barrister but sports an obvious ambivalence about what he does and the people who brief him. He takes himself seriously, but has enough self-awareness not to let his successes go to his head. Early on in the novel, Tanner jokingly tells his psychologist that he will give his final submissions in the Leonard trial via a series of tweets. It is comments like these and the aforementioned character traits that suggest that in Tanner, Beasley may have created a legal hero for Gen X. And as Tanner issues his final invoice after the jury has delivered its verdict, one is left hoping that Beasley will find the time to give Tanner a new brief.

Reviewed by Juliet Curtin

Extract from *The Burden of Lies* by Richard Beasley

The crime scene shots of the aftermath of the head wound weren't pretty. Nor were the close-ups of Randall's knees.

The woman said to have ordered this execution sat with her hands clasped together on one side of Kit Gallagher's conference room table. She stood to greet Tanner. She was in an ivory suit, one button on the jacket, tightly tailored at the waist. She was short, but the heels gave her enough height. Long straight black hair, deep black eyes that could have looked over the Nile from a palace five thousand years ago. The rest was the Golden Age of Athens.

Gallagher ran through Tanner's CV. If Tina Leonard was impressed, she didn't show it. She looked like she made her own mind up about people. She had a pink rock on a finger you weren't meant to miss, smaller stones of the same kind on each ear. Her ring finger was clear. Her marriage, like her business, had crumbled post the GFC.

'Do you know the prosecution's witnesses?' Tanner said, once his career highlights had been covered.

'Not as friends,' Tina Leonard said. 'I'm sure you've gathered that.' Contralto voice, which lesser men would run from. Those who didn't would do what they were told.

'Let's start with Mick Bitar. How long have you known him?'

An eyebrow arched, her black eyes went back in time. 'Twenty years. Twenty-five.'

'How?'

'He performed services for my father,' she said. 'He did the same for my brothers. For some of that time I was working for the family company.' She said the last words like they were the ugliest in the English Language.

'Services?'

A faint smile appeared. 'He's a facilitator. He calls himself a fixer.'

'What does he fix, Tina?'

'He often makes arrangements for the smooth running of construction sites.'

'What does that mean?'

Her smile broadened. 'Usually no more than mediation between people who are failing to communicate.'

'What people?'

'Everyone. Builders. Trades people. Union officials. Local government.'

'Are his mediation techniques legal?'

The smile faded away. 'Not every detail of my father's business was made known to me.'

'Anything else?'

She shrugged. 'I've heard he's quite convincing when it comes to marginal development applications. He's been known to persuade members of local government to see things from a developer's point of view.'

'One of those acts of persuasion got him a criminal record.'

'My brothers say Mick leads people to water,' she said, 'and then he makes them drink.'

'Sounds like the sort of person to introduce to an ex-banker you've got bad memories of.'

There was a flash from her dark eyes, almost like a camera at night. 'I didn't ask him to kill Oliver Randall. If I'd wanted that done, I would have done it myself.'

Tanner smiled. 'If I call you to give evidence at your trial, Tina, don't answer that way. It sounded too close to having the ring of truth.'

She looked at him, nodded slowly.

'Jayden Webb. He did kill Randall. How does he have fifty thousand of your dollars at his flat?'

'I know you've read the brief, Peter,' she said. 'Kit told me you were thorough.'

'Reading the brief isn't being thorough, Tina. It isn't even first base. You read the brief in the dugout. I'm going to hear your whole story in your words. Then I'll listen to it again. We might go over it ten, fifteen times. There are only two rules: you tell me the truth, and you tell me everything. Why did Webb have your money at his home when he killed Randall?'

Tina Leonard told them that the money was for Bitar. She wanted a meeting with her brothers. She wanted back into the family empire. He was their associate. When they wouldn't meet or even talk to her, she contacted Bitar, had lunch with him. He said he could make it happen. Fifty thousand was his fee. Webb was a labourer on building sites. Bitar sent him to pick up the cash.

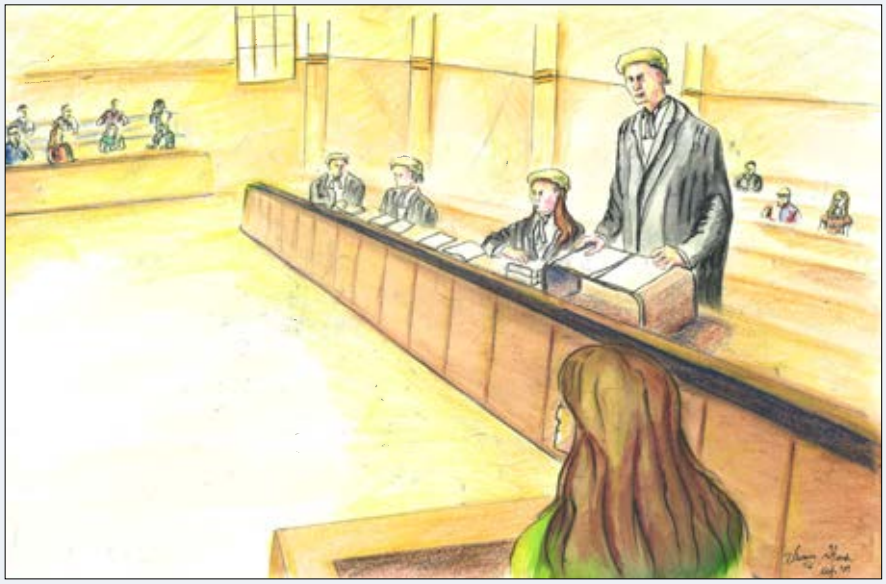
'Why would you want back in?' Tanner asked. 'Didn't you want out years ago? Wasn't that what setting up your own company was all about? Freedom from the tyranny of the men?

That's my take on it from your statement. Am I wrong?'

She picked up the glass in front of her almost in slow motion, took a sip, put it down. 'I'd been bankrupted, Peter. Obliterated.

I was ready to get back to work, to what I'm good at. I wasn't ready to start on my own again. That I'd do later.'

'Even with four million of your father's money?'



'That was my money,' she said sharply. 'That and more. My brothers have contacts. They're in the building game. I needed to reacquaint myself with it before I ran on my own again.'

Tanner nodded, made a note to get Gallagher to make attempts to talk to Leonard's brothers, confirming their resistance to meeting with her. 'Why the animosity with your brothers, Tina? Where's that come from?'

She looked at him blankly, then at Gallagher. 'We're going to cover my whole family history today? Don't you want to hear about who actually killed Oliver?'

'We'll get to that. What happened?'

Leonard took them back more than twenty years, to when she was Athina Ioannidis. She was spoilt, she admitted. 'My father had become wealthy by the time I was a little girl. I got treated to things my brothers hadn't. From toys to travel to the homeland. My sister and I did well at school, the boys – they didn't really apply themselves. We got into university, they went to work for dad.'

She loved buildings, design, studied hard, got into architecture.

'I worked for my father when I finished uni,' she said. 'He had his architects let me help them. I was good with numbers, I did budgets, drafted development and project applications – he let me have a finger in everything. I did an MBA. My brothers hated how involved I was. They hated me more once I left and became successful on my own without our father's company behind us. They've built nothing on their own. I have.'

'Simple as that? Sibling rivalry?'

'Sibling envy, Peter,' she said. 'But as simple as that. My brothers inherited my father's views about women. They inherited what I can guarantee are high levels of testosterone. They didn't want me in the family business. I wasn't a man. Then they liked me less when I stood on my own two feet.'

'And they didn't like you any more when your business failed?'

Her eyes flashed that light again. She had fire in her, he could see that.

'Jesus, Pete,' Gallagher muttered, not quite under her breath.

Tina Leonard's mouth opened slightly, but she waited a moment before she spoke. 'You should read your brief, Peter,' she said calmly. 'My business didn't fail. Things got tight. Then Oliver Randall lied to me. He and his bank stole Limani from me, and sold it to one of the big boys. Lovro Constructions.' She pointed to one of the folders Tanner had in front of him. 'It's all in there. If you're interested?'

Tanner nodded. 'You're paying me to be interested, Tina, so I will be.'

She tilted her head upwards. The pharaoh's queen looking at some commoner. A clever slave, perhaps. 'You wouldn't be otherwise?'

'I don't wish to upset you, Tina, but no, not particularly. You have my full attention because you're my client. I like to make that clear to people from the get-go. I have a professional interest in helping you beat this charge. Otherwise, I really don't care who shot Oliver Randall.'

'I'm glad you've made that clear,' she said, leaning towards him, elbows now on the desk, hand clasped together under her chin. 'Can I be clear too? I don't need a knight on a white charger. I never have. Right now, I want the best lawyer. I hope that's you.'

'The prosecutors say you had Randall shot because he ruined you. They're right about the last bit at least, aren't they? You had cause?'

She smiled faintly again. 'Oliver did over five years in prison. What do I need with revenge?'

'How does a bank executive end up doing five and a half years for supplying commercial amounts of coke?'

Tina Leonard put her arms down on the table. 'He used to feed it to his clients,' she said. 'The bank's clients. Coke. Girls. The budget was substantial for both.'

'Girls and coke?' Tanner said. 'My client development practices are behind the times. What's the name of this bank again?'

'South East Banking Corporation,' she said.

'How do you know this – about Randall? Were you invited to any of these parties?'

She laughed, spontaneity mixed with bitters. 'They're not used to women clients. Not as property developers. This was male-structured entertainment. Oliver made that clear.'

'He told you himself?'

She took a deep breath, shook her head. 'Not about the girls. I heard that from – well, it doesn't matter, it was true. He told me about the drugs once, not in – just in an unguarded moment.'

'An unguarded moment?'

'My first lender was Nipori Bank. Its Australian business went bust in the GFC. They were bought by SEBC. I had a close relationship with the banker I originally had at Nipori before SEBC bought it out. He was a bit of a surrogate father – at least in the lending world. He introduced Oliver to me when SEBC took over, did things he didn't have to do given the – well, given the circumstances. Oliver took a real interest in Leonard Developments. We had a good rapport.'

'That's quite a betrayal then? Randall was the main witness in the proceedings when the bank sued you.'

She paused again, he saw her reaching back for what she felt at the time, stopping herself. 'He was a puppet,' she said. 'Other people pulled the strings.'

'Tell me what went wrong first.'

Leonard sighed, but then said, 'They were funding my biggest development. Something I'd worked on for years. When I was still with my father. Something he started.'

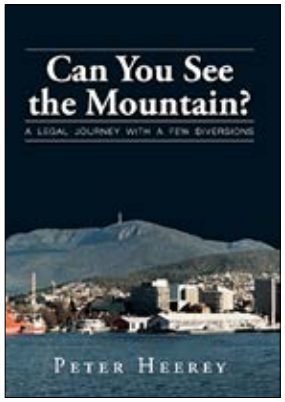
'Your father started?'

She nodded, smiled. 'The bay where Limani Views is situated was where my father built his first big home. Nothing like Hunters Hill, where we ended up, but . . . Anyway, he bought up land in the area. Houses. Flats. He had a grand plan, got distracted by other grand plans. I bought some apartment blocks in the area when I started to make money with the business, then with my ex-husband. Then an old

warehouse went up for sale right on the river foreshore. I was the only person who could develop the site properly, because we owned so much of the surrounding land.'
'You did Limani with your father?'
She shook her head, gave a sad smile. 'We weren't talking by then. He never forgave me for going off on my own. He –'
Leonard paused, and Gallagher took the time to pour her some water. There was the barest moment when Leonard's top lip quivered, but Tanner could see that tears weren't a common part of her game. She knew how to bury grief, even if whatever she felt remained unresolved. 'He sold the land to me. He did a business deal with me. He let Leonard Developments buy out Ioannidis & Sons' properties in the area.
My brothers –' She tipped her head back and smiled, and the effort nearly pushed a tear from an eye. 'My elder brother Theo prides himself on maintaining control, but Jimmy – he rang me and called me names you don't call women.'
Construction work at Limani Views was held up by court challenges to the development approvals. Leonard had other projects on the go, other debts to pay. Presales were slow. A monthly loan payment was only partially met, then the same happened the following month. There was a meeting she had with her estranged husband, who still had a stake in the business, their CFO and Randall. They put a plan to Randall to manage their loans, a long-term prognosis and strategy. 'He promised us a twenty-four-month loan extension, and a repayment restructure.
They called in our loans eight days later.'
'What happened then?'
Tina Leonard looked at her glass of water in disgust. 'They sued for the entire debt. Over two hundred million. They put in receivers to Limani, sold it at a public tender for a pittance.
Just before the tender, the bank released a report saying the land and the sediments in the river where the marina was to be built were highly polluted. Lovro Constructions bought my project for a quarter of its worth. And guess what – it turned out that the land wasn't that polluted after all. Now Lovro has a project worth a couple of billion. How fortunate for one of SEBC's biggest global clients.'
'You obviously think this is the result of a conspiracy between SEBC and Lovro Constructions?'
'I know it is,' she said, raising her voice. 'Oliver told me.'
Tanner added to some notes he'd already made of things he was going to ask Kit Gallagher to do, things that needed following up. 'He wrote to you right before his release?'
She nodded.
'I read the letter. It does say he wanted to apologise in person for something. The things he wished he hadn't done to you? You say he spilt the beans when you met him?'
'He told me the whole story. How SEBC managed not to lose money, how Luka Ravic from Lovro and –'
'Hold up,' Tanner said. 'I don't want to get to that yet. People saw you arguing with Randall in a café about a week before he was killed. What was that about?'
She let out a kind of ironic laugh. 'Timing.'
'Timing?'
'I asked him to help me. To tell his story. To a court if I sued, to my lawyer, to a journalist – I hadn't worked it out. He wasn't ready. He said he would, but he had things he had to straighten out first.'
'Like what?'
'Something to do with his family. He was scared of these people. They had the drugs planted in his house. He did nearly six years in prison because of them. He wanted to make some sort of peace with his daughter. She was thirteen, I think, when he went to prison. She – well, he wanted to do that. I was anxious to move forward. I lost my temper. It was momentary.'
'You're saying the coke was planted at Randall's house?'
'Yes. That's what he told me.'
'Meaning your conspiracy theory involves the police?'
'Certain police.'
'Why – why would they do that?'
'Because SEBC saw him as a liability – I've spelt this all out in my statement.'
Tanner blew out a long breath. 'So, Tina,' he said, 'our case theory for your defence? SEBC or Lovro Constructions find out Oliver Randall might spill the beans on the wicked game they played on you, and they had him killed?'
She glared at him before answering. 'You don't believe me, Peter?'
He laughed. Some kind of reflex. 'Not yet, no. But I don't disbelieve you yet, either.'
'I was hoping for better than that.'
'This man Webb – he didn't name you at first as having hired him to kill Randall. That was a few days later. You say he was got at?'
'There is something interesting there,' Gallagher said. 'Webb's solicitor – Tom Clayton – he's been known to act for Mick Bitar.'
'So?'
'So, he wasn't Webb's first lawyer. He had someone else for a few days, then Clayton steps in. Then Webb does a deal, and fingers Tina.'
'What's our theory about that? That Bitar sent his lawyer to Webb to get him to cut a deal and blame Tina, when really someone else paid him to kill Randall?'
'It's not a theory, Peter,' Leonard said sharply.
'Why does Mick Bitar hate you so much? Why would he lie and say you asked him to kill Randall?'
'He knows Luka Ravic, the head of Lovro Constructions. He does business with them. They would either have used him, or Mick has seen a way to make money by setting me up as their scapegoat for killing Randall.'
'That's an interesting case theory, Tina,' Tanner said. He closed the folder in front of him. He'd had enough for now.
He had in his brief the story she'd laid out in the statement, so the main thing was to check that she didn't seem crazy. She'd passed that test, even if he wasn't sure her story did. 'You said you have a younger sister?'
'Anastasia. Taz.'
'You're living with her now you're on bail?'
She nodded. 'Much to the delight of her husband.'
'How does Taz get along with your brothers?'
'Better than me.'
'I like specific answers to my questions, Tina. You'll need to follow that protocol.'
'Taz wasn't interested in the family business. She's married to a guy who's got his own money. She raised a family. They . . . they don't disapprove of Taz like they disapprove of me.'
'You have your own children?'
She smiled. 'Two boys. Alex and Chris.'
'How old are they?'
'Nineteen and sixteen.'
'And they're –'
'They're with my ex-husband,' she said. The smile faded. It was a topic to drop.
'We'll talk many times, Tina,' Tanner said. 'In the meantime, do you have any questions for me?'
'You haven't asked me if I had Oliver Randall killed, Peter.'
'Should I ask? Sounds like a trap for beginners to be so direct.'
He stood to leave. 'Did you keep your papers from your case with SEBC? Affidavits, pleadings, that kind of thing?'
'I can find them somewhere.'
'Send them to Kit.'
'Oliver Randall was worth a lot more to me alive than dead, Peter,' she said as he shook her hand in farewell. 'I didn't have him killed.'

Can You See the Mountain? A Legal Journey with a Few Diversions

By Peter Heerey | Hybrid Publishers | 2017



This enjoyable book is the Peter Heerey's account of his life, including his time as a Federal Court Judge. In a light-hearted manner, it recounts the 'interesting and wide-ranging personal and public life' of the author, as stated in the foreword to the book by Alex Chernov, the former barrister, judge and Governor of Victoria.

Heerey's book is a very readable work. The chapters are not long, some less than a few pages in length. Heerey has an engaging style of writing and the chapters cover a diverse range of subject matters.

The chapters are grouped into four parts. 'Early Days' touches on Heerey's family history and then traverses his upbringing and education in Hobart. The title's reference to the 'Mountain' is to Mount Wellington in Hobart, where Heerey was born in 1939. 'The Victorian Bar' centres on his 1967 move from Hobart to Melbourne to join the Bar. 'The Federal Court' discusses aspects of his judicial career following his appointment to the Federal Court in 1990 as well as certain features of civil litigation, particularly the use of experts. 'After Court' contains several chapters in which Heerey discusses his post-judicial career and interests.

A number of chapters in 'Early Days' concern Heerey's time studying law at the University of Tasmania. He had significant involvement in rugby, which is discussed in chapter 6 ('Rugby'). He played prop or fullback and was President of the University Rugby Club. Heerey describes meeting Edward 'Weary' Dunlop at an Intervarsity competition in Melbourne. One of his coaches was a university lecturer who would mark essays with comments such as 'factually correct, but lacks colour and amusing anecdotes'.

While at university, Heerey did national service. He discusses this in chapter 4 ('National Service')?. Heerey describes his introduction to classical music as when, to accompany a passing-out parade, the army band played 'Non più andrai' from Mozart's *The Marriage of Figaro*. Whether this had the same effect on him as did 'Sull'aria' – also from *The Marriage of Figaro* – on the inmates of Shawshank State Penitentiary, is left unstated.

The legal event that dominated Heerey's time at university was the litigation involving Professor Sydney Sparkes Orr. This is discussed in chapter 9 ('The Orr Case'). Orr was dismissed by the University of Tasmania as professor of philosophy primarily on the ground that he had a sexual relationship with an 18-year old undergraduate student. Orr's claim for unfair dismissal was rejected: *Orr v University of Tasmania* (1957) 100 CLR 526. Heerey refers to several features of the litigation and to Orr himself. Heerey met Orr on several occasions when Heerey was an articled clerk at the Hobart firm Hodgman and Valentine, which acted for Orr.

Heerey describes his career as a barrister over a number of chapters. He refers in chapter 17 ('Life at the Bar') to a number of cases in which he was involved as a junior over a variety of subject matters. The criminal cases included *R v Mitchell*, which ran for 133 days, of which the Full Court was highly critical on appeal ([1971] VR 46 at 64-65) in what Heerey describes as 'fair comment'.

Heerey gives an interesting summary of the background to and outcome of the litigation culminating in Giannarelli v Wraith.

He had a significant media practice. This included a general retainer from the *Herald and Weekly Times* and appearing for Fairfax during a Victorian Government inquiry into newspaper ownership on a team led by Tom Hughes QC and David Bennett QC. In 1985, Heerey participated in one of the last Australian appeals to the Privy Council in a dispute between Lang Hancock and Peter Wright on one side and Hammersley Iron on the other, over a royalty agreement. He recalls 'a pleasant conference with Doug [Williamson QC], pouring over a map of London and discussing the relative merits of the Dorchester and the Savoy'. Heerey also describes trips to Bougainville in a dispute concerning the Panguna copper mine and to South Africa. The latter concerned proceedings commenced by the South Australian Cricket Association to have the Australian ban on sporting contact with South Africa on account of the apartheid regime declared illegal, following the announcement of the 'rebel' tour led by Kim Hughes.

Heerey was appointed silk in 1985. In chapter 19 ('Barristers' Immunity – The Giannarelli Case'), Heerey gives an interesting summary of the background to and outcome of the litigation culminating in *Giannarelli v Wraith* (1988) 165 CLR 543, in which he appeared at all levels, acting for the defendant solicitor, Mr Shulkes.

In the third part of the book, which covers Heerey's time on the Federal Court following his appointment in 1990, he discusses his experience as a judge. He identifies a number of memorable cases, covering topics such as investment schemes, price fixing, abuse of market power, admiralty law and intellectual property. In relation to the latter, one case mentioned is *Comite Interprofessionel des Vins Côtes de Provence v Bryce* [1996] FCA 742 which concerned whether a Tasmanian vineyard, which was established by a Frenchman who named it 'La Provence' and which sold wine which included those words on the label, contravened the *Australian Wine and Brandy Corporation Act* (Cth).

Chapters 29 to 32 concern experts and expert assessors. Heerey appointed an assessor in a patent case concerning erythropoietin and genetic engineering. Other chapters in this part include 'Law and Literature' and 'Judgment Writing' in chapters 33 and 34. In discussing judgment writing, Heerey refers to 'some unnecessary and irritating habits', particularly 'bracket creep'. The example given is *Google Inc v ACCC* (2013) 249 CLR 435 at [1] where French CJ, Crennan and Kiefel JJ commence as follows:

> The appellant, Google Inc (Google), operates the well-known internet search engine 'Google' (the Google search engine).

Heerey suggests imagining the sentence without the bracketed inserts and asks 'would any reader later coming across the words "Google" and "Google search engine" have any doubt as to what the writers had in mind?' He also describes the cliché as the 'bane' of good legal writing.

The final few chapters concern Heerey's post-judicial career and interests following his retirement from the Federal Court in 2009. Most notably, he was Chair of the Australian Electoral Commission for five years. He summarises the convoluted manner in which s 213 of the *Commonwealth Electoral Act* 1918 prescribes how the order of names on a ballot paper is to be determined, which Heerey says is 'a classic example of the Commonwealth "itchy pen" philosophy of legislative drafting'.

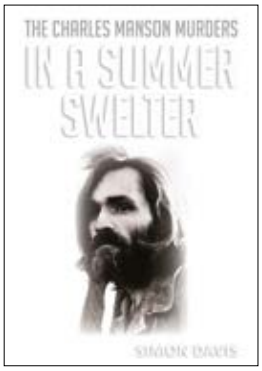
A number of chapters throughout the work refer to Heerey's non-legal interests. In addition to rugby, mentioned above, there are chapters on skiing, sailing, cycling and travelling, including to Ireland for which it appears Heerey has a particular regard.

Peter Heerey is to be commended for an interesting and thoughtful reflection of his life.

Reviewed by Daniel Klineberg

The Charles Manson Murders: In a Summer Swelter

By Simon Davis



It must be very difficult to write about perhaps the most famous criminal trial in the history of the world. Everyone has read something, seen a television program or movie about it and it captivated everyone at the time the trial/trials were in progress. Much too has been written about it, so what more can be said, one might ask?

Simon Davis has done something unique in that he has written a book that deals with many different aspects of this most famous case. What we have first is a summary of 'The Family', who Charles Manson was, what he thought, what he believed in, his misogyny, love of violence, the way he lived and his leadership. We then learn of the shooting of a drug dealer in mid 1969 (a few months before the murder of Sharon Tate), showing the violent way Manson lived at this time and his false protestations of 'doing it' for 'the family'.

We then learn of the murder of Gary Hinman, a friend of 'the family', a kind, gentle man who it seems was killed for his money. Manson and 'family members' Susan Atkins and Bobby Beausoleil were charged with the murder. We then have the remainder of the book dealing mostly with the murders of Sharon Tate and four others who just happened to be staying with her that night i.e. 9 August 1969, and Leno and Rosemary La Bianca, who were found dead on 10 August 1969. Manson and 5 'family members', Tex Watson, Susan Atkins, Patricia Krenwinkle, Linda Kasabian and Leslie Van Houten were charged with the murders. There is then a chapter dealing with the murder of Donald Shea, a ranch hand at the ranch that the family were living at at the time. Manson and two other family members were charged with the murder which occurred in mid-August 1969. Manson had said that Shea was responsible for a police raid on the ranch and that he, i.e. Shea, wanted to have 'the Family' evicted from the ranch.

Finally, Davis gives us a chapter entitled 'Reflections' which is just that. He deals with the question whether justice was done, the motive for the murders, 'The cult of Charlie', Cultish behaviour, whether the time period ie 1960's had some significance, the concepts of 'Authorisation and Obedience' and 'Group Conformity' with a reference to the experiments of Stanley Miligram in 1961, and the concept of dehumanisation.

What Davis has done in this book is not only deal with themes and issues that have always surrounded these murders such as 'Helter Skelter', the role of drugs, the role of a cult, the extraordinary 'evil' personality of Manson and his 'hold' over 'family members' and the personalites of the followers, i.e. the family members, particularly those who were charged with such gruesome murders. This book also provides us with details of the charges, what happened during the grand jury hearing, the trials and the appeals, the cross examination of key witnesses and whether it succeeded or failed, the advocacy (which was good, bad and great), the extraordinary largely unethical behaviour of some of the lawyers for the young female co-accused (lawyers who basically took instructions from Manson even though they were acting for one of the young females, to implicate the young girls as much as possible in the murders and thereby reduce Manson's role), as well as providing a legal commentary and legal explanation as to, for example, what the prosecution needed to prove, the differences between the charges, how evidence was used and the law at the time. He does all this by referring in detail to court transcripts, the police interviews, police statements, parole hearings and American criminal law cases as well as quotes from numerous sources including books written by Atkins, Watson, the Prosecutor Vincent Bugliosi, an interview with Manson by reporters from *Rolling Stone* magazine on 25 June 1970, other articles in magazines as well as videos/films by the ABC, CNN, Discovery Channel and an interview of Leslie Van Houten by Barbara Walters for the ABC in January 1977.

Lawyers who basically took instructions from Manson even though they were acting for one of the young females, to implicate the young girls as much as possible in the murders and thereby reduce Manson's role.

We also have some photos in this book. We all will recognise most of them, especially that infamous photo of the three young co accused, Atkins, Krenwinkel and Van Houten, arriving at Court for the first Tate/La Bianca trial, in their prison dresses, short hair, smiling widely.

What we have in this book is a detailed account of all the issues surrounding these murders, written in a style that is easy to understand, is informative of legal issues and the relevant law, yet also tells a narrative, a story, a story of extreme ideas and extreme violence.

Only a few weeks before I wrote this book review, I saw on the news that Leslie Van Houten had been granted parole. The State Governor could still overrule the decision. She is now 68 years of age, has many wrinkles but beautiful totally grey hair (she was 19 years old at the time she brutally stabbed Leno and Rosemary La Bianca).

This book is incredible to read - even if you have read it all before.

Book reviewed by Caroline Dobraszczyk

The Pillars of Digital Security: How to ethically use technology in legal practice

By Philippe Doyle Gray

In 2014 Phillipe Doyle Gray wrote a lengthy article for the Summer edition of *Bar News* called 'The pillars of digital security' in which Mr Gray explored the pitfalls of legal practice in the digital age, and offered helpful suggestions on how to minimise the risk of inadvertent disclosure of confidential information obtained or generated in the course of providing legal services. An online review said of that article that it:

> provides a vocabulary for lawyers who know little about technology, and it aims to provide a universal approach to issues of ethics and malpractice, regardless of the operating system, device, or particular technology. His formulation links (1) key terms of … rules of professional conduct, (2) the way in which computing devices

work, and (3) the way in which lawyers practice their profession.

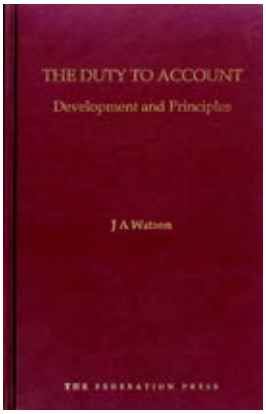
Undoubtedly, Mr Gray's 2014 article is a useful primer on the subject of digital security, and at the time was truly groundbreaking.

His self-published book *The Pillars of Digital Security* is a revision of the 2014 article. Despite the subtitle 'How to ethically use technology in legal practice' the book remains a treatise on how to maintain security and confidentiality in the age of electronic legal practice. It does not, for example, explore wider ethical issues of technology in legal practice, such as the appropriate use of a party's social media presence, or the use of technology in presenting re-enactments in court.

Compared to Mr Gray's 2014 article (freely available on the internet) this book really does little more than update references to iOS 7 and 8 to iOS 10.3 (now superseded), and provides some minor additional discussion about security protocols and the dangers of network communications. At USD99.95 (Amazon), this book may be useful for those who consider themselves to be more or less technologically illiterate. For everyone else, the original article and a Google search should suffice.

The Duty to Account: Development and Principles

By J A Watson



To a common lawyer taught property and equity at the University of NSW, *The Duty to Account* is at times a challenging read. Having sorted one's socage from one's scutage, however, Watson's text is an enjoyable discussion of the nature and (long) history of account.

By reviewing the feudal system of landholding, Watson demonstrates that the legal obligation to account for property being held 'to the use of' another substantially predates the *Statute of Uses* and the origins of the modern day trust. It argues that a liability to account will arise whenever a person receives property which they are not allowed freely to use, a liability that is independent of liability in contract, tort, unjust enrichment, trusts or other fiduciary obligation. Eschewing this traditional taxonomy of the law of obligations, Watson divides his treatment of the duty to account into chapters dealing with accounting parties at law, and accounting parties in equity, and within each chapter describes a wide variety of relationships and transactions in which one party may be liable to account to another.

One consequence of Watson's thesis is that it is wrong to ask whether an account of profits is available as a remedy for, say, a tort or a breach of contract. Instead, according to Watson, the correct approach is to ask whether the circumstances that amount to a tort or a breach of contract are also circumstances in which there is an obligation to account. Such re-calibrated analysis provides a coherent explanation for the outcome of otherwise conceptually-awkward cases. Having said that, Watson recognises that his thesis does not explain all of the circumstances in which an obligation to account may arise. His endeavour is much more modest than that of the 'restitution industry'.

Watson's book is the classic 'jack of all trades, master of none'. It is a very interesting historical exploration of the duty to account, but it is by no means a work of legal history (nor, in fairness, does it purport to be). While it provides an intellectually stimulating explanation of the doctrine of account, its utility in day-to-day practice may be limited. It does, however, supply fertile ground for the forensically adventurous seeking to justify an account in circumstances where the prior caselaw would disallow it.

Korea - The Endgame

Michael Pembroke, historian and Supreme Court judge, travelled through North Korea in 2016. He has been a Visiting Fellow at Wolfson College, Cambridge (2015) and a Director's Visitor at the Institute for Advanced Study, Princeton, NJ (2017). This is an edited extract from his book *Korea – Where the American Century Began*, which will be released in February 2018. Noam Chomsky said of the book: 'Perceptive and compelling – often heart-rending, sometimes downright terrifying – this is a richly informed study.'

The Korean peninsula has had a troubled history but nothing quite compares with the tragedy of its American-inspired division in the twentieth century; or the war that inexorably followed; or the permanent conflict that has ensued. It is not simply that so many millions of people died or that so many families have been torn apart. It is that a festering and unresolved geopolitical sore has been created; one that has made matters worse; one that has exposed the peninsula to competing political interests, contributed to social dysfunction and disadvantage and made northeast Asia more dangerous. China, Russia and South Korea have understandable interests in the stability of the peninsula by reason of their adjoining borders. Japan has a legitimate interest by reason of its geographic proximity and its historical relationship. The United States – the original proponent of the division - has neither borders nor proximity. Its underlying interest is in the maintenance of its regional hegemony and in pushing back against the rise of China in the Asia-Pacific region.

The division

The fateful proposal that the Korean nation should be divided at the 38th parallel was an American initiative, made by a little known war-time policy committee known as the State-War-Navy Co-ordinating Committee - called 'Swink' after its acronym SWNCC. It was a precursor to the National Security Council. The proposed dividing line was selected on 10 August 1945 by two young colonels from the State Department working late in the evening in the Pentagon. They were given half an hour for the task and a map of 'Asia and Adjacent Areas' from a 1942 National Geographic magazine. One of the colonels was Dean Rusk.

The partition was a unilateral initiative. The United Kingdom was not consulted, nor any other allied power. Korea was ignored. It was prompted by the entry of the Soviet army into Manchuria and came in the immediate aftermath of the detonation of atomic bombs on Hiroshima on 6 August and Nagasaki on 9 August. Stalin acquiesced, intriguingly and without demur. The division of Korea was not entirely without precedent, as Imperial Russia and Japan had considered a partition in 1896 and again in 1903 – although the military and State Department men in SWNCC had no idea of those events.[1]

The determining consideration had been Russia's intervention in the Pacific war. Stalin had agreed at the Yalta Conference to enter the war against Japan within three months of the end of the war in Europe. The German surrender took place on 8 May 1945 and precisely three months later, on the evening of 8 August, Soviet Foreign Minister Molotov informed the Japanese ambassador of his government's hostile intentions. That night around midnight, the Soviet army moved into Manchuria on a grand scale. Its front, consisting of three army groups, 1.5 million men and over 5,000 tanks, extended more than 4,600 kilometres from the Pacific coast to eastern inner Mongolia. Its manifest ability to occupy the whole of the Korean peninsula before American forces could arrive was a source of consternation in the Pentagon. By 10 August the first elements of the Russian 25th Army had entered northeast Korea. A fortnight later they had completed occupation as far south as Pyongyang. By 1 September they had effected occupation to the 38th parallel. So impressed was one American military historian that he named the Soviet invasion of Manchuria and the Korean peninsula 'Operation August Storm'[2].

A divided Korea was not what Franklin Delano Roosevelt had contemplated. But he died in April and President Truman was a different, more conservative man. Roosevelt had embraced a post-war world order that included a vision of a free and independent Korea, to be preceded by a period of international trusteeship to prepare it for self-rule. As early as March 1943, he raised the concept of a trusteeship of Korea with the British Foreign Secretary, Anthony Eden; and the principle was subsequently embodied in the Cairo Declaration in December that year. Shortly afterwards, he raised it with Stalin,[3] who responded favourably, although he thought the period of trusteeship should be as short as possible. On 2 August 1945 the final proclamation at the Potsdam Conference in Brandenburg reiterated that 'the terms of the Cairo declaration shall be carried out'.

But as the radioactive fallout from Hiroshima and Nagasaki settled over Japan, a not so subtle metamorphosis was occurring in Washington. Roosevelt's concept of an international trusteeship for Korea was buried by Truman's implacable anti-communist resolve. The United States had invited and encouraged the Soviet army's movement into Manchuria and Korea and had urged Russia to declare war on Japan, but some in Washington were beginning to have reservations. There was a newfound perception of the strategic importance of denying a substantial part of Korea to Soviet Russia. One historian noted drily that 'The fate of the Korean peninsula suddenly became of interest to the Americans'.[4]

The change of thinking by the Truman administration led to a change of direction that altered the course of history in the region. Russia's aspirations were entirely expected. It had long held a natural and understandable

A North Korean soldier stands watch at the Demilitarized Zone July 17, 2008. Photo: US Defense Dept / Wikimedia Commons

interest in Korea and Manchuria, where it had been humiliated in the Russo-Japanese War (1904-5). But the United States had not previously expressed any strategic interest or concern. It had even been advised internally that, in return for their assistance in the war against Japan, the Soviets 'would want all of Manchuria, Korea and possibly parts of North China'[5]. This was the price to be paid. And the reason was clear. Until the atomic bomb made it unnecessary, the Americans expected heavy losses in their planned invasion of the Japanese mainland but believed that the casualties to be incurred by the Russians in invading Manchuria and Korea would be greater. A Joint Chiefs of Staff document stated unambiguously that 'our objective should be to get the Russians to deal with the Japs in Manchuria (and Korea if necessary)'[6]. The quid pro quo for persuading the Russians to do the nasty work was the known probability that they would appropriate Manchurian and Korean territory on their far eastern border.

But in August 1945, when the Soviet army entered the war, Truman and those advising him decided that they no longer wanted to pay the price, at least in Korea. The balance had shifted, as it so often seems to do, in favour of those who preferred confrontation, the establishment of clear territorial boundaries and the use of military force and occupation. For ideological reasons, Washington wanted a defensive wall. And so it made a scramble for Korea.

Thus only a week after Potsdam, one of America's most pressing political and military objectives suddenly became the perceived need to secure and cement an artificial division of Korea at the 38th parallel - and to occupy the country south of the proposed dividing line as soon as possible. It was a purely reactionary and strategic decision that marked the beginning of the most anomalous period in Korean history since 668 CE, when the kingdom was first substantially unified. Not only did the partition ignore the Korean people but its practical effect was to undermine Roosevelt's notion of trusteeship, with its correlative standard of international fiduciary behaviour 'higher than that trodden by the crowd'[7]. For it was patent that once division and competing antagonistic occupations were imbedded, future unification would be increasingly unlikely - as it surely proved to be.

One former US Foreign Service officer proffered this heartfelt and damning description –

> 'No division of a nation in the present world is so astonishing in its origin as the division of Korea; none is so unrelated to conditions or sentiment within the nation itself at the time the division was effected; none is to this day so unexplained; in none does blunder and planning oversight appear to have played so large a role… [and] there is no division for which the US government bears so heavy a share of the responsibility as it bears for the division of Korea'.[8]

B-29s of the US Air Force drop their 500-pound bombs over North Korea

The arbitrary division of the Korean peninsula was an invitation to conflict. It made a war for the reunification of the peninsula inevitable and it created a source of discord and international tension that remains unresolved. When war arrived less than five years later, it became the first of America's failed modern wars and its first modern war against China. The conflict launched the long era of expanding American global force projection and marked the true beginning of the American Century.

The war

Few Americans know the true history of the Korean war. Few understand how Washington tragically chose to continue the war after October 1950, despite the warnings of China and the apprehensions of the British. Fewer still are prepared to accept any responsibility for the consequences that have ensued or the impasse that now exists. The war started as a United Nations 'police action' to repel the North Korean invasion and restore peace at the border. After three months, Kim Il-sung's ambitious attempt to reunify the peninsula with Soviet tanks had been defeated, the mandate of the United Nations Security Council achieved and the North Korean forces pushed back to the 38th parallel. But as has happened so often since, Washington's ideological and military enthusiasm ensured a wider and more substantial conflagration – continuing the war for nearly three more years. Civilian deaths among the Korean people are estimated to have been more than three million - but we will never know.

After repelling the invasion, the unnecessary American-led crusade to cross the 38th parallel, to invade North Korea, to impose regime change and to threaten the Chinese border on the Yalu River, was a calamity. The following words are as apt for Korea, as they were for Vietnam, and for so many subsequent American interventions – 'In attempting to snuff out a small war they produced instead a massive conflagration. Determined to demonstrate the efficacy of force employed on a limited scale, they created a fiasco over which they were incapable of exercising any control whatsoever'[9].

In late October, China reacted by entering the conflict in force - using exceptional infantry tactics. The resulting retreat by the US Eighth Army was not merely the longest in American military history but 'the most disgraceful'[10], 'the most infamous'[11] and 'one of the worst military disasters in history'[12]. In reality it was a rout and President Truman declared a state of emergency. Legitimate questions about the wisdom, morality and legality of taking offensive action north of the 38th parallel were lost beneath a familiar wave of moral righteousness and misplaced confidence. Doubters were sidelined, sceptics labelled as appeasers and allies were either 'with us or against us'. Washington wrapped itself in an armour of certitude.

In a pattern that has since been repeated, the quest for UN authority to cross the 38th parallel was mired in unconvincing rationalisation, transparent ambiguity and diplomatic and legal machinations reminiscent of the wrangling over the invasion of Iraq in 2003. The British government agonised. Canada was troubled. India opposed. And Australia dared not disagree. Washington would not be deterred. A conflict that started with noble

intentions as a United Nations police action, transformed itself into an unnecessary war in which the principal antagonists became China and the United States. It did not have to be. And it only made things worse.

After the battle line settled around the 38th parallel, the profligate bombing campaign north of the border and the widespread use of napalm, flattened, burned and destroyed those who remained lived a troglodyte existence in caves and holes in the ground.

The architect of the bombing campaign was Curtis LeMay, head of Strategic Air Command. His commander-in-chief was President Truman. LeMay was the world's foremost practitioner of obliteration bombing. It has been said of him that the Luftwaffe's Hermann Göring and the Royal Air Force's 'Bomber' Harris 'weren't even in the same league'[16]. When LeMay reminisced on his achievements in Korea, he remarked with unflinching casualness that 'Over a period of three years or so, we killed off – what – twenty percent of the population of Korea as direct casualties of war, or from starvation or exposure?' He added that we 'eventually burned down every town in North Korea anyway, some way or another...'[17]

LeMay's attitude to civilian casualties was morally indefensible by any standard. 'There are no innocent civilians'[18] he said. 'It is their government and you are fighting a people, you are not trying to fight an armed force anymore. So it doesn't bother me so much to be killing the so-called innocent bystanders'[19]. By his own estimation 'we killed off over a million civilian Koreans and drove several million from their homes'[20]. LeMay conceded however that 'I suppose if I had lost the war, I would have been tried as a war criminal'[21]. He was probably right on the last point.

By the time the armistice was agreed in July 1953, civil society in North Korea was broken. Conventional explosives and napalm had achieved their intended effect. Not only were more bombs dropped on Korea than in the whole of the Pacific theatre during World War II – but more of what fell was napalm in both absolute and relative terms. The bombing campaign continued relentlessly for nearly three years after the invasion had been repulsed in September 1950. And it kept going for fifteen months when the only outstanding issue at the truce talks was the question of the release and repatriation of prisoners. John Foster Dulles liked to call it 'massive retaliation'[22]. Even when peace was in sight, Dulles had misgivings about letting up on the bombing campaign. He did not want an armistice 'until we have shown - before all Asia - our clear superiority'[23]. Now there is blowback.

Henry Kissinger said that if President Truman had been prepared to accept the status quo at the 38th parallel, 'he could say he had rebuffed communism in Asia… He could have shown a face of power to the world while teaching Americans the wisdom of constraint in using such power. He could have escaped terrible battlefield defeats, the panic and gloom that followed, and other grave difficulties'[24]. Kissinger's US-centric analysis is important but it is only part of the story. The consequences to the Korean people were far more tragic; the effect on the long-term stability of the peninsula far more serious; and the prospect for ongoing conflict

Bombing of Wonsan, North Korea, 1951. Photo: US Air Force

North Korea and instilled in its people a level of distrust and resentment that has shaped the country's continuing hostility toward the United States. In the re-built streets of Pyongyang, the legacy of bombing is bitterness. Most of North Korea was levelled – 'systematically bombed town by town'[13]. Cities and towns were razed, leaving a landscape pockmarked by piles of bricks and the foundations of buildings. MacArthur said in 1951 that 'The war in Korea has almost destroyed that nation. I have never seen such devastation…If you go on indefinitely, you are perpetuating a slaughter such as I have never heard of in the history of mankind'[14]. It only got worse. Dean Rusk said that the United States bombed 'everything that moved in North Korea, every brick standing on top of another'[15]. By late 1952 the population of Pyongyang was down to about 50,000 people from half a million before the war. The few officials who had not moved to safety at Kanggye in the north, operated from underground bunkers; many women and children had been sent to China; and

in northeast Asia more worrying. The failed war in Korea established the pattern for the next sixty years, and the world is reaping the consequences. The 'wisdom of constraint' remains elusive. One of the consequences is that we have entered a 'strange new world' where Americans 'are finding it harder than ever to impose their will on anyone, anywhere'.[25] As the bestselling writer, Alistair Horne, observed so wisely - 'How different world history would have been if MacArthur had had the good sense to stop on the 38th Parallel'[26].

US Army Col. Kurt Taylor briefs Secretary of State Hillary Rodham Clinton, left, and Secretary of Defense Robert Gates, right, at the truce village of Panmunjom, in a demilitarized zone (DMZ) north of Seoul, South Korea, July 21, 2010, as a North Korean soldier watches through the window.

The legacy

It is now obvious that the Korean war was a watershed. The manner of the war's conduct, and the assumptions and attitudes that it generated in Washington, established a precedent that the United States has chosen to continue time and again - no more clearly demonstrated than by Secretary of State Madeleine Albright's jarring statement that 'If we have to use force, it is because we are America; we are the indispensable nation'[27]. As one diplomatic historian noted somberly - 'Korea's legacy is practically incalculable…in terms of the cost of the arms race, the international isolation of China, and for the impact on American political development'[28]. Half a century after Korea, Gore Vidal described with exaggerated, yet biting and uncomfortable cynicism, the foreign policy trend that Washington has followed ever since – 'We honor no treaties. We spurn international courts. We strike unilaterally wherever we choose…we bomb, invade, subvert other states'[29].

The Korean war was the key that unlocked the riches of NSC-68; removed the post-war cap on military spending; restored and enlarged the American military apparatus after nearly five years of demobilization; and gave oxygen to the Truman Doctrine. And it defined the modern world in a way that pitted the United States against any movement wherever it saw a perceived threat to its strategic or economic interests or even its credibility. Then and now Washington had a fetish for credibility over proportionality. As for China, the ill-tempered Korean armistice served only to deepen and continue Washington's antagonism toward it. And as for North Korea, the seeds of its nuclear ambitions were probably sown a few years after the armistice when - in flagrant violation of the terms of the armistice - Washington introduced nuclear weapons onto the peninsula, despite the concerns of its allies and the unambiguous advice of the State Department.

No one can deny the validity of the initial decision to repel the North Korean invasion and restore peace and security at the 38th parallel; or that the ensuing three-month conflict was a just war. But the fateful decision in October 1950 to invade North Korea was driven by an ideological objective – to impose social, political and regime change. Like the slow-burning consequences of interventions in the Middle East, it has engendered a deeper and longer-lasting conflict; one that is exacerbated by the continuing festering presence of American troops on the peninsula, from which they have never left. It is not difficult to understand why there is still no peace treaty with China or North Korea. Nor is it difficult to understand why the Korean peninsula has become the world's most volatile crisis point.

The war left North Koreans with a permanent siege mentality, a defensive, embattled, ultra-nationalistic spirit and a self-image based on pride at having survived an encounter with the most technologically advanced power in the world. Despite the protestations of Secretary of State Tillerson that 'we do not seek an excuse to send our military north of the 38th parallel'[30], the country lives with a constant fear of invasion, subjugation and occupation. Pyongyang braces every spring when the United States and South Korea conduct their annual joint military exercise in the seas around the Korean peninsula. And the siege mentality is exacerbated by the menacing presence of American troops just below the 38th parallel and the almost

permanent deployment of naval ships and aircraft in the region. More threatening still is the United States' nuclear and missile arsenal. The Pyongyang regime knows – the whole world knows - that the United States has a stockpile of between 4,000 to 7,000 nuclear warheads; that over a thousand are actively deployed on ballistic missiles, submarines and at air bases; and that some are almost certainly targeted at Pyongyang.

In the face of such threats, North Korea regards its nuclear program as 'an important deterrent to external aggression and a security guarantee for the regime's survival'[31]. Nuclear weapons and ballistic missiles are its ultimate insurance. It will never surrender them in response to threats, coercion and sanctions. Pyongyang officials repeatedly state that nothing will stop their nuclear and missile development and that sanctions will not stop the process. There is every reason to believe them. They feel threatened and have done so for nearly seven decades. And their conviction and sense of threat are real. The war has not ended. There has been an armistice between military commanders not a peace treaty between states.

James Clapper, United States Director of National Intelligence from 2010-17, could not have been clearer. He warned that the notion of getting North Korea to give up its nuclear capability is a 'lost cause' and a 'non-starter'.[32] And General James F. Grant, a former director of intelligence for US Forces Korea, once explained that 'It [nuclear capacity] is their only current asset that makes them a serious player at the negotiating table. In their minds, it is the ultimate poison pill that will forestall military action against them…' In Grant's opinion, North Korea has four overall goals - 'regime and state survival and continuity, external respect and independence of action, controlling the nature and pace of internal change and the eventual peaceful unification of the Korean peninsula under terms acceptable to North Korea'.[33] Invasion of the South is not one of them. Nor is a first strike on the United States or its armed forces. Kim Jong-un is neither irrational nor suicidal.

The perception of American hypocrisy only strengthens Pyongyang's resolve. While Washington professes to desire a world without nuclear weapons and demands a denuclearized Korean peninsula, it will not abide by the same rules. In 1957, the United States unilaterally abrogated the armistice treaty by introducing nuclear weapons. In 2001, it withdrew from the Anti-Ballistic Missile Treaty with Russia. And in 2016-17, it opposed – and lobbied its allies to oppose – the groundbreaking United Nations resolution for multilateral negotiations designed to achieve a worldwide nuclear ban treaty. North Korea's nuclear and missile capability is a response to the American military presence, not the cause of it. Paradoxically, Washington has reversed the logic, portraying Pyongyang's capability as the justification for its indefinite military posture in South Korea and its continuing wartime operational control of the South's armed forces.

Pyongyang wants engagement and respect; it wants regime security and state survival; it wants a peace treaty to end the 70-year war and remove the threat to its existence; and it wants a way forward with South Korea. Denuclearization is unlikely to occur without them. China's recent criticism was pointed. It counselled the United States that it was driving North Korea 'in the wrong direction', that it was 'only making things worse' and that its 'hostile policy is to blame for North Korea's weapons programs'.[34] China's recent joint proposal with Russia represents the way forward – a two track path toward both denuclearization and a peace mechanism. But Washington appears to want the former without recognizing the need for the latter. It is playing a losing hand. Sanctions will cause hardship but will not influence government policy. Nor will they precipitate the collapse of the regime. As the respected British journalist Simon Jenkins wrote recently the most effective sanction on North Korea is 'the sanction of prosperity'.[35]

To similar effect is Thomas L. Friedman, writing in the *New York Times*. He has proffered the solution that Washington seems unwilling to recognise. The United States should 'offer to recognize the legitimacy of the North Korean regime'; it should 'open an embassy in Pyongyang, engage in economic trade and aid'; and it should put 'a very clear peace offer to the North Koreans' that 'if you fully denuclearize and end your missile program, we will offer you full peace, full diplomacy, full engagement, economic aid, and an end to the Korean War.'[36] This is the only endgame.

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Swearing in of his Honour Judge Timothy Gartelmann SC as a judge of the District Court of NSW

His Honour Judge Timothy Gartelmann SC was sworn-in as a judge of the District Court of NSW at a ceremonial sitting on Tuesday, 3 October 2017. Attorney General Mark Speakman SC MP spoke on behalf of the New South Wales Bar, while Richard Harvey, treasurer of the Law Society, spoke on behalf of the solicitors' profession.

His Honour was raised in the Adelaide Hills, the son of an artist and an IT expert at the Woomera Rocket Range. His Honour was the eldest of four children and attended an Adelaide private school before leaving early to test alternative careers in landscaping and the army. It is rumoured that upon completion of his military training his Honour could speak in Morse code.

It was after completing the leaving certificate that his Honour took a punt and enrolled in a journalism degree in the Northern Territory, where it just happened that there was one compulsory law subject, and this began more than 25 years in the law as solicitor, barrister and senior counsel.

In fact it was one of his teachers in the journalism course who first saw a certain aptitude that his Honour possessed and enthusiastically recommended that he pursue a law degree. Promptly, he transferred to the Australian National University, where he obtained his degree in 1991.

In 1992 he completed the College of Law and embarked on a career as a solicitor at several specialist criminal law firms, after which he accepted a position at Legal Aid NSW. His Honour has spent more than two decades in the service of the people of NSW. Briefly his Honour was a solicitor advocate appearing in the Local and District courts, the quintessential sole practitioner before being called to the Bar.

Attorney General Speakman spoke on behalf of the Bar and reminded those in attendance of his Honour's superlative knowledge of the criminal jurisdiction, his insight and calm and measured temperament during his years as a barrister. His Honour appeared in nearly every type of application in the criminal jurisdiction from bail applications, severity conviction appeals, sentence hearings, fitness, as well as every 'special' hearing and of course he was an old hand at trials with juries. The attorney also shone the light on his Honour's many occasions before the Court of Criminal Appeal. In fact he was regarded as counsel of choice in that particular jurisdiction. The attorney recalled his Honour's personable and often patient and generous personality; one who was always ready to advise and to calm a panic-stricken reader or junior with urgent questions.

Several high profile and important cases of legal principle were referred to; for example Crickett in the CCA, *R v RMC* in 2013, and in 2014 *CS v R*. These three cases were particularly grave examples of criminal behaviour and displayed crucial aspects of his Honour's customary frankness and candour before the court and his full appreciation of responsibility. These cases indicated a high esteem in which the bench held his Honour and the attorney indicated that his Honour's qualities of trustworthiness, consideration and fairness were unassailable.

Reference was also made to his Honour's predilection for mountain bike riding and road cycling. The attorney indicated that riding, although an enjoyable pastime, had caused his Honour physical injury and lengthy periods of rehabilitation rather than the more anticipated result of good health and improved physical ability.

Mr Harvey, on behalf of the Law Society, said that Judge Gartelmann had practised as a distinguished silk for some 15 years before taking appointment to the District Court. His Honour was first an accredited criminal law specialist as far back as 1999 and certainly in recent years has proven this to be his area of exceptional expertise. Mr Harvey then reminded his Honour's customary calmness and intelligence when faced with a curious (sometimes uncomfortably curious) judge during difficult cases.

Beyond cycling and a career as a leading silk his Honour was noted as having an artistic streak – most probably inherited from his mother, Roe Gartelmann – a noted South Australian landscape artist. However his Honour's greatest devotion was of course to his family as husband to Magistrate Nell Skinner and father to children Sam, Alex and Eliza – all of whom have exceptional original stories about adventures and travels.

Finally, his Honour noted that he was not the first barrister or judge to have started his career eschewing public speaking however as things go he got used to it. His Honour remembered fondly being John Stratten's last pupil before becoming silk. His pupil master had encyclopaedic knowledge of criminal law but the real lessons learnt were more about John Stratten's advocacy style. After watching and spending time with his pupil master his Honour appreciated that a good barrister might not necessarily be the most theatrical, the most aggressive, colourful and full of movement. Rather it is often the opposite. The most important lessons learnt were those of method, preparation, and above all reasonableness. These made for by far the more effective style of advocacy. His Honour also remembered the great privilege it was to be led by Paul Byrne SC and Mark Ierace SC, and he fondly remembered his other mentors Justices Latham Hulme and Johnson, among others including Michael Crawford-Fish and Carolyn Davenport SC. His Honour acknowledged how gratifying it was to come this far and look forward to the challenges of the future.

By Kevin Tang

Local Court of NSW

Magistrate Brett Shields

Brett Shields was sworn-in as magistrate of the Local Court of NSW on Monday, 28 August 2017. His Honour graduated from law school in 1985, after which he practised as a solicitor at Ebsworth & Ebsworth, then at Mallesons. He was called to the bar in 1994 and read with Mark Williams, now Judge Williams SC of the District Court. Eventually he took a room on 12th Floor Wentworth and built up a practice that included commercial, industrial and employment law, as well as personal injury.

Magistrate Theresa Hamilton

Theresa Hamilton was sworn-in as a magistrate of the Local Court of NSW on Monday, 11 September 2017. The majority of her career was spent in Queensland. She studied law at the University of Queensland and was admitted as a barrister in that state in 1978. Initially, she worked for the Commonwealth Crown Solicitor's Office in Queensland as a Crown prosecutor. In 1983 her Honour joined the Aboriginal and Torres Strait Islander legal service. In 1990 she joined Queensland's Crime and Corruption Commission, rising to general counsel and other senior positions over the next 17 years. In 2007 she joined the Independent Commission Against Corruption in NSW as a deputy commissioner.

Magistrate Christopher Halburd

Christopher Halburd was sworn-in on Monday, 11 September 2017. His Honour received a Diploma in Law from the LPAB and joined a busy practice in in the Albury Wodonga area. He was appointed by the Victorian health minister to sit on the board of Albury Wodonga Health. His Honour is committed to lifelong learning and has three masters degrees, including business administration from Charles Sturt University and international law from the University of Kent's Brussels School of International Studies. His Honour Magistrate Halburd is known as a compassionate, considerate and thorough practitioner and has the added distinction of having lived and worked overseas in Brussells, Vietnam and the UK.

Senior counsel appointments 2017

Back row, left to right: Huw Baker, Lesley Whalan, Melissa Gillies, Michael Wright, Michael Elliott, Francis Hicks, Greg Waugh
Front row, left to right: Naomi Sharp, Ruth Higgins, Kate Morgan, Richard Scruby

Huw Baker
Crown Prosecutors Chambers Sydney

Huw Baker commenced practice at the New South Wales Bar on 24 January 2005, when he was appointed as a Crown prosecutor. He specialises in the area of criminal law as both trial and appellate counsel. He is the chairperson of the ODPP Indigenous Lawyers Mentoring Pilot Program and regularly gives informal presentations concerning criminal law, practice and procedure, advocacy and evidence at conferences. [BA Australian National University; DipL Legal Practitioners Admission Board]

Michael Robert Elliott
8th Floor Selborne Chambers

Michael Elliott came to the New South Wales Bar on 15 February 2002. His major area of practice involves commercial disputes, with a particular focus on professional negligence, insurance, contract law, trade practices, corporations law, equity and fraud. He also has appeared for a range of organisations and individuals in royal commissions, ICAC hearings and other inquiries. More recently, Michael was counsel assisting the Heydon Royal Commission into Trade Union Governance and Corruption. [BA, LLB (Hons) University of Queensland]

Melissa Anne Gillies
Culwulla Chambers

Melissa Gillies commenced practice at the New South Wales Bar on 23 February 2001. Since 2003 she has specialised in the area of family law, appearing in the Family Court and Federal Circuit Court, along with family-related matters and some criminal matters in the Local Court. Melissa is an accredited family law arbitrator and regularly presents papers to various groups on various aspects of family law. [LLB University of Technology Sydney]

Francis Paul Hicks
Greenway Chambers

Francis Hicks commenced practice at the New South Wales Bar on 17 February 2003. He generally undertakes commercial matters, being primarily engaged in technology and construction disputes concerning commercial, retail, industrial, mining and infrastructure projects (including renewable energy) and large scale residential developments. He has worked on Halsbury's Laws of Australia *Building and Construction* title and given numerous papers at Building and Construction Disputes Workshops, CLE seminars and insurance forums. [BA, LLB University of New South Wales]

Dr Ruth C A Higgins
Banco Chambers

Dr Ruth Higgins commenced practice at the New South Wales Bar on 1 May 2006. Her principal areas of practice are competition law and economic regulatory law (especially energy and telecommunications). She also appears in class action proceedings, public and constitutional matters, corporate criminal matters and general commercial disputes (including insolvency). Ruth has been a visiting scholar at Columbia University in New York and a lecturer in law at Corpus Christi College, Oxford. In 2007 she was the co-convenor of the New South Wales Bar Association's rhetoric series of lectures and was a co-editor of *Historical Foundations of Australian Law*: Vols. I and II. [LLB (Hons) Glasgow University; DPhil Oxford University]

Katharine Clare Morgan
Tenth Floor Selborne/Wentworth Chambers

Kate Morgan commenced practice at the New South Wales Bar on 16 February 2004. She practices in the areas of regulatory litigation, including civil penalty proceedings, commercial and taxation law, competition and consumer protection, constitutional and administrative law and criminal matters, among others. Kate was the co-vice chair of the Women Barristers Forum for 2014 and 2015 and has been a member of Bar Council's Working Party on the Equitable Briefing Policy and is currently a member of the Equitable Briefing Working Group. She has addressed the Bar Readers Course and presented Bar Association seminars regarding CPDs for the Bar Association in relation to practice at the bar and family responsibilities. [B Ec, LLB (Hons) University of Sydney; LLM (Yale)]

Richard Craig Scruby
Tenth floor Selborne / Wentworth Chambers

Richard began practising at the New South Wales Bar in September 2002. His main areas of practice are equity and commercial, bankruptcy and insolvency, tax and revenue law. In 2015 he was junior counsel assisting the Royal Commission into Trade Union Corruption. He is a member of the Diversity and Equality Committee. [BA LLB (University of Sydney), BCL M Phil (Oxford)]

Naomi Louise Sharp
Sixth Floor Selborne / Wentworth Chambers

Naomi began practising at the New South Wales Bar in 2002 after she had received the Blashki Award for coming first in the Bar Exams. Her principal areas of practice include competition and consumer law, contract, equity and trusts, public and administrative law, as well as inquests and inquiries. In 2014 she was counsel assisting in the Australian Human Rights Commission Inquiry into Children in Immigration Detention. Similarly, she was counsel assisting in several case studies for the Royal Commission into Institutional Responses to Child Sexual Abuse. She has also served on Bar Council, as well as a Bar Association Professional Conduct Committee and its Human Rights Committee. [BA (Hons) LLB (University of NSW) LLM (McGill University, Montreal)]

Gregory Richard Waugh
12th Floor Selborne / Wentworth Chambers

Greg began practising at the New South Wales Bar in 1990. His principal areas of practice are commercial, equity, with a particular focus on probate law, and alternative dispute resolution. Greg has served on the board of 12th Floor Selborne/Wentworth Chambers. [LLB BComm (University of NSW)]

Lesley Anne Whalan
Frederick Jordan Chambers

Lesley began practising at the New South Wales Bar in 1998. Her main areas of practice are medical negligence, product liability, commissions of inquiry and coronial inquests. Between 2013 and 2015 Lesley was a member of a Bar Association Professional Conduct Committee. [BA (Australian National University) LLB (University of NSW)]

Michael Luscombe Wright
Frederick Jordan Chambers

Michael began practising at the New South Wales Bar in 2000. Prior to that he had practised for some years as a solicitor in Papua New Guinea. His main areas of practice are environment and planning, native title, administrative law and alternative dispute resolution. Michael is currently a member of the Bar Association's Joint Working Party on Over-representation of Indigenous People in the NSW Criminal Justice System. [BA LLB (University of Sydney)]

NSW Bar FC 2017 10th Anniversary

The year the silverware returned home

Introduction

The NSW Bar Football Club (NSW Bar FC) is open to barristers, members of the judiciary, judges' associates and tipstaves, clerks and employees of the Bar Association, regardless of gender, level of ability or fitness. It currently consists of some 90 members.

Domain Soccer League (DSL)

NSW Bar FC competed in the DSL competition which was held at lunchtime between April and September in the Domain.

Promoted to Division 3 for the 2017 season, it was a season filled with close contests that saw Bar FC remain competitive with many teams who had age on their side. The results for the season overall proved that football is a game of fine margins with Bar FC being unlucky on a number of occasions not to win games or, at least, draw games that were ultimately lost.

From 15 games played, Bar FC won only 1 game, drew 6 and lost 8. The games were tight and the result decided by no more than one goal. The team played a brand of football that was both attractive to watch and competitive.

Special mention should be made of a few players who have contributed significantly over the years. Captain Simon Philips has been a stalwart in central defence and a constant inspiration to all members of the team. On the few occasions he was not present, his lack of instruction and intuition were sorely missed. Goalkeeper John Harris also put his body on the line repeatedly, resulting in an orbital fracture being sustained during the course of one of the DSL games (Captain Philips denies he was the culprit). Harris was sidelined for a few games and, as might well be expected, somewhat cautious upon his return. Within a few weeks though, Harris was back to his winning ways and kept a clean sheet in the last two games of the DSL. Some newer members also proved invaluable to the team. Anais d'Arville and Sebastian Hartford-Davis toiled hard all year and provided finesse, pace and guile to the midfield. A welcome addition to Bar FC was the return of Jeh Coutinho (clerk, Banco Chambers) who played in the opening season and has strapped on the boots yet again in 2017, a testimony to the pull of the beautiful game.

A final mention should be made of Joe Hunter, a German student who worked with David (Sir Alex) Stanton during the year. He brought a European flavour to the team that was appreciated by all although, he was heard to exclaim on a number of occasions following what he thought was a foul, 'Why does the referee not see this?' I guess we play the game a little bit differently here.

7th Annual Sports Law Conference

The 7th Annual Sports Law Conference was held at the TAG Room at the Sydney University Soccer Football Grandstand on 9 September 2017. It was opened by the Hon Justice Anna Katzmann of the Federal Court of Australia and chaired by the Hon Justice Geoff Lindsay of the Supreme Court of NSW.

Approximately 40 barristers were registered for the conference. Also in attendance was Mr Stephen Doherty, senior claims advisor, Suncorp.

Alan Sullivan QC spoke about 'Ethics in Sport-the FIFA Code of Ethics and the Garcia Report'. He provided an incisive and illuminating account of his work as deputy chairman of the Adjudicatory Chamber of the FIFA Ethics Committee. During his four-year term which ended in May 2017, many big names in football were suspended or banned from the game by the Ethics Committee, including the then president of FIFA, Mr Sepp Blatter, the president of UEFA and a senior member of the FIFA Executive Council, Mr Michel Platini and the FIFA secretary-general (CEO), Mr Jerome Valcke.

Alan spoke about why football is particularly susceptible to corruption, the work of the FIFA Ethics Committee and the challenges faced by it. He concluded with a consideration of the controversy surrounding the preparation and publication of the Garcia Report (a report prepared by the former chairman of the Investigatory Chamber of the FIFA Ethics Committee, Mr Michael Garcia and the then deputy chairman of the Investigatory Chamber of the FIFA Ethics Committee, Mr Cornel Borbely) into the 2018/2022 FIFA World Cup bidding process.

Professor Deborah Healey of the University of NSW, addressed aspects of the law, practice and policy of anti-doping. She spoke about how doping undermines the value of sport. She quoted David Howman, the chief executive of WADA, who said that 'the intrinsic value of sport, often referred to as the 'spirit of sport' is a celebration of the human spirit, body and mind, and is characterised by values such as ethics, honesty, respect for rules, self-respect and respect for others, fair play and healthy competition. If sport is void of these rules (and others) it might be argued that is no longer sport'.

Professor Healey also spoke about the Code as providing a practical need to create a level playing field for sport from which the most skilful athletes or teams ultimately emerge as the winners of any particular competition or event. She also touched upon the likelihood of Code compliance from a psychological perspective, whether the Code will actually deter doping and the importance of education in promoting both breadth and depth of compliance with the Code.

Lastly, Graham Turnbull SC addressed the topic 'Toxic Masculinity or Men Just Behaving Badly'. The newspapers are seemingly replete with examples of professional sportspersons, men for the most part, behaving badly both on and off the sporting arena. Such conduct may give rise to a plethora of legal challenges for the player, his/her club, sponsors and for the game as a whole. Some sociologists are referring to such conduct as an emanation of 'toxic masculinity'. Graham took to his task with relish and provided an entertaining account of both endearing and some not so endearing moments in world football.

Bar Football – Suncorp Perpetual Trophies

At the conclusion of the seminar and lunch, some 45 barristers and a few of their sons, took to the Sydney University Football Ground for the annual Suncorp Football Challenge.

Game 1: Victoria v Queensland (one-all draw)

The Victorians led by Captain Anthony Klotz and otherwise comprising Alexander Solomon-Bridge, Phil Cadman, Nicholas Phillpott, Daniel Nguyen, James Fitzpatrick, Douglas James, Mike Kats, Chris Pearson, Chris Beach, Chris Archibald, Keeper John Harris (NSW) and Xavier Bolger (Craig Bolger's son) (NSW), took on an understrength Queensland Team consisting of Captain Johnny Selfridge, David Chesterman, Eoin Mac Giolla Ri, Jens Streit, David Purcell, Michael Hodge, Samuel McCarthy, Daniel Favell, Andrew Skoien, Mac Giolla Ri Junior and Daniel Lo Surdo (Anthony Lo Surdo's son)(NSW).

In a fairly even contest each team had their share of chances with neither able to fully capitalise on their opportunities. In the end, it was a fitting one all draw. Best and fairest for Victoria was Michael Kats and for Queensland Jens Streit. The match was refereed by Simon Burchett (NSW).

Game 2: New South Wales v Queensland (NSW 7, Queensland 2)

The Queenslanders joined by Craig Bolger (NSW) and Keeper Alex Kuklik (NSW) were required to play on against a rested and well-prepared NSW team consisting of Hugh Morrison; John Harris (GK), Simon Philips (C); Anais d'Arville; Jeh Coutinho; Vahan Bedrossian; Michael Fordham SC; Richard di Michiel; Shereef Habib SC; Lachlan Gyles SC, Rohan de Meyrick, Adrian Canceri and Darren Covell.

The much-anticipated contest between Queensland, the then holders of the Suncorp

NSW Bar v Vic Bar v Qld Bar Challenge Cup and a NSW team out to avenge its narrow loss in 2016 loomed as a classic 'State of Origin' showdown. However, such was the dominance of the home team, that the match was effectively over well before half time. The game plan of NSW (cooked up by the brains trust of Coach (Sir Alex) Stanton and Captain Philips) involved using a 3-4-3 formation to take advantage of the huge expanses of the Sydney University Football Ground and the pace of our front three – and it certainly worked a treat (much better than for the Socceroos earlier in the week) as NSW found themselves 2-0 up after only a handful of minutes, with well-taken goals by Di Michiel and 'speed machine' Morrison.

The NSW midfield of d'Arville, Coutinho, Canceri and Habib dominated all aspects of the game, leaving our defence (Fordo, de Meyrick, Philips and 'Bomber' Harris in goal) with little to do except keep score. The hapless Queenslanders, already exhausted from their exertions against the Victorians, could do little to stop the NSW juggernaut and further goals to Bedrossian, Coutinho, Morrison and Di Michiel made the half time score 6-0.

At half time, several home players swapped the blue and white for maroon and played for Queensland in the second half, which made for a much more even affair. Gyles and Covell came on for the home team. Bedrossian, playing for Queensland now (on matrimonial instructions), pulled one back for the visitors, before Canceri stepped up at the other end with a brilliant curling shot which evaded Keeper Kuklik (in goal for Queensland) and snuck in off the inside of the far post – a contender for goal of the tournament to put NSW up 7-1.

Further sustained pressure from Queensland, especially by Bolger in concert with his son Xavier and Daniel Lo Surdo allowed Bedrossian another goal. In the end, NSW won comfortably, 7-2.

The victory for NSW meant that avoiding a loss to Victoria would ensure the 'Tri State' Cup returned to its rightful and proper home. Best and fairest for NSW was Richard Di Michiel and for Queensland, Craig Bolger (NSW). The game was refereed by David (Patchildinho) Patch (NSW).

Game 3: New South Wales v Victoria (NSW 3, Victoria 2)

The third and final match of the day was a much tighter affair. The members of the NSW contingent for this encounter were Alex Kuklik (Keeper), Geoff O'Shea, Craig Bolger, Ivan Griscti, Nicole Compton, Oshie Fagir, Tim Hackett, Richard Sergi, Jeh Coutinho, Simon Philips (C), Vahan Bedrossian, Glenn Fredericks and Anais d'Arville.

NSW swapped Kuklik into goal, Fredericks and Griscti into defence, Sergi and Fagir out wide and Bolger and debutant Hackett up front. Harris was in goal for Victoria, who also had the speedy Xavier Bolger to bolster their squad.

The Victorian line-up consisted of a few first-timers for Bar football. Notwithstanding that fact, the Victorians probably played the most inspired football witnessed in many years of this contest.

While NSW generally controlled the game, the Victorians defended resolutely, with Tony Klotz marshalling his troops brilliantly, and played strongly on the counter attack. Fredericks had his work cut out denying his much younger opponent, but did his job effectively. D'Arville and Coutinho again dominated the midfield battle and the latter appeared

Back Row (left to right): Craig Bolger, Vahan Bedrossian, Darren Covell, Adrian Canceri, Lachlan Gyles SC, Richard di Michiel, Rohan de Meyrick, Gillian Mahony, Geoff O'Shea, Jeh Coutinho, John Harris, Ivan Griscti, Tim Hackett, Shareef Habib SC, Hugh Morrison, David Stanton (Mgr) and Anthony Lo Surdo SC (Referee).
Front Row (left to right): Richard Sergi, Michael Fordham SC, Nicole Compton, Anais d'Arville, Simon Philips (C), Alex Kuklik, Glenn Fredericks and Oshie Fagir.

to have opened the scoring with a brilliant, dipping long range effort which beat Harris all ends up but unluckily cannoned back from the underside of the cross bar. Soon after, Hackett calmly finished off a great spell of team passing to put NSW 1-0 up (which was the half time score).

Two further goals to the home team early in the second half then decided the contest. First, di Michiel beat the offside trap (much to Harris' displeasure) to tap one in and then soon after, Bedrossian finished off a brilliant team move of four one touch passes involving d'Arville, Coutinho and others for what was undoubtedly the silkiest goal of the day. NSW then rang the changes with Compton and O'Shea providing much-needed fresh legs.

Needing to score an unlikely four goals in about 15 minutes to claim the silverware, the Victorians did not lie down. A complacent second half start by NSW saw Phil Cadman (Vic) nutmeg Simon Philips (NSW) in the middle of the pitch which gave the cover defence a few anxious moments as did Alexander Solomon-Bridge's (Vic) spectacular bicycle kick attempt on goal which flew comfortably over the cross-bar to the relief of Keeper Kuklik. However, from well outside the box, one of the Victorian midfielders outrageously chipped over Kuklik and under the bar for another contender for goal of the day, to make it 3-1.

The Victorians continued their relentless pursuit for the back of the net and with a tiring NSW defence and Captain Philips having firstly pushed further forward and then retired from battle to avoid an official sanction for 'being egregiously out of position', Chris Archibald (Vic) had a cracking shot at goal from about 20 metres out. It was hit with such vehemence that NSW keeper Kuklik didn't see it coming as it slammed into the back of the net.

The final score of 3-2 in favour of NSW was a reasonable reflection of the closeness of the match. It also meant that NSW retained the Suncorp NSW Bar v Victoria Bar Challenge Cup and regained the Suncorp NSW Bar v Vic Bar v Qld Bar Challenge Cup!

Best and fairest for NSW was Jeh Coutinho and for Victoria Chris Archibald. The game was refereed by Anthony Lo Surdo SC (NSW).

The games were followed by drinks and canapes and then a sit-down dinner and speeches. It was a fun and memorable way to celebrate the 10th anniversary of NSW Bar FC and the inaugural NSW Bar v Vic Bar game played on a rain-sodden St Johns Oval all those years ago. In attendance at the dinner and during the day were John Marshall SC, Gillian (The Enforcer) Mahony and Graham Turnbull SC, each foundation members of NSW FC but who, for various reasons, were unable to take to the field. Also in attendance was Peter Agardy of the Victorian Bar who founded the Victorian Bar Team.

Donation

The Sports Law Conference raised $1,500 which was donated to CanTeen to assist with its ongoing support of, and commitment to, children battling cancer, including the funding of sports and other camps to provide those children and their parents with much-needed respite.

Acknowledgements

NSW Bar FC acknowledges Suncorp for its ongoing and generous support.

A special thanks to:

David Chesterman of the Queensland Bar, Anthony Klotz of the Victoria Bar and David Stanton of the NSW Bar for arranging their respective teams;

Justice Katzmann for opening the Sports Law Conference;

Justice Lindsay for chairing the Sports Law Conference;

Alan Sullivan QC, Professor Deborah Healey and Graham Turnbull SC for speaking at the conference;

Each of the participants and especially those members of the Queensland and Victoria Bars for travelling to Sydney; and

Anthony Lo Surdo SC for organising the day.

The future

NSW Bar FC provides an ideal opportunity for barristers to mix with other barristers, judges and members of the profession in a healthy way. The forty-minute games at lunchtime in the DSL have proven time and time again to be the best form of Zen for busy barristers.

The Bar Football 'State of Origin' and Sports Law Conference will be held in Melbourne in 2018.

We look forward to welcoming new members to the squad in 2018. If you are interested in joining the team, please email David Stanton (d.stanton@mauricebyers.com) to join the mailing list. If you would like to attend or speak at the 8th Annual Sports Law Conference in 2018, please email Anthony Lo Surdo SC (losurdo@12thfloor.com.au).

Anthony Lo Surdo SC
David Stanton Simon Philips

Juniors' fees

> *For the quantification, then, what shall I do? I am already reeling under the advice of many prophets. There is no Polonius at hand to give me memorable precepts as he did Laertes when he fled the confusion. I shall simply select a figure as Tom Collins selected a day from his diary and we shall see what turns up. Such is life.*

Readers who are very old or who practise in the ignoble and second-rate field of industrial law may recognise the above passage from a judgment of Justice Staples, formerly of the Conciliation and Arbitration Commission in *Federated Storemen and Packers' Union v Albany Wool Stores Pty Ltd and Ors* (1979) 231 CAR 388. Decrepit industrial barristers (like our president) will also recall that Staples J was the first and thus far last tribunal member to publicly acknowledge that award wage setting is an intellectually offensive psuedo-science, much like colonic hydrotherapy, feng shui and the assessment of damages. His Honour's candour was rewarded by the abolition of the Arbitration Commission and its reconstitution as the Australian Industrial Relations Commission, sans Staples J.

In *Albany Wool Stores* Jim Staples was asked to fix the wages of wool storemen. Junior barristers are asked to fix their own rates of pay. The judge and the juniors have a problem in common.

A junior seeking guidance about a proposed rate will receive many opinions. They will generally fall into two categories: the rate is far too high; or the rate is far too low. 'The juniors at Banco charge thrice that--people will assume you're not good.'; or 'That's far too high. I can get Andrew Bell for that. And you're not even a doctor.'

Some of the advice is given during the Bar Practice Course. M-, an experienced and highly regarded clerk, came to speak to the nascent readers about rates. She is an adherent of the second view. She suggested that readers should charge $750 for a day in court. 'But M-', no one exclaimed, 'that's ridiculous. A month ago as a solicitor I charged $500 for one hour. And that was before I had the benefit of this life-changing Bar Practice Course'.

M- also suggested that readers charge one third of their normal hourly rate for devilling. This because the silk would do the work in a third of the time and would only charge the client a third of the time. 'But M-', no one pointed out, 'there is an enormous flaw in that logic. It takes me three times as long but the silk is charging the client at three times my normal rate. The effect of your proposed discount is that I am subsidising either the silk or the client. It is a nonsense.'

Perhaps M-, like many clerks, is suffering from a kind of Stockholm syndrome vis-a-vis silks which saps her objectivity. But she is not alone in eschewing rationality when it comes to juniors' fees, prospects and working requirements. Lack of reason is characteristic of discourse in these areas. Cognitive dissonance is common. Consider two familiar refrains:

> I regret that you have come to the bar at a time of severe decline. Everything settles. You will have no work. Financially you will suffer.

> You will be perpetually over-worked. You will not see your families for many moons. Cheshire & Fifoot are your only friends now.

Roy Delgado / Cartoonstock

"Remember to bill for the time it takes to bill for the time it takes to bill."

One might, stoically, accept a moderate income for a 35 hour working week. Or a 70 hour week with commensurate financial rewards. It is a little more difficult to resign oneself to a future characterised by both overwork *and* financial ruin. Similarly:

> The bar is not what it was. Our work is no longer valued. Clients are forever squeezing us on costs, usually successfully.

> The cost of litigation is now astronomical. Lawyers over-charge continually. Millions of dollars are diverted from commerce and the public into the pockets of lawyers. The barristers may not be as bad as the solicitors for over-charging, but they are bad.

One might be able to bear public disapprobrium with the help of, say, a BMW 5-Series; or endure penury comforted by a kind of moral correctness. But to suffer both poverty and public censure seems a little unfair.

So, then, for the quantification, what shall the junior barrister, reeling from the incongruent advice of many prophets, do?

The one true prophecy is this. The junior's rates have little to do with the quality or quantity of work received. Early success is a function of many other factors, some related to capability but most arbitrary; predominantly accidents of timing and the random kindness and cruelty of others. With time, perhaps, ability and cost--or ability relative to cost--become factors. But not so in the early years.

Once that premise is accepted, the answer to the rate-setting question is clear. The junior should determine the top of the range for her level of experience and area of law, and adopt it. It probably will not win briefs; it probably will not cost briefs. If it does cost some briefs, there is the comfort of earning the same money for less work, and there is something to be said for that.

And, of course, Polonious' precepts remain true:

> Give every man thy ear, but few thy voice;

And certainly not thy voice for $750 a day; not once, not ever, no matter what the M-s may say.

Advocatus replaces the previous column Advocata, following Advocata's retirement.
Practising barristers at the NSW Bar are invited to send an opinion column to the editor, with your name, providing a perspective of practice at the Bar.
Entries that seek to critique existing practice or mores by reference to personal experience will be preferred.
In each edition one selected piece will be published anonymously under the title 'Advocatus'.

R v Dookheea:[1] Bullfry and the onus of proof

Just when you thought it was safe to go back into the water! In its joint decision in *R v Dookheea*, the High Court has re-agitated the question how to direct a jury on the meaning of 'beyond reasonable doubt'. Ever since *Thomas*,[2] the unwisdom of the trial judge seeking to provide exegetical comment on those simple English words has been emphasised at the highest level – until now.

In *Dookheea*, the High Court (without any need to do so) has gone a step further:

> Secondly, although, *as authority stands*, it is generally speaking unwise for a trial judge to attempt any explication of the concept of reasonable doubt beyond observing that the expression means what it says and that it is for the jury to decide whether they are left with a reasonable doubt … the practice ordinarily followed in Victoria … and often followed in New South Wales includes *contrasting the standard of proof beyond reasonable doubt with the lower civil standard of proof on the balance of probabilities.* That practice is to be encouraged. It is an effective means of conveying to a jury that being satisfied of guilt beyond reasonable doubt does not simply mean concluding that the accused may have committed the offence charged or even that it is more likely than not that the accused committed the offence charged. What is required is a much higher standard of satisfaction, the highest known to the law: proof beyond reasonable doubt. (Emphasis supplied.)

The scene: the District Court at Parramatta (Judge Blenkinsop presiding).

Bullfry (for the defence): And we would also ask your Honour to direct the jury in terms of Dookheea, but on the basis that this is a very serious offence (armed robbery) and that they must approach the matter using the civil standard as explained in *Briginshaw v Briginshaw*[3] which is to be applied by them when making the contrast.

Her Honour: The contrast with what, Mr Bullfry?

Bullfry: Your Honour, the contrast between the ordinary civil standard and the criminal standard, as suggested by the High Court. The charge is very serious. The consequences are very grave for the accused. Thus, the jury must be reasonably satisfied by cogent evidence, not inexact proofs or indefinite testimony, or indirect inferences, that given the seriousness of the allegations and the gravity of the consequences for the accused, that he committed the offence. Such a direction continues to recognise the civil standard, as the High Court noted in *Neat Holding Pty Ltd v Karajan Holding Pty Ltd*.[4] There must be evidence sufficient to move the mind to a state of actual persuasion of a fact where the finding of fact is one to which serious consequences attach.

Of course, there is a subtle difference between the persuasion of the mind having regard to the gravity of the fact, and the standard of proof which your Honour will have no difficulty in explaining to twelve laymen. As to that last point, your Honour will no doubt have in mind the simple distinction drawn by the High Court in *Rejfek v McElroy*[5] to the effect that:

> The 'clarity' of the proof required, where so serious a matter as [armed robbery] is to be found, is an acknowledgment that the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved.

Her Honour: How does that differ from proof beyond reasonable doubt?[6] Indeed, that last sentence in Neat sounds like proof beyond any doubt at all – 'actual persuasion' of a fact? And does not section 140(c) of the Evidence Act now cover *Briginshaw*?'

Bullfry: That is a question upon which greater minds than mine have stumbled, your Honour. 'Actual persuasion' is satisfied at a civil trial, your Honour, once the occurrence of the act is more probable than not – then it is certain'.[7]

Her Honour: Well, that is a fine distinction which will be difficult to explain. And I thought that ever since *Green*[8] and *Thomas*, trial judges have been strictly adjured not to attempt to explain what the simple English words 'beyond reasonable doubt', mean?

Bullfry: That position, so it would appear, is yesterday's thinking. The High Court pays lip-service to the traditional position but then goes on to suggest that the trial judge do the very thing which the authorities have hitherto made clear is very dangerous.

Her Honour: What authority does the High Court cite for this suggestion?

Bullfry: Very little, unfortunately. There is a reference at footnote [59] in *Dookheea* to the Bench Books (which are Delphic) and to *Ho*[9] and to *Ward v The Queen*[10]. Now the reference in *Ho* at 548, [15] is not to the Court of Criminal Appeal's judgment at all – Bell J is, in fact, quoting from the impugned judgment of the trial judge in *Ho* who had referred to 'a civil case whether monetary damages are claimed and where the case is decided on the balance of probabilities'. Her Honour makes the point that in *Fontaine*[11], Barwick CJ had confirmed that it is 'unnecessary and unwise for a trial judge to attempt explanatory glosses on the classical formula'. In *Ho*, the complaint was not about use of the civil onus but the far more common distinction drawn between a finding 'beyond reasonable doubt' and a finding 'beyond any doubt".

Her Honour: Are you saying that *Ho* does not in terms support the new approach?

Bullfry: Unfortunately, it would seem not. And if the practice is 'often' followed in NSW, one might have expected a footnote replete with references.

Her Honour: Well, what about *Ward*?

Bullfry: *Ward* is a most peculiar case in which the trial judge, to assist the jury on onus, using his hands to demonstrate(!), invoked the metaphor of 'tipping scales' so that in a civil case if the scales tipped 'ever so slightly' to one side or the other, that side was successful: see per McClellan CJ at CL at [52]. It is a little like the Queensland case where the Court of Appeal deprecated the use by the trial judge of the cricket umpire and the LBW appeal. Your Honour will remember it – *R v CBK*[12] in which the trial judge, to make things easier for the jury, had discussed their being satisfied beyond reasonable doubt in terms of the 'height of the ball, … the snicker and any other replays that are available, where the ball pitched, whether it was in line with the stumps …".

Her Honour: Is that it? Is that the entirety of the authority?

Bullfry: It is. And your Honour is bound to apply it. In fact, doing so is to be encouraged. Now my requested direction doesn't involve anything 'fanciful', so the problem in *Green*[13] does not arise. My request simply requires an appropriate Briginshaw approach. In

Briginshaw, Dixon J pointed out that: '… reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences ….[14]

Her Honour: But surely, as soon I give that sort of direction, I will be inviting the jury to engage in an analytic exercise dissecting such doubts as they may be experiencing? It will be creating a mare's nest.

Bullfry: That is no doubt something that the CCA can sort out in due course if your Honour goes astray. May I, with respect, hand up a suggested direction to the jury that deals with the balance of probabilities example in the context of *Briginshaw* – and your Honour will see that I have purposely refrained from introducing any hand gestures, or references to cricket.

ENDNOTES

1 [2017] HCA 36 at [41] per Kiefel CJ, Bell, Gageler, Keane, Nettle, and Edelman JJ.
2 (1960) 102 CLR 584.
3 (1938) 60 CLR 336. "In *Briginshaw* five judgments (those of Latham CJ, Rich, Starke, Dixon and McTiernan JJ) were delivered, each with substantial differences and nuances of meaning , and with Latham CJ indeed dissenting as to the result": per Peek J in *Stanberg Pty Ltd v Tabibi* [2012] SASC 187 at [99].
4 [1992] HCA 66; 67 ALJR 170 at 170 – 171 per Mason CJ, Brennan, Deane and Gaudron JJ.
5 [1965] HCA 46; (1965) 112 CLR 517 at 521 – 522 per Barwick CJ, Kitto, Taylor Menzies, and Windeyer JJ.
6 See the discussion by Peek J in *Stanberg Pty Ltd v Tabibi* [2012] SASC 187 at [112] and following.
7 "A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain": per Deane, Gaudron and McHugh JJ in *Malec v JC Hutton Pty Ltd* [1990] HCA 20; 169 CLR 638 at 642 – 643.
8 (1971) 126 CLR 28 citing Dixon CJ in *Dawson v The Queen* (1961) 106 CLR 1 at 18: "it is a mistake to depart from the time-honoured formula. ... The attempts to substitute other expressions … have never prospered." And see *Darkan v The Queen* (2006) 80 ALJR 1250 at 1265, [69].
9 (2002) 130 A Crim R 545 at 548, [15] per Bell J
10 [2013] NSWCCA 46 at [54] per McClelland CJ at CL (Latham and Adamson JJ agreeing) at [246], [247].
11 (1976) 136 CLR 62 at 71.
12 [2014] QCA 35 at [4].
13 (1971) 126 CLR 28 at 33.
14 (1938) 60 CLR at 361 – 362. And see *FTZK v MIMA* [2014] HCA 26 per French CJ and Gageler J at [12].

THE FURIES

Lifts. Every day I go to court I have to do the 'lift dance'. Men more senior than me insist on waiting for me to enter and leave first, while within male ranks juniors give way to seniors. Sometimes it takes an extra half a minute to do this dance. Should I say that I don't want to be marked out as different because of my gender?

Dear Escalating Advocate,

Civility, whether it is at the lift well or in a court room, is never a waste of time and a courtesy, provided it is motivated by respect, is always worthwhile. Taking your time to acknowledge another in the lift and, with eye contact and gesture, allowing them to precede you, may well be the beginning of many fruitful encounters whether ascending a building or transcending a timetabling issue. If the other person would, instead, prefer to extend to you that courtesy, then eye contact and a hand gesture (taking all of three seconds) should be sufficient to make that clear. However, an impatient insistence that you squeeze yourself between trolleys and the generous girths of older practitioners to exit on a floor (possibly not yours), just because you are wearing a skirt, is neither courteous nor respectful and should be treated with contempt. If you are extended the courtesy of entering a lift first, perhaps you can reciprocate by offering to press the button? Otherwise, have you ever offered to allow others to go before you at the lifts? If not, then you may well be in breach of the unwritten rules of lift precedence which we now set out for your edification:

1. All juniors (regardless of gender) should allow silk to take precedence, acknowledging, as they must, the respect owed to senior counsel for their fortitude in answering questions from judges.

2. All barristers (regardless of gender) should allow judges to take precedence, acknowledging, as they must, the respect owed to judges for their fortitude in deciphering responses from senior counsel.

3. Everyone should allow couriers to take precedence, acknowledging, as they must, that no one has the fortitude to come between a courier and an opening lift door.

Judges often say that advocates should only take their best points and avoid unnecessary evidence and cross-examination. But it is difficult or impossible to identify the best points until the end of the trial (or the end of the appeals); many cases are lost because such-and-such a question wasn't asked or such-and-such a point wasn't taken. How can I follow the instruction to be highly selective without running the risk that I will abandon a potentially winning point? Surely my duty to my client requires that I err on the side of caution and include those points which might win, not only those which appear to be the best points at the outset of a case?

Dear Unbridled Barrister,

Your two-paragraph question suggests you may lack some discipline in expressing yourself (as to which we refer to the Furies' first advice in the last edition of *Bar News*). Apparently, that also extends to points of argument and possibly claims.

To answer your question, the Furies invoke the words of none other than Chester Porter QC: 'The secret of winning cases, criminal or civil, is to pick out one or two points that you're really going to fight on, and fight on those. The scattergun defence never works.'

Chester Porter QC was, before his retirement in 2000, accorded Christ-like qualities which the Furies suspect was not just because his last name has the happy coincidence of rhyming with 'water', but because many people thought he knew a thing or two about advocacy. His words have been faithfully recorded on the oral histories section of the Bar Association website (Chester 14:10), but little else is given to explain them.

Without wanting to risk a theological rift with the more devout believers in Porter's divinity, the Furies interpolate that in 'picking one or two points that you are really going to fight on', Porter QC was suggesting that they ought to be your best points. We may even go further and suggest that, in more complex cases, more than two points may be required to win, in which case you must run your *necessary* or *winning* points. Running unnecessary and losing points is distracting, time wasting and may diminish the potency of your best points.

Of course, you are now asking the question: how does one decide which are the necessary or winning points? This requires judgment. Good barristers have it and we are reliably informed that, through experience, it may be developed.

Until you *have* judgment, may we suggest that you *give* judgment, or at least pretend to. If you were to judge the case before you, in a way that is both favourable to your client and intellectually honest, what points would you rely upon? If, in doing this, you develop judgment, you may find yourself being accorded a status that guarantees you precedence at the bar. Maybe even at the lifts. But perhaps not before couriers.

David Bennett AC QC

50 years at the New South Wales Bar

Members of the bench and bar gathered in the Common Room on 20 October 2017 to congratulate David Bennett AC QC for his remarkable achievements during the half-century since he was called to the bar in 1967. Not since the 150 Not Out Dinner in 1999 for Tom Hughes, Chester Porter and Frank McAlary had there been a gathering under Bar Association auspices to celebrate the milestone of 50 years in practice. Speakers for the evening were John Sheahan QC, President Arthur Moses SC and, of course, David Bennett AC QC himself.

Mr Bennett's accolades are many and varied. He took silk in 1979; was appointed officer in the Order of Australia on 12 June 2000 for service to the law and the legal profession in the areas of administration, education and practice. He was appointed as a life member of the Bar Association in October 2001. He has served as bar councillor for many years. He was an office bearer and president of the New South Wales and Australian Bar Associations. He served as president of the Medico Legal Society of NSW; as a council member of the Australian Academy of Forensic Sciences; as member of the International Commission of Jurists, Australian Section. In August 1998 Mr Bennett was appointed as solicitor-general of the Commonwealth, then subsequently appointed for a second five-year term in 2003. Following David's second term as solicitor-general he returned to the bar and in 2010 delivered the Sir Maurice Byers Address – the Bar Association's premier oration on Constitutional law.

In addition to being a celebration of David Bennett's achievements during a half-century in the law, the evening was also an opportunity for a light-hearted roast. President Arthur Moses SC spoke about, among other things, Mr Bennett's interview 'On the Couch' with Richard Ackland. He said:

> Richard couldn't be here tonight. In fact, he was not invited. However, it was from him that we did learn many relevant things. David's favourite movie is *Dr Strangelove*. His favourite piece of music is 'Oh Susannah'. His most recognised talent is the ability to simplify complex concepts. David's hobbies include dinner parties and computer games. He has a strong dislike of white wine and champagne before dinner and claims to make the best martinis in the Southern Hemisphere. He once famously said that being a barrister was 'like being paid for eating chocolate'.
>
> …
>
> Unfortunately, overshadowing much of David's hard work in the office of bar president is his brush with The Naked Lady – that scandalous painting which had hung on the walls of this common room. I won't say anything more about that matter, except that David's opinion on the lady who is the subject of the painting has, according to Ackland, 'troubled many medical and legal experts'.
>
> In May 2003, at the swearing-in of Annabelle as a Federal Court judge, David broke with the convention that the attorney-general should speak on behalf of the bar. This was done on the basis that 'sometimes the first law officer accepts and acts on recommendations from the second law officer'. In the conclusion to his speech David noted that 'this is the first and last time on which I'll be able to address you as your Honour. Notwithstanding that I will never cease to honour you and your incredible achievements'. It was the first and only time that I can recall a swearing-in ceremony bursting into applause.


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This page, top to bottom, left to right:

1. Tim Hale, Jeff Phillips, Trish Kavanagh.
2. Tony Bannon, Chief Justice Bathurst, Peter Jacobson, Ishita Sethi.
3. Catering.
4. Jeffrey Phillips.
5. Garth Campbell, Andrew Smorchevsky.
6. John Sheahan.
7. David Jackson.

Top of this page, left to right:

8. John Sheahan, Hugh Stowe.
9. James Gibson, Sam Hallahan, David Larish.
10. Michael Izzo, David Harris.
11. Simon Kalfas, Charles Gregory, Vance Hughston Mark Boulton.
12. Rashelle Seiden, David Jackson, Sheila Kaur-Bains.
13. Carer, Phillipa Gormly, David Williams, Matthew Lewis, Paul Glissan.
14. Simon Kalfas, Trish Hoff, Mark Boulton.
15. David Jackson, David Bennett, Maher Gaven, Malcolm Oakes, John Sheahan, Noel Hutley.
16. Dale Bampton, Sonia Stewart.
17. Matthew Lewis, Brian Knox, Michael Heath.
18. Tony Bannon, Peter Jacobson.
19. David Bennett, John Sheahan, Tim Hale.
20. Dyson Heydon, David Jackson.
21. Virginia Lydiard.

Claire Palmer

The New South Wales Bar Association, in conjunction with the Katrina Dawson Foundation, has awarded Claire Palmer the inaugural Katrina Dawson Award. The Katrina Dawson Award is an annual award that was created to honour the memory of Katrina Dawson, who was a beloved member of the New South Wales Bar.

Katrina's colleagues will remember her for far more than her exceptional skills as an advocate. Perhaps most of all, she will be remembered as someone who made life at the bar so much the richer because of the friendships she forged and for the mentoring and assistance she provided to anyone who sought her out, as many did. It was this contribution that Katrina made to the bar and the extent to which she had a positive impact on those who had the privilege of knowing her, that led the Bar Association's president, Arthur Moses SC, to suggest to the Katrina Dawson Foundation that the bar find a way to acknowledge and contribute to her legacy.

To date, the Katrina Dawson Foundation has had as its focus the funding and mentoring of young women at the undergraduate and postgraduate level. However, when Moses pitched the idea that an award be created in Katrina's name, with the objective of encouraging women to commence their practice as a barrister, it was warmly embraced by the foundation. 'We have always been enormously grateful for the support members of the bar have provided to the foundation', said Nikki Dawson, the foundation's chief executive officer. 'The award has been funded entirely through the generosity of members of the New South Wales Bar and we are thrilled that the Bar Association was able to see the award all the way through from the initial idea of its being granted, to its first recipient.'

The award, worth $12,000, is open to women who have passed the New South Wales Bar exam and are committed to starting practice. This year's award was funded by donations made to the team of barristers that ran in the 2017 Sydney Half-Marathon. A four-person selection committee was formed to choose the inaugural recipient of the award. It consisted of Jeremy Stoljar SC and Sandy Dawson SC, both directors of the Katrina Dawson Foundation, as well as Anna Mitchelmore. Among other criteria, including excellent academic qualifications and demonstrated leadership in the community, the selection committee was looking for applicants who were able to show an ability and desire to participate in, and foster life at the bar.

Claire Palmer very recently commenced her career at the bar, having participated in the September Bar Practice Course. She has joined the Sixth Floor, where she is reading with James Arnott and Ross Foreman. Immediately prior to coming to the bar, Palmer completed a DPhil at the University of Oxford as a Clarendon scholar. During her time overseas, Palmer also lectured in law and international relations and worked as an associate in the Supreme Court of Namibia.

'I am tremendously honoured to be the 2017 recipient of the Katrina Dawson Award', Claire said. 'It is a clear testament to Katrina's warmth, brilliance, and generosity of spirit that her colleagues and friends have contributed so generously to make this award possible. The objective of the award is to support women who decide, as Katrina did herself, to start a career at the bar. I am extremely grateful to the New South Wales Bar Association (and all those who have supported this award) for this exceptional opportunity.'

Art Law

Mr Shane Prince and Mr Brian Kelly leaving the Supreme court following *Save Our Rail NSW Inc v State of New South Wales by the Minister administering Transport for New South Wales* **[2014] NSWSC 1875 (24 December 2014).**

The painting, by Emily Beckett, was entered in the Law Society's 'Just Art' competition.

The Peteris Ginters Lunch – In honour of his retirement from practice

Robert Reitano

On Friday 27 October 2017 a group of 70 or so barristers, former barristers, clerks and chambers staff gathered at the Marigold Restaurant in Chinatown to celebrate the retirement from practice of one of the bar's own, Peteris Ginters. Peteris was diagnosed on 7 November 2016 with motor neurone disease. The lunch was an opportunity to say thank you to a friend, a colleague, a mentor, a fellow practitioner and most of all, to one of the good blokes of the New South Wales Bar. Few of you will ever know the feeling of emptiness that surrounded me on the morning of 10 November 2016. After not seeing Peteris for two days, he entered my room, closed the door and uttered the words I will never ever forget: 'So do you want to know my news? I've got motor neurone disease.' There was nothing to say so I filled the silence with the only word I could think of: 'f**k'. After that I went through all those things that I suppose people confronted by such news from others go through, 'This might be a mistake, you need to get a second opinion'. He left chambers that day with the promise that we would still have lunch. And we certainly did on 27 October 2017.

It is not uncommon to question why it is that someone who has lived a healthy, productive and blameless life can be struck down by such a debilitating disease without warning or provocation. There is no satisfactory or remotely appropriate answer to such a question. On any level there is no good that can come of this. Or at least that was what I thought until I considered what I had learnt from the experience of watching my friend and his wife, Caroline's response to motor neurone disease. Those at the lunch were privileged to witness Peteris's response to his diagnosis of a disease without a cure. The good to come out of this lay in the sterling example Peteris offers to each one of us in confronting this challenge.

From the time of his diagnosis Peteris has faced the challenge with strength and stoicism. His primary concern has been his family and the pressure the disease has placed upon them. Peteris loves his family and his thoughts are about them and not himself. He knows he has a battle on his hands but his primary concern is to shelter his family and friends as best he can from his suffering.

Members and staff of 15 Wardell Chambers. **Standing from left to right:** Andrew McSpedden, Adrian Canceri, Andrew Joseph, Tim Reilly, Larissa Andelman, George Lucarelli, Erik Young, Geoff Johnson, Hanna Roberts, John McNamarra, Casey Thomas. **Seated from left to right:** Paul Jones, Peteris Ginters, Robert Reitano.

Peteris has entered a trial of a new therapy under the care of one of Australia's leading neurosurgeons, Professor Dominic Rowe AM, acknowledging that while his experience may assist others, it is unlikely to extend his life. In true Peteris style he took the opportunity to speak in support of Professor Dominic Rowe's Research Project at the lunch, and as a result $16,000 was raised for the cause.

As a bar, one thing we do very well is close ranks in adversity. This was certainly no exception. This was an advertisement for everything that is good about the bar. It was a remarkable celebration from beginning to end. Ingmar Taylor SC as master of ceremonies was as perfect as ever. The speech from Moses SC was greeted with a standing ovation like no other. Peteris replied to Moses SC in a speech that left no eye dry in the house. Kenzie QC proposed a memorable toast.

Moses SC's remarks included:

> We know that collegiality matters in this profession which can be bruising. However, I should note, that according to a survey undertaken recently of the New South Wales Bar, the data showed that members of the criminal and industrial bar, where collegiality is the strongest, reported higher scores for quality of working life and resilience than their colleagues practising in commercial and personal injury litigation.

Peteris has proven himself to be a leading member of the industrial bar. His colleagues invariably describe him as diligent, bright, punctual and capable: an absolute delight to work with.

As some of you may know, Peteris began returning briefs late last year, following his diagnosis with MND. He has shown great courage, dignity and determination in the face of what must have been a great shock to him and his family.

I should note that when Justice Marshall retired from the Federal Court in a ceremonial sitting in 2015, he singled out Peteris for special praise, saying that he had been ably assisted by Peteris as his associate. Justice Marshall referred to Peteris as a leading member of the Sydney junior industrial bar. The judge was wrong to say that. Peteris is a leading member of the Sydney industrial bar, period. He ran rings around senior counsel, especially some present today, including myself. Had Peteris remained at the bar, I believe he would have been appointed senior counsel.

Peteris is married to Caroline, who joins us today, with whom they have two children: his son, Mason and daughter, Taylor. Both were named – not at all inappropriately – after High Court judges. Caroline has been a

great source of strength and love to Peteris and the love of his family will sustain him.

Peteris, on behalf of the entire bar of New South Wales, I offer you my sincere congratulations for all that you have achieved during a career that has, regrettably, come to an end far too soon. I also offer my heartfelt best wishes and promises of support for you and your family in the times ahead. We stand by you, now and in the future. We thank you. We love you. We salute you.

The standing ovation that followed saluting our friend and colleague resounded through the Marigold Restaurant and down the streets of Chinatown.

Peteris was then heard in reply:

It's traditional at events like these to begin with a roll call acknowledging and thanking the judicial and tribunal members and distinguished and other guests for being here. I would prefer to start by simply saying welcome, and thank you to all of my dear and close friends for being here, as that captures how I feel about everybody in this room. I am overwhelmed and humbled by the number of people who are here to share today with Caroline and me.

So, why are we all here? First, to enjoy lunch, a few drinks and a catch up with friends and colleagues. Secondly, because on 7 November last year I was diagnosed with motor neurone disease.

Motor neurone disease, or more specifically in my case, amyotrophic lateral sclerosis, was first described as a neurological disease by a French physician (J M Charcot) in 1874. In simple terms, we are all full of nerve cells (or neurones) that control the muscles that enable us to move, speak, breathe and swallow. In people with motor neurone disease these neurones fail to work normally, degenerate and die. With no neurones to activate them, muscles gradually weaken and waste.

The form of motor neurone disease that I have typically commences by first attacking the neurones associated with the major muscle groups in the legs and arms. As you can see I'm a case in point. Motor neurone disease goes on to affect a person's ability to walk, speak, swallow and breathe. For this reason it is ultimately fatal.

Fortunately I am under the care of a brilliant neurologist, Professor Dominic Rowe at Macquarie Neurology. Dominic is presently the principal investigator in a world first human trial of a drug, CuATSM. I am in the privileged and very lucky position to be a participant in this drug trial. Currently there are only about 30 people on the trial, with the hope that it will expand to include about another 20.

To date, animal trials of CuATSM have been encouraging. For example, use of CuATSM restored health to a very sick mouse model of amyotrophic lateral sclerosis, extending its one- to two-week lifespan to almost two years.

Unfortunately though, humans are not mice, so there is a great deal of work that still needs to be done to determine whether CuATSM will be safe and effective in slowing down the degenerative effects of motor neurone disease in humans.

It's very early days but I have to be, and do remain, optimistic. I've got nothing to lose, and there is a great deal to be said for the power of positive thinking!

With this in mind, and if you wish to, please feel free to contribute to Professor Rowe's research. You can be assured that every (tax-deductible) dollar donated will go directly and in full to Professor Rowe's research.

Finally, I must make special mention of a few people who helped with making this day possible. Arthur Moses and Ingmar Taylor for coming up with the idea of holding a get-together. The staff from my former chambers – John, Casey, Hannah and Mitchell – for taking on the burden of managing logistics. Lastly, and most importantly, my best friend Robert Reitano, who has been a great support for me since my diagnosis, as well as being the driving force behind making today's function a reality.

Thank you again for all being here to share this day with Caroline and me.

Members and former members of H B Higgins Chambers, where Peteris started at the Bar: **Seated:** Adam Searle MLC, Peteris Ginters, Ingmar Taylor. **Standing left to right front:** Mark Gibian, Shane Prince, David Chin, Francis Backman, Adam Hatcher, Patricia Lowson. **Standing left to right behind:** Darien Nagle, Tony Howell, Geoff Warburton, Andrew Joseph, Daniel Brezniak and long-standing clerk Damian Elliott.

There was not a single person at the lunch who did not regard themselves as utterly privileged to have shared any part of their life's experience with Peteris and to hear him speak of his life, his wife and children and his approach to motor neurone disease.

The New South Wales Bar rose to its feet for Peteris that day and continues to do so in support of him and his family, honouring him as a true friend. A man of strength, courage and substance whose professional life reflects the best of life at the bar and whose family life has set a standard that can only be admired. Again Peteris Ginters, we salute you.

If you would like to make a donation to Professor Dominic Rowe's research, please contact Robert Reitano at rreitano@15wardell.com.au.