THE JOURNAL OF THE NSW BAR ASSOCIATION | AUTUMN 2018

barnews

First Nations and the NSW Bar

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Implied terms of fact: counsel's last resort

Robert Stephen Toner *(1951-2018)*

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ISSN 0817-0002

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

Cover: The Hon Justice Rares of the Federal Court at a ceremonial welcome before the determination of the Yindjibarndi People claim. Photo: By Tina Jowett

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What the Bar was, is and can be

Australia is indeed the lucky country, for most. Yet the tyranny of the majority has cast its stains here too.

One such stain is the treatment of our Indigenous peoples. Massacred, dispossessed of their land, deprived of citizenship, and treated with disdain or worse for decades, the descendants of our First Nations unsurprisingly remain largely disadvantaged.

This edition of *Bar News* focuses on the rights of First Nations people and the law.

In August 2001 the Bar Association established the Indigenous Barristers' Trust – The Mum Shirl Fund. Established and carried on in large part by the sheer force and determination of Chris Ronalds, with the support of Ruth McColl, Bret Walker, Mullenjaiwakka and Michael Slattery, amongst others, it has facilitated the pursuit of the practice of law by Indigenous persons.

This edition carries profiles of four such First Nations lawyers: Teela Reid, previously tipstaff to Justice Lucy McCallum, and barristers Tony McAvoy, Leon Apostle and Damian Beaufils.

Teela speaks of the assistance provided by the Bar Association and the trust: 'It's not just the financial assistance – it's the connections made amongst law students, graduates and people in the profession such as judges, barristers and solicitors that are breaking down barriers. Young Aboriginal lawyers are now starting to believe that going to the Bar is possible…'.

Michael Kirby has written a piece that examines the everyday discrimination faced by Aboriginals in the in the 60s. And Sol Bellear, who recently died shortly before the 25 year anniversary of Paul Keating's Redfern Speech, speaks of its impact in a moving interview conducted by the NSW Aboriginal Land Council.

Looking forward, Professor Megan Davis, Professor Rosalind Dixon, Associate Professor Gabrielle Appleby and Noel Pearson discuss how the First Nation's people should be recognised by our Constitution, and why there should also be a mechanism created to acknowledge the wrongs of the past. As they explain, the Uluru Statement from the Heart provides the path to an important, indeed necessary, step to true recognition and reconciliation. It is a shame that the human failings of our national cricketers gave rise to more commentary and column inches than the failure of our leading politicians to embrace the Uluru Statement.

Vance Hughston SC and Tina Jowett provide an analysis of the developing law in respect of native title compensation claims, where Courts are being asked to put a monetary figure on the loss of the connection Aboriginal peoples have with 'country' following the extinguishment of their native title rights.

A different stain caused by the tyranny of the majority is examined in a powerful speech by a leader of our Bar, Bret Walker. His speech focusses on our nation's decision to indefinitely detain refugees overseas. By reference to German case law and the writings of Immanuel Kant, he expounds on the fundamental proposition that it is impermissible to use the lives of others as a means to an end.

Bar News continues to examine the current State of the Bar and its increasingly diverse membership. To that end there is a new column, 'Who is a barrister?', under which title each edition will profile a barrister who is not one of the usual suspects.

The caricature of a barrister is a white, middle-aged man practising out of wood-paneled chambers adjoining the Supreme Court (yes, Bullfry, I am talking about you). They still make up a sizeable proportion of the Bar, but they are aging (about a third of the Bar are men over 60yrs of age) and the make-up of the Bar is gradually changing. Did you know that more than 10% of the Bar are women over 50 yrs? The first 'Who is a barrister?' column profiles one of them – Anne Gibbons, who came to the Bar at the age of 52 yrs.

Wellbeing at the Bar continues to be a significant issue. Our President has written a powerful column on judicial bullying and the effect it has on practitioners.

A view from the other side of the bar table is provided by our first Archon's View column. An anonymous Superior Court judge writes about the effect that certain types of counsel have on her [or him]. Known types of counsel are identified, such as the LOD (light on detail) counsel, who 'work on the assumption that facts are like truffles, an expensive delicacy not to be consumed in substantial qualities; also that judges were truffle pigs. And, just in the case of the poor truffle pig, the judge never got the good end of the deal.'

For those who have been meaning to take up gentle exercise to help address the stresses of the Bar, there is a review of Supreme Court Justice Ruth Bader Ginsberg's exercise regime.

This edition also contains a typically entertaining piece by David Ash, packed full of amusing asides, on the development of the law on implied terms in a contract. It reveals the rich history that underlies the usual one paragraph excerpt from *BP Refinery (Westernport)*, the last Privy Council decision to be recorded in the *Commonwealth Law Reports*.

There a number of other great pieces. David Robertson has written a fascinating account of the first paperless trials being conducted by the Land and Environment Court. Michelle Painter provides an insight into the tragedy and emotions that arise when 'the whispering division' hears matters in its Family Provision List. Christopher Parkin of the NSW Bar, and Duncan McCombe, chair of the Young Bar of England and Wales in 2017, tell us what it is like to practise at the London Bar. Alexander Rose writes about how the law is slowly catching up with genderfluidity. Steven Berveling provides an insight of what it is like to be a plaintiff in a personal injury matter. Kevin Tang provides another of his entertaining excursions into the history of the Bar, this time the history of the 'Doctor's Commons' who practiced ecclesiastical law. And Poulos' obituary of that titan of the Bar, Robert Toner SC, is absolutely wonderful.

Bar News, as the journal of the NSW Bar, is a record what the Bar was, what it is, and what it can be. If you can contribute to that record, please do so.

In particular, if you have a strong view about an aspect of practice or the mores of the Bar then send me a piece that can be published anonymously as Advocatus.

Or if you merely have questions, then send me one, and let the Furies provide the answer.

Ingmar Taylor
Greenway Chambers

Judicial bullying

by Arthur Moses SC

A workplace too important to fail

Many of you will recall in March-April 2017 the Bar Association surveyed 2329 practising certificate holders. By the standards of such things, it was a great success. We received 947 valid responses: equivalent to 41 per cent of all New South Wales PC holders.

While the courts are adopting new technologies and becoming more efficient, the fair and quick administration of justice depends more than ever upon the professionalism and diligence of both bench and bar and courteous relations between the two.

The survey incorporated three sets of questions designed to measure the wellbeing of barristers and the quality of their working life. It yielded a rich data set, which is being analysed to identify problems experienced by members, particularly those affecting the retention of junior barristers and to provide a methodology for new or better services and benefits.

I have spoken candidly, both in *Bar News* and in the mainstream media, about the urgent need for state and federal governments to properly fund the courts and legal aid. For decades now, access to justice has been given only lip service by various ministers and members of parliament. The strains upon the criminal justice and family law systems are manifest in clogged lists, underpaid and over-worked junior counsel, a growing reliance on pro-bono schemes and the prevalence of self-represented litigants. While the courts are adopting new technologies and becoming more efficient, the fair and quick administration of justice depends more than ever upon the professionalism and diligence of both bench and bar and courteous

relations between the two. The courtroom, it could be said, is a workplace that is too important to fail.

Against this backdrop, it is concerning to report on instances where relations between bench and bar have begun to fray. Of those who responded to the survey, 66 per cent said they had experienced judicial bullying. The Fair Work Ombudsman provides a definition of bullying in the workplace, according to which, a worker is bullied at work if:

- a person or group of people repeatedly act unreasonably towards them or a group of workers
- the behaviour creates a risk to health and safety.

Unreasonable behaviour includes victimising, humiliating, intimidating or threatening. Whether a behaviour is unreasonable can depend on whether a reasonable person might see the behaviour as unreasonable in the circumstances. Examples of bullying include:

- behaving aggressively
- teasing or practical jokes
- pressuring someone to behave inappropriately
- excluding someone from work-related events or
- unreasonable work demands.

Chambers work, in the form of drafting submissions and holding conferences, occupies a great amount of barristers' time, but our *raison d'etre* is advocacy and the courtroom is our workplace. The verbal interaction between the bench and bar table is what determines one's success or failure in the profession. Which makes it surprising that there does not appear to be a definition of judicial bullying. However, like US Supreme Court Justice Potter Stewart in *Jacobellis v Ohio*, members of the Bar Association appear to 'know it when they see it'. The QoWL survey contained an open question: 'What form did this judicial bullying take?' Respondents identified as examples:

- Belittling, patronising or humiliating comments in front of colleagues and a jury
- Repeated intimidation and interruptions
- Angry outbursts and yelling
- Unreasonable deadlines
- Gender slurs: 'Being asked in an open court who will take care of my baby during the trial'.

I would suggest that some of the correlates of judicial bullying and poor quality of working life result from the pressure that our courts are under.

Judicial bullying was reported by barristers at all levels of seniority – including those with less than five years standing through to, and including, those with more than 20. The survey also indicates that the *prevalence* of judicial bullying *appears* to be higher in the District and Supreme Courts than the Federal Court. Barristers whose areas of practice are professional negligence and personal injury reported comparatively greater difference in wellbeing scores between those who have experienced judicial bullying and those who have not.

We can say with a high degree of confidence that, among those holding a New South Wales Barrister's practising certificate, a 'Yes' response to the question on judicial bullying correlates with a *cluster of factors*, which *together predict a low quality of working life*. Other factors that relate to a barrister's working conditions include, but are by no means limited to:

- Working more than 60 hours per week;
- Working more than 20 unpaid hours per week;
- Lack of sleep
- A perception that other barristers are more productive
- A feeling that their job is not secure
- Perfectionism

Perhaps statisticians and social scientists will disagree, but I would suggest that some of the correlates of judicial bullying and poor quality of working life result from the pressure that our courts are under. The Bar also needs to be mindful of the fact that judges are under enormous pressure and like the rest of us, have human frailties which sometimes manifest in inappropriate behaviour in the courtroom. As president, I will continue to vigorously advocate to the premier and the attorney general for increased funding for legal aid and for adequate judicial resourcing. Furthermore, the Bar Association will target all of the factors correlating with lower scores for wellbeing.

That said, the Bar Association has received an unequivocal message from its members: judicial bullying is perceived to be a workplace hazard for barristers and you expect us to respond on your behalf.

Appropriate responses

First, I have asked the Wellbeing Committee to investigate appropriate responses to instances of judicial bullying. Without prejudicing the outcome of their deliberations, there are a number of options being looked at. The first is a 'Hotline' or other means of confidential consultation. The Bar Association has the capacity and experience to do this and there are a number of precedents.

> Members of the Bar Association who are concerned with a delay in a reserved judgment, can contact the Bar Association's executive director in writing requesting that discrete inquiries be made of the court or tribunal.
>
> BarCare and the Benevolent Fund are two more. A fundamental concern for barristers, their clerks and other colleagues is that a request for assistance should not put them at risk of a professional conduct investigation by the Bar Association. That is why BarCare, in particular, is operated at arms length from the Bar Association, in order to reinforce trust in its impartiality and confidentiality.
>
> Ethical Guidance Scheme: members of the New South Wales Bar Association can seek urgent ethical guidance from a senior counsel currently serving on the association's Professional Conduct Committees. In urgent cases the contact may be by phone. Bar Council could form a dedicated committee to manage reports of judicial bullying through practices and procedures that mirror the Professional Conduct Committees.

In most instances, trials take place in an open courtroom, in some cases before a jury. Proceedings are recorded and transcribed. Clients, counsel, solicitors and court staff are present. Many trials are reported in the mainstream media. If judicial bullying occurs, it is taking place 'in plain sight'.

Secondly, consideration is given to consultation with the heads of jurisdiction: a 'quiet word' with the chief judge or the chief justice occurs from time to time. The Bar Association in the past has lodged a complaint with the Judicial Commission of NSW in relation to judicial bullying. However, I can say that without breaching any confidences that when I have raised issues with Chief Justice Bathurst, he has engaged in a constructive manner in relation to the issue of judicial conduct in the courtroom. Chief Justice Allsop of the Federal Court, tells our readers during their Bar Practice Course, that he does not tolerate judicial bullying by members of his court and if it is experienced by any of the readers, then he would like to know about it. The comments of Chief Justice Allsop provide reassurance to our colleagues at the outset of their career, that judicial bullying is not the norm and should not to be tolerated by the profession.

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Training and CPD

Reporting and verification of judicial bullying can have only a limited effect. Regardless of how the problem is characterised, judicial bullying is, by its nature, a conflict that can be escalated or de-escalated, depending on the behaviour of the judge and counsel.

Many companies train their staff in 'how to deal with difficult people'. A curriculum and training modules could be included in the Australian Bar Association's Advanced Trial Advocacy Intensives and the Bar Association's Continuing Professional Development program and Bar Practice Course, which would instruct counsel in techniques for increasing their resilience and

responding appropriately to judicial bullying.

Professional courtesy

While there are appropriate responses open to the Bar Association, the most opportune time for an intervention is before the court adjourns. Professional courtesy and a sense of collegiality require counsel – particularly senior counsel – not to look the other way if a colleague at the bar table is subjected to unreasonable, inappropriate or objectionable behaviour at the hands of a judge. Ask for an adjournment to break the cycle of confrontation. Offer encouragement or constructive advice to the counsel at the bar table, or if the barristers subjected to bullying wishes to raise the matter appropriately with the Bar Association, then consider lending your support.

This is a matter of extreme sensitivity, but great concern to members of this association. There is no other body better placed to represent the interests of those for whom the courtroom is their workplace. For that reason, I, as president, together with the Bar Council, will treat judicial bullying with the utmost gravity.

NEW SOUTH WALES
BAR ASSOCIATION

ABA - High Court Dinner & High Court silks bows ceremony

The Hon Justice Michelle Gordon

Noel Hutley SC

The newly appointed silks from every state and territory took their bows before the High Court in Canberra on Monday, 5 February 2018. That evening, the Australian Bar Association held its annual dinner in the Great Hall of the High Court

The silks take their bows before the High Court

Lisa Nichols SC

NSW silks, L to R: Lesley Whalan SC, Melissa Gillies SC, Francis Hicks SC, Michael Wright SC, Michael Elliott SC, Ruth Higgins SC, Greg Waugh SC, Naomi Sharpe SC, Kate Morgan SC

Presidents of the state and territory bar associations, L to R: Ian Robertson SC, Christopher Hughes QC, Noel Hutley SC, Matt Collins QC, Ken Archer, Arthur Moses SC, Miles Crawley SC, Matthew Howard SC, Chris Gunson SC

ACC Australia National Conference 2017

A report from the Practice Development Committee

by Liz Cheeseman SC, Chair, and Michele Kearns, Clerk Representative

ACC Award for Excellence in Corporate Social Responsibility sponsored by the NSW BAR Association presented by Liz Cheeseman SC to Ailsa Bailey, Senior Legal Counsel, NAB

The Practice Development Committee is a committee of the NSW Bar Association. The committee comprises silks, juniors and clerks from a variety of practice areas. The committee's charter includes as one of its objects, the promotion of the work of barristers to solicitors, in-house counsel and clients.

NSW Bar sponsorship of ACC Australia National Conference

One of the ways in which the committee has sought to promote the work of barristers to in-house counsel, both corporate and government, is by forming a close working relationship with the Association of Corporate Counsel Australia (ACC Australia), formerly known as ACLA. ACC Australia is the premier organisation representing the interests of lawyers working for corporations and government in Australia. The NSW Bar Association is a National Corporate Alliance Partner of ACC Australia and has in recent years been a major sponsor of the ACC National Conference.

In the last edition of *Bar News*, we reported that the Bar Association was sponsoring the ACC National Conference in Alice Springs in November 2017. We are pleased to report that the conference was a great success.

The Bar Association was represented at various events during the conference by Liz Cheeseman SC, Ingmar Taylor SC, Kellie Edwards, Michele Kearns, Angela Noakes and Emma Hoolahan.

The Bar Association sponsored the Australian Excellence in Corporate Responsibility Award which was awarded to National Australia Bank. The NAB team's work included:

- support for the Refugee Advice and Casework Service's Refugees Clinic, which provided about 125 free legal appointments a week ahead of the 1 October 2017 visa application deadline;
- providing legal and commercial expertise to develop the first public offshore green bond from an Australian bank (the proceeds of which will be used to refinance renewable energy and low carbon transport projects) and a world first social bond to specifically promote workplace gender equality; and
- helped develop and maintain documentation for NAB's Microfinance partnership with Good Shepherd Microfinance, which provides fair and affordable financial products to more than 26,000 vulnerable Australians each year.

The 2017 ACC Australia Benchmarks and Leading Practices Report identified employment and workplace relations as one of the top three areas of work that in-house legal departments are most likely to outsource. Ingmar Taylor SC, Kellie Edwards, Michele Kearns and Justin Moses, Head of Knowledge & Development, Legal, Westpac lead an engaging masterclass looking at direct and early briefing of the Bar in a workplace relations context.

One of the hits of the exhibition space, was the Barista Bar run by our indefatigable clerks, Michele Kearns, Angela Noakes and Emma Hoolahan. The clerks were kept busy throughout the conference, engaging directly with delegates, explaining the organisation of the NSW Bar and promoting the services of NSW barristers to the in-house community.

Future events

The committee will continue to work in close partnership with the NSW Barristers Clerks Association and has a number of joint projects in the pipeline.

In response to feedback received from the ACC National Conference delegates the committee is planning a roadshow which will visit various in-house legal teams to provide information on how in-house counsel can best engage the NSW Bar.

In addition, a series of presentations directed to the practicalities of finding and briefing a barrister is in development for each of the NSW Law Society's Young Lawyers committees.

John Dorset Shaw: 50 years at the NSW Bar

John Shaw (left) and his fiancee Violetta, along with colleagues and friends celebrating at Courtneys in Parramatta.

On 9 February 2018 Lachlan Macquarie chambers celebrated 50 years to the day that John was admitted to the NSW Bar.

A dinner was held for John at Courtney's restaurant at Parramatta which was well attended by his colleagues and a number of his close friends and associates.

The president of the Bar Association Arthur Moses SC was unable to be in attendance due to his professional commitments but he sent a note on behalf of the Bar Association congratulating John on 50 years of practice. Arthur canvassed, from the Bar Association's records, some of John's early history at the bar. After John was admitted he practised from Selborne chambers and his master was Phil Powell QC.

Rob O'Neill shared his recollections after he met John in August 1975 on the formation of Wardell Chambers. As John had come from 'Phillip Street' he secured one of the prime corner rooms in Wardell chambers. In 1986 John moved to the "wild West" of Parramatta and was one of the founding members of Lachlan Macquarie chambers.

Over the years John has had an extensive practice in equity, family law, wills, probate and appelate work. John has also developed a close professional relationship with his instructing solicitors some of whom have briefed him for very many years. Some of those were able to be in attendance on the night to celebrate with him. John has developed those relationships by developing a professional work ethic.

John in reply shared some recollections of his early days at the bar particularly an instance where he was briefed to appear before his former master in the Supreme Court and His Honour's succinct advice to John's client to 'bring a toothbrush with him' when the matter of contempt return to the court. John also shared his memories of briefs he held as a junior to Clive Evatt QC and his 'interesting' way of conducting a hearing.

Rob O'Neill
Lachlan Macquarie Chambers

Dear Editor

Yesterday I was alarmed by a report that the NSW Government is considering or intending to abolish committal proceedings in criminal prosecutions. Indictments found without committal proceedings are not new: they are called *ex officio* indictments. Although not new they are exceptional, and are used only in very special circumstances.

I make these comments as a barrister and retired judge who has conducted numerous criminal matters both at committal and trial stages. I was a Crown prosecutor for some years. That role included almost weekly appearances for the Crown in the Court of Criminal Appeal in the years immediately before my appointment to the bench.

Because of the seriousness of the matter, I am moved to warn the government to think carefully before changing the system of the prosecution of criminal cases.

The abolition of committal proceedings without substituting an appropriate equivalent would almost certainly result in many cases going to trial with little or no chance of resulting in convictions. There would be resultant high costs of mounting trials including the expense of empanelling many more juries.

The abolition of committal proceedings is very likely to result in a high prosecution failure rate because of the inability of whoever has the task of finding bills of indictment to assess the evidential strength of many cases when that assessment depends upon paperwork alone without hearing and seeing witnesses whose credit may be doubtful.

One of the primary functions of preliminary hearings is the evaluation of the strength of the prosecution case. The mere fact that there is evidence on paper to establish the essential elements of a crime does not show its probative value. The weight of evidence is an important factor to be considered

In the inevitable event of a much larger number of failed prosecutions at trial, the community at large would become more adversely critical of the criminal prosecution system than they are now, to the detriment of public respect for the law.

I strongly suspect that the financial support provided to the court system, which has manifestly declined over recent decades, is the result of our governments' opinions that money spent on the court system is not electorally efficacious.

Only after a preliminary consideration of the available evidence in a committal proceeding, with access to the evidence if required, should an experienced office (a legal practitioner) in the prosecution service be required to decide, not just that there is some evidence to support a conviction for a crime, but that the weight of the evidence is likely to support a guilty finding by a jury.

The Hon J A Nader RFC QC
Worendai, NSW

Dear Editor

I enjoyed reading Justice Allsop's 2017 Sir Maurice Byers Lecture, set out in the last issue of *Bar News*. The address builds on an 1987 observation by that advocate, 'The law is an expression of the whole personality and should reflect the values that sustain human societies.' My concern is not so much for the law or for the judges who administer it but for the practitioner who represents the client in negotiating its many paths and pitfalls.

It will be soon be the case if it is not already that a material number of commercial solicitors and barristers will never have a natural person as a client, let alone the increasing number of practitioners who will never practise other than as in-house counsel.

In the context of Sir Maurice's observation, how is the law utilised as and applied as an expression of the whole personality which reflects the values that sustain human societies, in a dispute where one or more of the parties has only a legal personality and, to pick up the jargon of trust law, perhaps no more than a bare personality?

The situation is the more complicated when one considers the increase in matters across jurisdictions. A lawyer may represent a group of companies registered in a group of jurisdictions. That lawyer owes a duty to the court, but one asks 'which court?'

My concern is hardly a novel one. As a letter from a highly experienced general counsel to the editor of the ALJ published in December last year indicates, practitioners in the corporate world are well aware of the practical and ethical issues. But it is something that requires close attention sooner rather than later. Or we may wake up to find the civil divisions of our superior courts divided into the Natural Persons List and the Legal Personalities List.

Regards,
David Ash

Intersectionality:
The future of diversity at the NSW Bar

by Lee-May Saw

It is remarkable how appropriately the title of a seminal text on intersectional diversity, *All the Women Are White, All the Blacks Are Men, But Some of Us Are Brave*,[1] captures what it is like to be a woman of colour at the NSW Bar.

In a section titled 'New v Old' in their book *New Women, New Men, New Economy: How Creativity, Openness, Diversity and Equity are Driving Prosperity* , Narelle Hopper & Rodin Genoff capture current forces transforming Old to New in contemporary business and society.[2]

These forces symbolise a context in which New Law is a rapidly growing feature of the legal services market. A context in which the complete complexity of diversity is becoming better and better accommodated and understood.

The NSW Bar Association Diversity and Equality Committee formed a new Cultural Diversity Subcommittee in October 2017. The Subcommittee is committed to furthering cultural diversity at the NSW Bar. A key area of focus for the Subcommittee in the coming year will be intersectional diversity.

What is intersectionality?

Intersectionality refers to the way in which different aspects of diversity, such as gender, cultural identity, sexuality, age and disability, are interconnected and cannot be separated from one another. The theory of intersectionality was first named in the 1980s in the work of Kimberlé Williams Crenshaw. The concept of intersectionality itself in fact existed for decades before this, originally deriving from the work, history and experiences of African American feminists and developing through the work, history and experiences of other women of colour.

Why does intersectionality matter for the NSW Bar?

The traditional approach to issues of diversity in Australia and New South Wales has been to address aspects of diversity independently of each other. It is this approach which ultimately led to the inception of intersectional theory by key African American feminists who have criticised traditional one-dimensional approaches to diversity for rendering individuals who experience multiple aspects of diversity simultaneously 'invisible'.

The sentiments behind the introduction of intersectionality are captured in the words of Mohawk lawyer and activist Patricia Monture-Angus who said:

> Some Aboriginal women have turned to the feminist or women's movement to seek solace (and solution) in the common oppression of women. I have a problem with perceiving this as a full solution. I am not just woman. I am a Mohawk woman. It is not solely my gender through which I first experience the world, it is my culture (and/or race) that precedes my gender. Actually if I am object of some form of discrimination, it is very difficult for me to separate what happens to me because of my gender and what happens to me because of my race and culture. My world is not experienced in a linear and compartmentalized way. I experience the world simultaneously as Mohawk and as woman. It seems as though I cannot repeat this message too many times. To artificially separate my gender from my race and culture forces me to deny the way I experience the world. Such denial has devastating effects on Aboriginal constructions of reality.[3]

In the leadership sphere it is increasingly being acknowledged that intersectionally diverse leaders are ambitious, capable, resilient, innovative and well positioned to contribute to both the success of their organisation and their own individual success in the 21st Century.[4] The Diversity Council of Australia have found that companies in the top quartile of racial/ethnic diversity in leadership teams are 35% more likely to have financial returns above their national industry median,[5] and that companies in the top quartile of gender diversity in their leadership teams are 15% more likely to have financial returns above their industry median.[6]

In a legal services environment which is global and crosses international borders, the business case in favour of the Bar, as leaders of litigation and dispute resolution teams, embracing the benefits of intersectional diversity, has never been stronger.

Lessons that can be learned from the global context – USA v Australia

When the history of women's rights is considered, there is well-founded support for looking internationally in a search to identify how and where to begin when it comes to harnessing the benefits of intersectionality. Given that Australia continues to be a country in which

the number of appointments of lawyers of an Asian background to the bench above the level of Magistrate remains minimal if any, is there anything we might learn from our learned friends in places like the United States of America or the United Kingdom?

It is possibly less surprising to an Australian than an American that similarities between the USA and Australia are often more superficial than precise. Historically the USA had an exclusion policy which was the equivalent of the White Australia Policy. Cultural groups in the USA and their history and composition differ to those in Australia with Australia lacking the influential Hispanic and African American communities that populate the USA.

The USA legal system lacks the distinction between solicitors and barristers that persists in the Australian legal system, and is somewhat notable like all things American for its larger scale and more prolific resourcing. The impact of these factors being that there are larger professional structures for ambitious culturally diverse lawyers to scale in any attempt to rise to the top.

A consideration of similarities and differences does little to explain how it was that in 1959 when USA exclusion policy was still very much at its forte, the first Chinese American judge to be appointed in the USA, Delbert E Wong who became a Judge of the Superior Court of the Municipal Court of the Los Angeles Judicial District, came to be appointed. Or how it is that numbers of women Asian judges including Jacqueline Hong-Ngoc Nguyen appointed as a Judge of the United States Court of Appeals for the Ninth Circuit by Barrack Obama on 14 May 2012, have come to be appointed.

However, in an age where Australian diversity and inclusion advocates have been touting the 'tipping point' at which diversity and inclusion currently stands in Australia, with more than 50% of solicitors now being women,[7] it is perhaps a key point in time for the NSW Bar to play its role in furthering and developing the present unique opportunities in New South Wales for intersectionality, diversity and inclusion.

Will focusing on foreign language skills be enough to ensure cultural diversity at the NSW Bar?

A common thread across international boundaries when it comes to supporting individuals from culturally diverse backgrounds is the capitalisation of foreign language skills of culturally diverse professionals. It is necessary for significant debate and discussion to take place about the pros and cons of focusing on the foreign language skills of culturally diverse barristers. The traditional role of barristers is distinguishable from that of solicitors who are a first point of call for client management and client relationships. Barristers and leading counsel appearing before New South Wales courts are engaged to and expected to do so in English, not a foreign language.

Not all culturally diverse barristers have foreign language skills. But all barristers who identify as culturally diverse will have to varying extents cultural competence skills and cultural knowledge which could be utilised in informing advice, litigation and dispute resolution. Given that the growing number of culturally diverse barristers at the NSW Bar continue to be concentrated among the junior ranks, is it fair and equitable to expect and place pressure on culturally diverse junior counsel to have skills not only as lawyers and advocates, but also as interpreters and translators? To what extent would this entrench culturally diverse barristers among the junior ranks of the Bar rather than supporting a progression of talented culturally diverse barristers into leadership roles? Would this simply perpetuate at the Bar the equivalent of the phenomenon of culturally diverse professionals as valued junior employees instead of leaders at a partnership or executive level?

The future of the NSW Bar and where intersectionality will take the NSW Bar

The NSW Bar, like other branches of the legal profession is undergoing an inevitable transformation under the influence of digital disruption. Like the impact of digital disruption on the legal profession, the complete effects of intersectionality on the NSW Bar will only be fully appreciated in retrospect rather than prospectively.

In 2010, the American Bar Association Presidential Initiative Commission on Diversity stated that:

> Properly designed approaches to diversity and inclusion do not run afoul of contemporary jurisprudence on colorblindness, gender-blindness, or reverse discrimination. Courts have frequently found that considerations of identity – and commitments to diversity – are permissible so long as they do not one-dimensionally and categorically equate a single, overbroad definition of identity (e.g., non-white) with a particular outcome.
>
> Diversity proponents must research and prepare clear statements on how their diversity initiatives consider race, ethnicity, color, sex, gender, sexuality, age, ability, accent and economic status among other factors in holistic, multi-dimensional ways that differ fundamentally from the forms of affirmative action (e.g., quotas and set-asides) which courts have prohibited.viii

As the evidence base for intersectionality extends its reach, the role of intersectionality in channelling and transforming Old to New at the NSW Bar will become more and more apparent. It is in the interests of members of the Bar as leaders of litigation teams, legal practitioners, and business operators, to have an understanding of this.

END NOTES:

1 Crenshaw K, 'Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, University of Chicago Legal Forum, vol 1989, iss 1, article 8, at 139.

2 Hooper N, Genoff R & Pettifer S 2015, *New Women, New Men, New Economy: How Creativity, Openness, Diversity and Equity are Driving Prosperity*, The Federation Press, Sydney, at 4.

3 Monture-Angus P 1995, *Thunder in My Soul: A Mohawk Woman Speaks*, Fernwood, Halifax, Nova Scotia, at 177-178.

4 Diversity Council of Australia 2017, *Cracking the Glass-Cultural Ceiling: Future Proofing Your Business in the 21st Century*, Diversity Council of Australia Limited, at 8; Rodgers-Healey D 2017, 'What is different about minority women's leadership?' <https://womensagenda.com.au/leadership/different-minority-womens-leadership/>

5 Diversity Council of Australia 2017, above, at 6.

6 Diversity Council of Australia 2017, above.

7 NSW Law Society 2017, Practising Solicitor Statistics <http://www.lawsociety.com.au/cs/groups/public/documents/internetregistry/1348330.pdf>

8 American Bar Association Presidential Initiative Commission on Diversity April 2010, *Diversity in the Legal Profession: The Next Steps*, American Bar Association, at 48.

Minister Dutton and the 'lily-livered judges'

by Anthony Cheshire SC

I have previously written about criticisms of the judiciary: by President Trump in the United States (*Bar News*, Autumn 2017); and by Federal ministers in Victoria (*Bar News*, Summer 2017).

In January 2018, Federal Home Affairs Minister Peter Dutton returned to this theme in the context of an attack on the Victorian government for its failure to control 'African gang violence', which he contended had left Victorians 'scared to go out to restaurants'.

Mr Dutton suggested that Victorians were 'bemused' when they looked 'at the jokes of sentences being handed down' due to 'political correctness that's taken hold' and complained that there was 'no deterrence there at the moment'. When Justice Lex Lasry issued a light-hearted tweet that there were citizens in Mansfield who were dining without being worried, Mr Dutton described him as 'a left-wing ideologue'.

In a succession of media interviews around Australia, Mr Dutton outlined the problems as he perceived them:

> Where we've got lily-livered judges and magistrates going weak at the knees, it doesn't reflect community standards.
>
> There is a problem with some of the judges and magistrates [Premier] Daniel Andrews has appointed and some of the bail decisions that have been made, been criticised even by Daniel Andrews' own ministers.
>
> …some of the decisions you see I think are pathetically weak ... If you've got people let out on bail from serious offences ... it's no wonder police are left scratching their heads.
>
> So if you're appointing civil libertarians to the Magistrates' Court over a long period of time then you will get soft sentences.

When three Federal ministers made comments about 'hard-left activist judges' who were 'divorced from reality' in the context of an appeal on sentence before the Victorian Court of Appeal in which judgment had been reserved (see *Director of Public Prosecutions (Cth) v Besim* [2017]

VSCA 165), Warren CJ held that there was *'a strong prima facie case'* of contempt of court. Her Honour commented:

> 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.

Although those comments were made in the context of a specific appeal, they would seem equally applicable to comments to similar effect directed generally at magistrates in Victoria making decisions on bail or sentence.

As Warren CJ made clear:

> …the legal notions of contempt of court do not exist to protect judges or their personal reputations. These laws exist to protect the independence of the judiciary in making decisions that bind governments and citizens alike. These laws further exist to protect public confidence in the judiciary.

Comments attacking a judge or the judiciary generally can constitute an offence of scandalising the court, which was described by *Rich J in R v Dunbabin*; *Ex parte Williams* [1935] 53 CLR 434 at 442 as including:

> …interferences…from publications which tend to detract from the authority and influence of judicial determinations, publications calculated to impair the confidence of the people in the court's judgments because the matter published aims at lowering the authority of the court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office.

Mr Dutton's comments were strongly criticised by, amongst others, the Judicial Conference of Australia, the Australian Bar Association, the Law Council of Australia and the Law Institute of Victoria.

Mr Dutton, however, had a solution:

> I think there should be greater scrutiny around some of the appointments being made to the Magistrates' Courts.
>
> The solution, in part, is to make sure that the appointments that you're making to the Magistrates' Court are people who will impose sentences and will provide some deterrence to people repeatedly coming before the courts.
>
> Frankly, the state governments should be putting out publicly the names of people that they're believing they should appoint to the Magistrates Court and let there be public reflection on that, because there are big consequences and we've seen that on the Gold Coast with the one-punch incident that you speak about.

The suggestion of public involvement in the process was a clear move towards judicial election. This was not a new solution. In 2010, then Federal Opposition Leader Tony Abbott said:

> I never want lightly to change our existing systems but I've got to say if we don't get a better sense of the punishment fitting the crime, this is almost inevitable.
>
> If judges don't treat this kind of thing appropriately, sooner or later we'll do something that we've never done in this country: we will elect judges and we will elect judges that will better reflect our sense of anger at this kind of thing.

It is, however, a solution not without problems of its own. Studies in the United States suggest that sentences are harsher in election years and in particular when there are a large number of campaign advertisements being run. Contributors to judicial political campaigns may expect preferential treatment and lawyers are not immune from being approached for donations.

The prospect of judges copying the example of one banjo-playing successful candidate's song is an entertaining one, although perhaps not one that encourages respect for the solemnity of the process and the system in general:

> There's a judge they call Paul Newby, he's got criminals on the run. Paul's steely stare's got them running scared and he'll take them down one by one. Paul Newby, he's a tough old judge respected everywhere. Paul Newby - justice tough but fair. Paul Newby – criminals best beware.

Attack advertisements are, however, more concerning, although perhaps reflective of some of Mr Dutton's comments, with judges often being criticised for having sided with 'felons' or 'molesters' over 'law enforcement' or 'victims'.

Requests for donations extend from the upfront traffic court candidate's request for 'twenty dollars cause you all gonna need me in traffic court' because 'I got some stuff I gotta go do'; to the sinister successful candidate's email to a lawyer who had donated to his opponent:

> I trust that you will see your way clear to contribute to my campaign in an amount reflective of the $2,000 contribution you made towards my defeat ;-)

The current system for judicial appointments in Australia is the subject of robust discussion from time to time, such as occurred recently following the appointment of Tim Carmody as the chief justice of Queensland. Speaking *In Praise of Unelected Judges* in 2009, then Chief Justice Robert French said:

George Brandis, Malcolm Turnbull and Peter Dutton at the announcement of a new home affairs portfolio, 18 July 2017.

Photo: Department of Immigration and Border Protection / https://creativecommons.org/licenses/by/3.0/au/deed.en

> Having said all that, there is a powerfully entrenched tradition of an appointed, rather than an elected judiciary in Australia. It is closely related to what I venture to say is wide acceptance of the proposition that judges should be independent of influences from governments and political parties and the ebb and flow of public opinion, in deciding cases before them. This is not to say that there is not room for improvement in the processes of judicial appointment in terms of consultation and transparency. There has been considerable discussion of this in recent years and steps have been taken in relation to the appointment of judges to strengthen the application of the merit principle and to widen the range of persons who may be considered for appointment by calling for expressions of interest or nominations.

Professor George Williams, dean of law at the University of New South Wales, writing in the *Sydney Morning Herald* in 2016 about the secrecy of appointments to the High Court in Australia, put the position thus:

> We must not politicise the appointment of judges, but nonetheless should change the process to bring about more transparency and accountability.

Professor Williams had previously noted improvements in the appointment process for judges in terms of advertising for expressions of interest, advisory panels for shortlists, interview processes and explicit appointment criteria; and he recommended the setting up of a judicial appointments commission similar to that adopted in the United Kingdom in 2006.

There is no doubt that reform of the appointment process for judges, including replacing it with direct election, is a valid topic for debate. Presenting it as a choice between soft decisions on bail and sentencing on the one hand and popular election on the other is, however, unlikely to be helpful to such a debate and indeed is likely to do little other than undermine public confidence in the judiciary and the legal system.

Whilst individual comments may well constitute a contempt of court, the system should be robust enough to engage in the debate and rebut superficial and intemperate comment. As individual barristers, we form part of that system and must be prepared to put our heads above the parapet, even at the risk of Mr Dutton describing us (along with pro bono lawyers acting for asylum seekers) as 'un-Australian'.

Give them the BOOT:
Negotiating enterprise agreements with existing employees for a 'new enterprise'

Vanja Bulut reports on *ALDI Foods Pty Limited v Shop, Distributive & Allied Employees Association* (2017) 350 ALR 381; (2017) 92 ALJR 33; (2017) 270 IR 459; [2017] HCA 53

The High Court has determined that an enterprise agreement to cover employees at a new enterprise can be made by a vote of current employees who have agreed to work, but are not at that time actually working, as employees in the new enterprise.

The court also considered the approach to be taken by the Fair Work Commission in determining whether an enterprise agreement will meet the 'better off overall test' (the BOOT) for the purposes of s 186(2)(d) *Fair Work Act 2009* (Cth) (the Act). The court concluded that when a full bench of the commission is determining an appeal it is engaged in a rehearing and as such it can find error based on additional evidence even though the primary decision was correct at the time it was made.

Facts

This decision concerned an application made by ALDI Foods Pty Limited (ALDI) for the approval of its proposed enterprise agreement, *ALDI Regency Park Agreement 2015* (the SA Agreement).

ALDI operates retail stores in various regions of New South Wales, Queensland and Victoria. ALDI's operation in each geographical region is treated as a separate enterprise, each covered by a separate enterprise agreement.

In early 2015, ALDI was in the process of establishing a new undertaking in Regency Park in South Australia and sought, from its existing employees in its stores in other regions, expressions of interest to work in the Regency Park undertaking. Seventeen existing employees accepted offers to work in the new region and ALDI commenced a process of bargaining with these 17 employees for an enterprise agreement to cover the work to be done there.

Neither of the two relevant unions, the Transport Workers' Union of Australia (TWU) nor the Shop, Distributive and Allied Employees Association (SDA) were involved as bargaining representatives for the new agreement.

ALDI put the SA Agreement to a vote of the 17 employees. 16 employees cast a valid vote, and 15 voted in favour.

Fair Work Commission application and appeal

On 4 August 2015, ALDI applied to the commission for approval of the Agreement. Deputy President Bull approved the SA Agreement without the participation of the two unions.

The TWU and the SDA filed notices of appeal against the decision of Bull DP to the full bench of the commission. Relevantly, it was contended that the SA Agreement:

> a) should have been made as a 'greenfields agreement' under the Act because ALDI was establishing a new enterprise and had not employed in that new enterprise any of the persons who would be necessary for the normal conduct of the enterprise; and
>
> b) the SA Agreement did not pass the BOOT.

The full bench (Watson VP, Kovacic DP and Wilson C) rejected these contentions, and dismissed the appeal.[1]

Full Court of the Federal Court decision

The SDA then applied to the Full Court of the Federal Court for judicial review of the decisions of both Bull DP and the full bench of the commission.

The Full Court, by majority (Katzmann and White JJ, Jessup J dissenting), upheld the SDA's contentions and issued writs of certiorari and prohibition.[2]

The majority of the Full Court focussed upon the perceived difficulty posed by the requirement of s 186(2)(a) of the Act for the SA Agreement to have been 'genuinely agreed to by the employees covered by the agreement' when no employees were, at that time, actually working under the SA Agreement.[3]

The majority of the Full Court also upheld the SDA's argument that the full bench misapplied the provisions of the Act in being satisfied that the SA Agreement passed the BOOT for the purposes of s 186(2)(d) of the Act, without resolving the issue raised by the new evidence.[4]

Having considered Part 2-4 of the Act, the High Court found that the word 'employed' in s 172(2)(b)(ii) of the Act ... should not be taken to mean 'employed in that new enterprise', as argued by the SDA, as the new enterprise does not yet exist.

The High Court decision

The High Court (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) unanimously upheld ALDI's appeal in relation to the coverage issue but dismissed its appeal in relation to the BOOT issue. In a separate judgment, Justice Gageler provided an additional observation concerning the coverage issue.

The High Court ordered that the matter be

remitted back to the full bench of the Fair Work Commission to determine whether the SA Agreement passed the BOOT, according to law.

The coverage issue

Citing the decision in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, the High Court noted that the material provisions of the Act must be understood, if possible, as parts of a coherent whole.[5]

Having considered Part 2-4 of the Act, the High Court found that the word 'employed' in s 172(2)(b)(ii) of the Act (which deals with the making of a 'greenfields agreement' in circumstances where the employer has 'not employed any of the persons who will be necessary for the normal conduct of that enterprise') should not be taken to mean 'employed in that new enterprise', as argued by the SDA, as the new enterprise does not yet exist. Rather, the High Court concluded that 'employed' simply means 'employed' by that employer.[6]

The High Court concluded that the ordinary and natural meaning of the terms of Pt 2–4 of the Act establish that a non-greenfields enterprise agreement can be made with two or more employees, so long as they are the only employees employed at the time of the vote who are to be covered by the agreement.[7]

Justice Gageler added that the words 'employees covered by the agreement' in s 186(3) and (3A) of the Act cannot be read as limited to employees to whom the agreement will apply immediately on coming into operation. Rather, like the words 'employer' and 'employers' in s 172(2)(b) and (3)(b), the words are without temporal significance.[8]

The BOOT issue

With respect to the BOOT issue, the High Court found that the majority of the Full Court was correct to conclude that the full bench did not address the correct question as the full bench did not engage in any comparison between the SA Agreement and the relevant modern award.[9]

The High Court noted that the appeal to the full bench provided under the Act is an appeal by way of rehearing and, accordingly, further evidence may be admitted on an appeal. The High Court found that the full bench was wrong to approach its task as if it were enough to conclude that Bull DP had 'properly considered the BOOT and reached a decision based on a sound analysis'.[10]

The High Court affirmed that, on a rehearing, having regard to the further evidence, error may be demonstrated in the outcome even though the primary decision was correct at the time it was made.[11]

END NOTES

1 *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 267.
2 *Shop, Distributive and Allied Employees Association v ALDI Foods Pty Ltd* (2016) 245 FCR 155.
3 *ALDI Foods Pty Limited v Shop, Distributive & Allied Employees Association* (2017) 350 ALR 381 at [15].
4 Ibid, [65].
5 Ibid, at [16].
6 Ibid, at [24].
7 Ibid, at [82].
8 Ibid, at [107].
9 Ibid, at [95]-[96].
10 Ibid, at [100].
11 Ibid, at [101].

Representation by industrial associations

Talia Epstein reports on *Regional Express Holdings Limited v Australian Federation of Air Pilots* [2017] HCA 55

In its recent decision in *Regional Express Holdings Limited v Australian Federation of Air Pilots* [2017] HCA 55, the High Court considered whether the fact that a person is eligible for membership of an industrial association is sufficient to make the industrial association 'entitled to represent the industrial interests of' that person in relation to contraventions or proposed contraventions of a civil remedy provision of the *Fair Work Act 2009* (Cth). In doing so, the Court accepted that historical recognition of the right of trade unions to act for non-members under previous statutes provided an important context to understand the intended meaning of the provision.

Background

The appellant, Regional Express Holdings Limited (known as 'Rex') is a commercial airline. The respondent (the 'Federation') is an industrial organisation and a registered organisation of employees under the *Fair Work (Registered Organisations) Act 2009* (Cth).

In September 2014, Rex sent a letter to a number of persons to the effect that any Rex cadet who insisted on his or her workplace right to appropriate accommodation during layovers under the relevant enterprise agreement would not be given a position of command.

The Federation alleged that the letter contravened various civil remedy provisions of the *Fair Work Act 2009* (Cth) and applied to the Federal Circuit Court for the imposition of pecuniary penalty orders for the alleged contraventions.

Before the Federal Circuit Court, Rex applied to have the claim summarily dismissed on the ground that the Federation lacked standing. The question was whether the Federation was entitled to represent the industrial interests of the recipients of the letters in circumstances where the recipients were not members of the Federation. Section 540(6)(b)(ii) of the Fair Work Act provides that an industrial organisation may apply to the Court for orders in relation to a contravention of a civil remedy provision only if, *inter alia*, the industrial association is 'entitled to represent the industrial interests of' the person affected by the contravention.

The primary judge, Judge Riethmuller, rejected Rex's application on the basis that because the recipients of the letter, who were affected by the alleged contravention, were eligible for membership of the Federation, the Federation was entitled to represent their industrial interests within the meaning of s 540(6)(b)(ii) of the *Fair Work Act*.[1]

Rex's appeal to the Full Court of the Federal Court of Australia (Jessup J, with whom North and White JJ agreed) was dismissed.[2] The judges of the Full Court based their decision on an historical survey of legislative development of the expression 'entitled to represent the industrial interests of'. Tracing its origins from a line of cases culminating in *R v Dunlop Rubber Australia Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1957) 97 CLR 7, which established the entitlement of a trade union to represent the industrial interests of employees eligible for membership of the union (the 'Dunlop Rubber principle'), to the current legislative framework, the Full Court held that phrase as used in s 540(6)(b)(ii) could be understood as meaning that an industrial organisation is entitled to represent the industrial interests of employees who are eligible for membership of the organisation.[3]

Rex appealed to the High Court, arguing that the Full Court erred by allowing themselves to be diverted from the text of the legislation by judicial and legislative history. Rex further submitted that the Full Court had misstated or misunderstood the Dunlop Rubber principle as establishing that a registered trade union in an industrial dispute represented the industrial interests of non-members.

The High Court's decision

The High Court (Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ) dismissed the appeal in a joint judgment, finding that the Full Court was not diverted from the text of the relevant provision. Indeed, the Full Court's approach to statutory interpretation, which looked to the context of the provision both within the *Fair Work Act* and against the backdrop of its legislative history, was entirely conventional given that the expression did not have a plain and ordinary meaning which in and of itself revealed what was meant by the word 'entitled'.[4]

Context within the Fair Work Act

The High Court first examined the context of s 540(6)(b)(ii) within the Fair Work Act. The expression 'entitled to represent the industrial interests of' appears in multiple provisions throughout the Act and, subject to contrary indication, the presumption is that the expression has the same meaning wherever it appears. Here, having regard to the other provisions in which the phrase appears, it was apparent that the phrase is intended to have the same meaning wherever it is used in the Act.[5]

The High Court then observed that the majority of provisions in which the expression appears give an industrial association standing to take action in relation to a person who is a member of the organisation. In each such case, an industrial organisation is also given standing to take action where the organisation is 'entitled to represent the industrial interests of' a person. Reading these two provisions together, in each such case, the condition 'entitled to represent the industrial interests of' could logically be understood as something which arises otherwise than from a person's membership of the organisation.[6]

The High Court considered that the context of s 540 itself further supported this interpretation. The terms of s 540(6)(b) can be contrasted with s 540(5), which provides that an employer organisation may apply for an order in relation to a contravention or proposed contravention of a civil remedy provision '*only if the organisation has a member* who is affected by the contravention, or who will be affected by the proposed contravention' (emphasis added). Section 540(5) therefore limits the circumstances in which an employer organisation may apply for an order to circumstances where the contravention affects a member, in contrast to the broader terms of s 540(6)(b). This analysis indicated that the Fair Work Act clearly draws a distinction between a person's membership

Regional Express Airlines VH-ZRE Saab 340B at Wagga Wagga Airport, 18 June 2009. Bidgee / GNU Free Documentation License, Version 1.2

of an organisation and the organisation's entitlement to represent the industrial interests of the person, leading to the conclusion that entitlement to represent the industrial interests of a person is not limited to members of the organisation.[7]

Historical context

The historical background and the *Dunlop Rubber* line of cases provided important context for the interpretation of s 540(6)(b)(ii) and supported the above conclusion. This line of cases was the starting point of the concept of an organisation's entitlement to represent the industrial interests of persons eligible for membership of the organisation. Considering the history of legislative application of that concept, culminating in its appearance in the *Fair Work Act*, the High Court agreed with the Full Court's analysis that the historical context logically implied that the entitlement of an organisation to represent the industrial interests of a person referred to in s 540(6)(b)(ii) equates with the *Dunlop Rubber* principle.

Although the expression 'entitled to represent the industrial interests of' was not used as such in *Dunlop Rubber*, or for that matter for some time in any of the subsequent authorities, as a result of *Dunlop Rubber* it came to be understood that an organisation or a union was entitled to protect the industrial interests of those groups of employees who were within its conditions of eligibility. Consistently with the Dunlop Rubber principle, provisions enacted in subsequent legislation, including s 178(5A) of the *Workplace Relations Act 1996* (Cth), were understood as operating on the basis that an organisation's entitlement to represent the industrial interests of a member in relation to work covered by a certified agreement derived from eligibility rules giving the organisation coverage in relation to the work of the member covered by the agreement.[8]

The effect of s 539 of the Fair Work Act was to consolidate in one provision a range of miscellaneous provisions going to an industrial organisation's standing to take certain action. Although the standing rules in respect of the civil penalty provisions in s 540(6) applied the expression 'entitled to represent the industrial interests of' in a novel setting, given the prior well-established meaning of the expression, the High Court considered that the phrase was used in its established sense.[9]

Industrial associations and rules of eligibility for membership

The High Court then turned to the argument advanced by Rex that not all industrial associations referred to in s 540(6) would necessarily have rules of eligibility for membership. Endorsing the findings of Jessup J and the Full Court, the High Court held that the fact that the *Dunlop Rubber* principle may not fit precisely with industrial associations that do not have eligibility rules was not a sufficient reason to doubt that the established sense of the expression was applicable to an industrial association which, like the Federation, is a registered organisation and therefore does have eligibility rules. Section 540(7), by emphasising the requirement in s 540(6) that an organisation be entitled to apply for an order, reinforced the conclusion that the *Dunlop Rubber* principle should apply to registered organisations in the same way that it applied to registered trade unions.[10]

The High Court left undecided the question of whether s 540(6) was limited in its application to registered organisations. In the context of the present appeal, it was clear that the section did apply to registered organisations. However, the High Court flagged that the *Dunlop Rubber* principle sense of entitlement to represent the industrial interests of persons may apply, *mutatis mutandis*, to other forms of industrial organisations having a real interest in ensuring compliance with civil remedy provisions in relation to a particular class of persons.[11] For now, the answer to this question remains unsettled, but the High Court's concluding remarks left open its determination until a time when the question is squarely raised on the facts of the case.

END NOTES

1 *Australian Federation Of Air Pilots v Regional Express Holdings* [2016] FCCA 316 at [29]- [30], [43].
2 *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2016) 244 FCR 344.
3 Ibid at 363 [56] (North J and White J agreeing at 345 [1], 365 [65]).
4 *Regional Express Holdings Limited v Australian Federation of Air Pilots* [2017] HCA 55 at [19].
5 Ibid at [20]-[21].
6 Ibid at [22].
7 Ibid at [23]-[28].
8 Ibid at [39]-[40].
9 Ibid at [48].
10 Ibid at [49].
11 Ibid at [50-[51].

Gillian van Niekerk / Alamy Stock Photo

Executive decisions in the time of Australian marriage equality

Karen Petch reports on *Wilkie v Commonwealth; Australian Marriage Equality Ltd v Cormann* [2017] HCA 40; (2017) 91 ALJR 1035

Following the announcement of the Australian Marriage Equality Postal Survey, the High Court considered whether the application of funds from the Consolidated Revenue Fund and a direction to the ABS to carry out the survey were validly exercised and whether section 10 of the *Appropriation Act (No 1) 2017-2018* (Cth) was constitutionally valid.

Facts

In August 2017 the Australian Government announced that it would direct and fund a postal survey, to be administered by the Australian Bureau of Statistics, on the question of 'whether the law should be changed to allow same-sex couples to marry' (**Postal Survey**). To facilitate the proposal, the finance minister purported to make a determination under section 10 of the Appropriation Act (No 1) 2017-2018 (Cth) (**Act**) to make provision for the $122 million required to fund the ABS to conduct the Postal Survey (Finance Determination). The treasurer issued a direction pursuant to section 9(1) of the *Census and Statistics Act 1905* (Cth) that the statistician carry out the Postal Survey (the Statistics Direction).

Relevantly, section 10 of the Act provides for an advance to the finance minister to make a Finance Determination, subject to the precondition that he/she is 'satisfied that there is an urgent need for expenditure in the current year, that is not provided for, or is insufficiently provided for, in Schedule 1' and that the lack of provision / sufficient provision is 'because of an erroneous omission or understatement' or 'because the expenditure was unforeseen' at the time of finalising the Budget (section 10(1)). The determination operates to amend the appropriations in Schedule 1 of the Act and is capped at $295 million (section 10(2), (3)). This form of the Finance Determination power was contained in each Appropriation Act No 1 since 2008-2009.[1]

Proceedings were commenced by two sets of plaintiffs, the *Wilkie* plaintiffs (led by Andrew Wilkie MP and including an elector and member of a rainbow family, and PFLAG Brisbane Inc) and the *AME plaintiffs* (Australian Marriage Equality Ltd and Victorian Senator Janet Rice). The essential issues where whether (i) section 10 of the Act was constitutionally valid; (ii) whether the Finance Determination was validly made; and (iii) whether the Statistics Direction was validly issued. The proceedings were heard together.

Issues before the High Court[2]

Whether section 10 of the Act was constitutionally valid:

It was common ground that an appropriation from the Consolidated Revenue Fund can only be for a purpose which Parliament has determined (Sections 81 and 83 of the Constitution).[3] The *Wilkie* plaintiffs argued that section 10 of the Act purported to allow the finance minister to supplement the amount appropriated by Parliament under Schedule 1 of the Act and was therefore constitutionally invalid. The court held that this construction of s 10 was incorrect. Section 12 of the Act provides for appropriation of the Consolidated Revenue Fund for the purposes of the Act, so that the power of the finance minister under section 10 is merely one of allocation of the advanced sum of $295 million, which has already been appropriated pursuant to section 12 operating on s 10(3)).[4] Accordingly, section 10 of the Act is not constitutionally invalid.[5]

Senators Louise Pratt, Janet Rice, Penny Wong and Dean Smith after the Marriage Amendment Bill is introduced to the Senate at Parliament House in Canberra on Wednesday 15 November 2017. Photo: Alex Ellinghausen / Fairfax Photos

Whether the preconditions to exercise of the section 10 power had been met:

Both plaintiffs argued that, on a construction of section 10, the Finance Determination was not authorised because the preconditions to exercise had not been met. The court held that the preconditions were met and the Finance Determination validly issued. Section 10 has a number of different elements:

a) that there is a need for expenditure;

b) that the need is urgent; and

c) that the need was, at the time of the Budget being finalised, either erroneously omitted / underestimated or unforeseen (the latter being the relevant criterion for the Finance Determination).

As to the first element, the court held that the notion of 'need' 'does not require that the expenditure be critical or imperative', rather, it refers to expenditure which ought to occur, whether for legal or practical or other reasons[6]. It is unnecessary to constrain the notion of 'need' by reference to some source external to government.[7]

As to the second element, the court recognised that 'urgency' is a relative concept, defined in the present context as urgent in the ordinary sequence of the annual Appropriation Acts. In coming to a view as to whether the expenditure is urgent, the finance minister has to weigh why the expenditure is needed in the current fiscal year and why it cannot wait for inclusion in the additional estimates Acts being Appropriation Acts No. 3 or No. 5[8].

As to the third element, expenditure is 'unforeseen' if it was actually unforeseen at the time of finalising the Budget. The question is not whether some other expenditure directed to achieving the same or a similar result might have been foreseen, nor whether the actual payment may have been foreseen other than by the Executive Government[9].

The court held that the finance minister considered the above elements separately and correctly in making the Finance Determination.10 Most significantly, the court held that the Minister could not have foreseen the additional expenditure because the conduct of a plebiscite by postal survey undertaken by the ABS was not government policy at the time of submission of the budget. This was so even though the conduct of a plebiscite was government policy at that time: the form of the plebiscite was not determined until its announcement on 7 August 2017.[11]

Whether the Statistics Direction was valid:

The *Wilkie* plaintiffs argued that the Statistics Direction exceed the treasurer's power under section 9(1) of the *Census and Statistics Act 1905* (Cth). The court held it did not. The subject matter of the Postal Survey was 'statistical information'. Statistical information includes information about personal opinion or belief including information as to the proportion of persons holding a particular opinion or belief[12]. The subject matter of the Postal Survey was, for the purposes of section 13 of the Statistics Regulation, 'in relation to' 'marriages', 'Law' and 'the social… characteristics of the population'[13]. There was nothing in the Statistics Act to exclude specification of a target population[14].

Implications

It follows from this decision that if a type of expenditure to which section 10 applies is, in the finance minister's view, urgently required and was actually unforeseen at the time of finalisation of the Budget, then he/she may apply funds appropriated from the Consolidated Revenue Fund up to the limit of the $295 million allocated by section 10(3). That may be so even if, a similar, albeit different, proposal has been put to, and dismissed, by Parliament. The cause for expenditure does not have to arise 'external' to government and can be an issue of government policy.

The Australian Marriage Equality Postal Survey went ahead, administered by the ABS. 79.5% of eligible voters participated, with 7,817,247 (61.6%) responding Yes and 4,873,987 (38.4%) responding No. On 8 December 2017, the law was changed to allow same-sex couples to marry.[15]

END NOTES

1 *Wilkie* at [84].
2 The High Court was also asked to consider, as a threshold issue, whether the plaintiffs in both the Wilkie Proceedings and the AME Proceedings had standing to seek all or any of the relief they claimed. The court availed itself of the discretion to 'proceed immediately to an examination of the issues' ([57]), and for reasons of its determination on the substantive issues did not revisit the issue of standing.
3 *Wilkie* at [70]-[71].
4 *Wilkie* at [87]-[90].
5 *Wilkie* at [95]
6 *Wilkie* at [111].
7 *Wilkie* at [112].
8 *Wilkie* at [113].
9 *Wilkie* at [120].
10 *Wilkie* at [132]-[133].
11 *Wilkie* at [137].
12 *Wilkie* at [146].
13 *Wilkie* at [147].
14 *Wilkie* at [148].
15 *Marriage Amendment (Definition and Religious Freedoms)* Act 2017 (Cth), passed 7 December 2017.

Subjects of a foreign power

Diana Tang reports on the s 44 cases, Re: Canavan; Re: Ludlam; Re: Waters; Re: Roberts (No 2); Re: Joyce; Re: Nash; Re: Xenophon [2017] HCA 45

Background

After the federal election in July 2016, questions arose concerning the qualifications of six senators (Senator the Hon Matthew Canavan, Mr Scott Ludlam, Ms Larissa Waters, Senator Malcolm Roberts, Senator the Hon Fiona Nash, Senator Nick Xenophon) and one member of the House of Representatives (the Hon Barnaby Joyce MP) to be chosen or to sit as a member of parliament by reason of holding dual citizenship, and whether by reason of s 44(i) of the Constitution, there was a vacancy in the place for which each person was returned. The questions were referred to the High Court sitting as the Court of Disputed Returns. The answer turned on the proper construction of s 44(i) of the Constitution.

Section 44(i) of the Constitution provides:

> Any person who:
>
> is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power, …
>
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

There was material to suggest that each of the senators and member of House of Representatives held dual citizenship at the date they nominated for election. However, at the time, they each believed that they were Australian citizens only and were unaware of circumstances that made them dual citizens.[1] The submissions made by the parliamentarians therefore focussed on an interpretation of s 44(i) which requires a degree of knowledge of foreign citizenship by the individual, and that s 44(i) would disqualify them where the individual fails to take reasonable steps to renounce that citizenship.[2]

The court rejected those submissions and favoured the approach put forward by the amicus appearing in the references for Senators Canavan, Nash and Xenophon, and Mr Windsor.[3] The court held that s 44(i) operates to render 'incapable of being chosen or of sitting' persons who have by voluntary act acquired foreign citizenship, or have the status of subject or citizen of a foreign power.

Whether a person has the status of foreign subject or citizen is determined by foreign law. Proof of a candidate's knowledge of their foreign citizenship status (or of facts that might put a candidate on inquiry as to the possibility that they are a foreign citizen) is not necessary to bring about disqualification under s 44(i).

Senator Malcolm Roberts at Parliament House in Canberra on Wednesday 9 August 2017.
Photo: Andrew Meares / Fairfax Photos

A person who, at the time they nominate for election, retains the status of subject or citizen of a foreign power will be disqualified by s 44(i). The only exception is where the operation of foreign law makes it impossible or not reasonably possible to renounce foreign citizenship, such that the foreign law is contrary to the constitutional imperative that an Australian citizen not be irremediably prevented by foreign law from participation in representative government. In those circumstances, where it can be demonstrated that the person has taken all steps that are reasonably required by the foreign law and within their power to renounce their citizenship, they will not be disqualified by s 44(i).[4]

The court considered this approach adhered most closely to the ordinary and natural meaning of s 44(i) and to the majority decision in *Sykes v Cleary* (1992) 176 CLR 77 where the court previously considered s 44(i). It was also consistent with the drafting history and avoided the uncertainty and instability that an inquiry into an individual's knowledge of foreign citizenship would create.[5]

Interpretation of s 44(i)

As a starting point, the court held that the relevant time of inquiry for the application of s 44(i) is the date of nomination for election. This arose from the words in s 44, 'shall be incapable of being chosen', as nomination is an essential part of the process of being chosen.[6]

Then, looking at the text and structure of s 44(i), the court concluded that s 44(i) consists of two limbs of disqualification.[7] The first limb disqualifies a person 'under any acknowledgment of allegiance, obedience, or adherence to a foreign power', where 'under any acknowledgment' captures any person who has formally or informally acknowledged allegiance, obedience or adherence to a foreign power and has not withdrawn that acknowledgment, and 'acknowledgment' connotes an exercise of the person's will.[8] The second limb disqualifies a person on the basis of a state of affairs existing under foreign law, being the status of subjecthood or citizenship or the existence of the rights or privileges of subjecthood or citizenship.[9]

As none of the circumstances of the persons referred concerned voluntary acts of allegiance within the first limb, the court focussed on the second limb.

The court recognised that the purpose of s 44(i) was to ensure that members of parliament did not have a split allegiance.[10] The court observed that the first limb achieved this by looking to the person's conduct. In contradistinction, the second limb is not concerned with the person's conduct, but instead looks at the existence of a duty to a foreign power as an aspect of the status of citizenship.[11] Such an interpretation was consistent with the drafting history, which could not support a narrower purpose sufficient to constrain the ordinary and natural meaning of s 44(i).[12] Moreover, the drafting history did not demonstrate that the mischief s 44(i) sought to address focussed exhaustively on an 'act' done by a person.[13]

The court held that whether a person has the status of a subject or a citizen of a foreign power necessarily depends upon the relevant foreign law.[14] This was because only the foreign law could be the source of the status or of the rights and duties involved in that status.[15] However, following *Sykes v Cleary*, foreign law could not be determinative of the operation of s 44(i).[16] An Australian court would not apply s 44(i) to disqualify a person by reason of foreign citizenship if to do so would under-

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JOYCE, BRO?

'I was born in Tamworth, just as my mother and my great-grandma was born there 100 years earlier ... My father was born in New Zealand and came to Australia in 1947 as a British subject.'

Deputy Prime Minister Barnaby Joyce cuts a glum figure in Parliament on Monday after revealing his dual citizenship investigations. Photo: AAP

Citizenship debacle Deputy Prime Minister's New Zealand revelation shakes govt's grip on power

Majority under threat

Adam Gartrell
Amy Remeikis

Malcolm Turnbull's government is hanging by a thread after dramatic revelations that Deputy Prime Minister Barnaby Joyce is a dual citizen, potentially ruling him ineligible to remain in Parliament and putting the Coalition's slim majority at risk.

Despite his bombshell announcement, Mr Joyce is refusing to step down from cabinet or abstain from votes in the lower house – where the Coalition has a one-seat majority – claiming he is confident the High Court will clear him to stay on.

However the Nationals leader is also taking urgent steps to renounce his New Zealand citizenship, paving the way for him to run again in case the court rules him ineligible and orders a byelection in his NSW seat of New England.

Mr Turnbull is also confident the court will clear his deputy, declaring: "The Deputy Prime Minister is qualified to sit in this house and the High Court will so hold."

But constitutional experts do not share the Prime Minister's confidence and Labor is questioning the government's entire legitimacy. The spotlight has also once again turned back on other foreign-born MPs – or MPs with parents born overseas – including the Liberal lower house MP Julia Banks, who has Greek heritage.

In shock developments on Monday morning, Mr Joyce confessed to the dual citizenship concerns and referred himself to the High Court precisely one week after Fairfax Media first raised questions with his office and New Zealand authorities.

Mr Joyce's office refused to provide evidence of sole Australian citizenship and repeatedly refused to answer questions over recent days, before seeking advice from the government's Solicitor-General. Fairfax Media sent a final request for comment an hour before Mr Joyce's lower house bombshell.

Questions over dual citizenship – which is prohibited for members of Parliament under section 44 of the constitution – have already forced two Greens senators to quit, Nationals senator Matt Canavan to resign as resources minister, and landed One Nation's Malcolm Roberts in the High Court.

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Canberra Times, 15 August 2017 / Fairfax

mine the system of representative government established under the Constitution.[17] The intent of the Constitution ('the constitutional imperative') is that people of the Commonwealth who are qualified to become members of parliament are not, except perhaps in the case of treason within s 44(ii), to be irremediably disqualified.[18] That is, the role of foreign law in s 44(i) could not be interpreted so as to prevent an Australian citizen who has taken all reasonable steps to renounce the status, rights and privileges carrying the duty of allegiance or obedience from standing for election to parliament.[19]

The court rejected the approaches put forward by the parliamentarians that s 44(i) only operates if the candidate knows of the disqualifying circumstance. While those approaches echoed Deane J in *Sykes v Cleary,* the text and structure of s 44(i) did not support it.[20] The court considered that such an interpretation involved a substantial departure from the ordinary and natural meaning of the text of the second limb.[21] Further, such an interpretation would be inimical to the stability of representative government. The court observed that if s 44(i) operated only where the candidate knew of the disqualifying circumstance, it would present conceptual and practical difficulties. Conceptually, there would be difficulties in determining the nature and extent of knowledge necessary before a candidate will be held to have failed to take reasonable steps to free themselves of foreign allegiance.[22] Practically, there would be difficulty in proving or disproving a candidate's state of mind.[23] Accordingly, the degree of uncertainty that would be introduced by a knowledge requirement would tend to undermine stable representative government, weighing against such an interpretation.

The court also held that s 44(i) is not concerned with whether the candidate has been negligent in failing to comply with its requirements.[24] The court considered that s 44(i) is cast in peremptory terms and the reasonableness of steps taken to ascertain whether disqualifying circumstances exist is immaterial to the operation of s 44(i).[25]

Application to the facts

The court made individual rulings in respect of each of the parliamentarians. The outcome for four of the parliamentarians was as follows.

Senator Canavan[26] – At the time Senator Canavan was nominated for election, he believed he was a citizen of Australia only. The court had to determine whether, at the date of his nomination, Senator Canavan was an Italian citizen by descent. Senator Canavan was born in Australia and his only link to Italy was through his maternal grandparents, who were born in Italy. Senator Canavan had never visited Italy or taken steps to acquire Italian citizenship. However, in 2006, his mother had applied for Italian citizenship for herself, and as a result Senator Canavan was registered by the Italian consulate as an 'Italian citizen abroad'. The joint expert report on Italian citizenship laws explained that Senator Canavan's status as an Italian citizen more likely arose through his maternal grandmother, not from his mother's application for Italian citizenship, because at the date of his mother's birth, his grandmother was an Italian citizen. The joint report also stated that registration as a citizen was a 'separate and more rigorous process' and could be distinguished from a declaration of Italian citizenship. From this, the court concluded that the reasonable view of Italian law was that Italian citizenship requires the taking of positive steps (outlined in the joint report) as conditions precedent to citizenship. Senator Canavan had not taken any such steps. On that basis, the court could not be satisfied that Senator Canavan was an Italian citizen. The court concluded that there was no vacancy in the representation of Queensland in the Senate for the place for which Senator Canavan was returned.

Senator Malcolm Roberts[27] – At the time Senator Roberts was nominated, Senator Roberts stated he was an Australian citizen by naturalisation and not incapable of being chosen by virtue of s 44(i). This was the only case with disputed facts. Justice Keane determined the facts in Re Roberts [2017] HCA 39. The facts as found were that Senator Roberts' father was born in Wales, and Senator Roberts was born in India in 1955. From evidence of British citizenship law, Keane J found that, by virtue of his father's nationality, Senator Roberts was born a 'citizen of the United Kingdom and colonies' at the time of his

birth. The evidence turned on Mr Roberts' efforts to identify his citizenship status and to renounce his British Citizenship before and after his nomination and election, and in particular, whether an email sent to the British High Commission on Australia was sufficient renunciation of citizenship. Justice Keane J held that it was not.[28] Justice Keane also found that Senator Roberts knew there was at least a real and substantial prospect that prior to May 1974, when Senator Roberts acquired Australian citizenship, he had been and remained thereafter a citizen of theUK until the registration of his declaration of renunciation of citizenship after his nomination for election.[29] In so finding, Justice Keane quoted Mr Roberts' evidence and made a pertinent observation as to the practical operation of the second limb of s 44:[30]

> 'At the time of my nomination I considered myself Australian and only Australian. This is my sincere belief based upon having grown up in Australia, our family culture and the fact that I had always had an Australian and only an Australian passport. I felt that I had done everything I could think of to rule out any possibility of me unknowingly being a citizen of either India or Britain.'
>
> During the course of his cross-examination, Senator Roberts referred on several occasions to this evidence as the foundation of his claim to be, and always to have been, an Australian and only an Australian. This evidence is the clearest statement of the basis for Senator Roberts' claim that he was not a British citizen at the date of his nomination. Several points may be made here. First, Senator Roberts equates feelings of Australian self-identification with citizenship, and so confuses notions of how a person sees oneself with an understanding of how one's national community sees an individual who claims to be legally entitled to be accepted as a member of that community.

On the basis of these findings the court concluded that Senator Roberts was incapable of being chosen or sitting as a senator under s 44(i) and there was a vacancy in the representation of Queensland in the Senate for the place for which Senator Roberts was returned.

The Hon Barnaby Joyce MP – Mr Joyce was nominated for election to the Senate in 2004 and nominated for election to the House of Representatives in 2016. At both times, Mr Joyce believed he was a citizen of Australia only. Mr Joyce's father was a New Zealand citizen and only naturalised as an Australian citizen in 1978. At the time of Mr Joyce's birth in 1967, his father was a New Zealand citizen, and under New Zealand law, Mr Joyce was a New Zealand citizen by descent. As with Mr Ludlum, Mr Joyce's status as a New Zealand citizen could only be lost by renunciation or, in limited circumstances, ministerial order. Mr Joyce had not renounced his New Zealand citizenship prior to his nominations. The court concluded that Mr Joyce was incapable of being chosen or sitting as a member of the House of Representatives and so the place of the member for New England in the House of Representatives was vacant.

Senator Nick Xenophon – Senator Xenophon had always considered himself to be an Australian citizen. Senator Xenophon's mother was born in Greece, and his father was born in Cyprus. Prior to Senator Xenophon's first election to the Senate in 2007, Senator Xenophon renounced any entitlement he might have to Greek or Cypriot citizenship. Following enquiries arising from the 2016 election, it became clear that Senator Xenophon was a 'British overseas citizen' (BOC) at the date of his nomination by descent, consequent on Cyprus being in British possession at the time of Senator Xenophon's father's birth. The court considered whether a BOC is a 'subject or a citizen of a foreign power' or a person 'entitled to the rights or privileges of a subject or a citizen of a foreign power' within s 44(i). Following changes to British citizenship laws, Senator Xenophon became a citizen of the UK and colonies by descent without a right of abode in the UK at birth, and following further changes was reclassified as a BOC and remained a BOC at the time of nomination. Senator Xenaphon had never been issued with a BOC passport and never received British consular services. The evidence of British citizenship law before the court was that BOC is a residuary form of nationality different from citizenship. Importantly, BOC status does not confer any right of abode, one of the main characteristics of nationality under international law. It was also relevant that a BOC is not required to pledge loyalty to the UK. The court concluded that BOC status does not confer rights or privileges of a citizen as that term is generally understood. Senator Xenophon was not a subject or citizen of the UK at date of nomination, nor was he entitled to the rights and privileges of a subject or citizen of the UK, and so there was no vacancy in the representation of South Australia in the Senate for the place for which Senator Xenophon was returned.

Filling the vacancies

For Senator Nash, Senator Roberts, Mr Ludlam and Ms Waters, the court determined there was no need to take a further poll. In each case, votes cast 'above the line' in favour of the party that nominated the candidate were to be counted in favour of the next candidate on the party's list.[31]

For Mr Joyce, the election was void. A by-election was required to elect a member for New England, which Mr Joyce won.[32]

Ms Hollie Hughes was the candidate determined by the special count to be entitled to be elected to the place left unfilled by Ms Nash. However, an issue arose as to whether Ms Hughes was 'incapable of being chosen' by s 44(iv) of the Constitution as holding 'an office of profit under the Crown'. The court dealt with this issue in *Re Nash* [No 2] [2017] HCA 52, finding that her position as part-time member of the Administrative Appeals Tribunal rendered her incapable of being chosen as a Senator.

END NOTES

1 The only reference in which there were contested issues of fact was concerning Senator Roberts. Those issues were resolved at a hearing before Keane J in Re Roberts [2017] HCA 39.
2 *Re Canavan*, [13]-[19].
3 Mr Kennett SC was appointed amicus curiae in respect of the three Senators that had not resigned their seat, or in respect of whom there was not an effective contradictor (Mr Windsor had joined the reference concerning Mr Joyce MP and there were contested questions of fact concerning Senator Roberts).
4 *Re Canavan*, [71]-[72].
5 *Re Canavan*, [19].
6 *Re Canavan*, [3].
7 In *Sykes v Cleary* (1992) 176 CLR 77, Brennan J considered there were three categories of disqualification in s 44(i). In *Re Canavan*, the court did not consider that much turned on the difference in analysis as set out by Brennan J and the two limb approach put forward by the amicus in the present case, however adopted the two-limb classification for the sake of clarity: [23].
8 *Re Canavan*, [21].
9 *Re Canavan*, [23].
10 *Re Canavan*, [24].
11 *Re Canavan*, [25]-[26].
12 *Re Canavan*, [27].
13 *Re Canavan*, [35], [36].
14 *Re Canavan*, [37].
15 *Re Canavan*, [37]
16 *Re Canavan*, [39].
17 *Re Canavan*, [39].
18 *Re Canavan*, [43].
19 *Re Canavan*, [44]-[46].
20 *Re Canavan*, [49]-[53].
21 *Re Canavan*, [47].
22 *Re Canavan*, [55]-[57].
23 *Re Canavan*, [58]-[59].
24 *Re Canavan*, [61].
25 *Re Canavan*, [61].
26 *Re Canavan*, [74]-[87].
27 *Re Canavan*, [99]-[103].
28 *Re Roberts* [2017] HCA 39 at [98], [102].
29 *Re Roberts*, [116].
30 *Re Roberts*, [110].
31 *Re Canavan*, [136]-[138].
32 *Re Canavan*, [139].

No Constitutional guarantee of freedom from executive detention

Anthony Hopkins reports on *Falzon v Minister for Immigration and Border Protection* [2018] HCA 2

Introduction

The High Court has upheld the validity of s 501(3A) of the *Migration Act 1958* (Cth) (Act) which requires the minister to cancel a visa if satisfied that the person does not pass the character test. The High Court held that s 501(3A) does not authorise or require the detention of a non-citizen and, accordingly, does not seek to confer upon the minister for immigration and border protection the judicial power of the Commonwealth.

Facts

The plaintiff, John Falzon, was a national of Malta. In 1956, he moved to Australia with his family. He was three years of age at the time. At no time did he obtain Australian citizenship. Until 10 March 2016, he held an Absorbed Person Visa and a Class BF Transitional (Permanent) Visa. His legal status as the holder of these visas was as a lawful non-citizen.

In 2008, Mr Falzon was convicted of trafficking a large commercial quantity of cannabis. He was sentenced to 11 years' imprisonment with a non-parole period of eight years. Four days before the expiration of Mr Falzon's non-parole period, a delegate of the minister cancelled his Absorbed Person Visa pursuant to s 501(3A) of the Act ('cancellation decision'). That had the effect also of cancelling his other visa. Mr Falzon was taken into immigration detention upon being released from custody.

Mr Falzon sought revocation of the cancellation decision. The assistant minister decided not to revoke the cancellation decision on the basis of the character test in s 501, given Mr Falzon's substantial criminal record. In so doing, the assistant minister accepted that that Mr Falzon had strong family ties to Australia (Mr Falzon had two sisters, four brothers, four adult children and 10 grandchildren in Australia as well as nieces, nephews and other family members) and that his removal would cause substantial emotional, psychological and practical hardship to his family.

Mr Falzon commenced proceedings in the High Court's original jurisdiction seeking orders quashing the cancellation decision and the decision not to revoke that decision, an order of mandamus requiring his removal from detention and a declaration that s 501(3A) was invalid.

The Act

Section 501(3A) provides as follows:
The Minister must cancel a visa that has been granted to a person if:

> a) the Minister is satisfied that the person does not pass the character test because of the operation of:
>
> (i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or
>
> (ii) paragraph (6)(e) (sexually based offences involving a child); and
>
> b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

Section 501(6)(a) of the Act provides that a person does not pass the character test if the person has a substantial criminal record, as defined by s 501(7). Section 501(7)(a), (b) and (c), to which s 501(3A)(a)(i) refers, provide that a person has a substantial criminal record if the person has been sentenced to death, to imprisonment for life, or to a term of imprisonment of 12 months or more.

Arguments

Mr Falzon contended that s 501(3A) purports to confer the judicial power of the Commonwealth on the Minister and thereby infringes Chapter III of the Constitution. Central to Mr Falzon's argument was the proposition that, in its legal operation and practical effect, s 501(3A) further punishes him for the offences he has committed and that that is its purpose.[1]

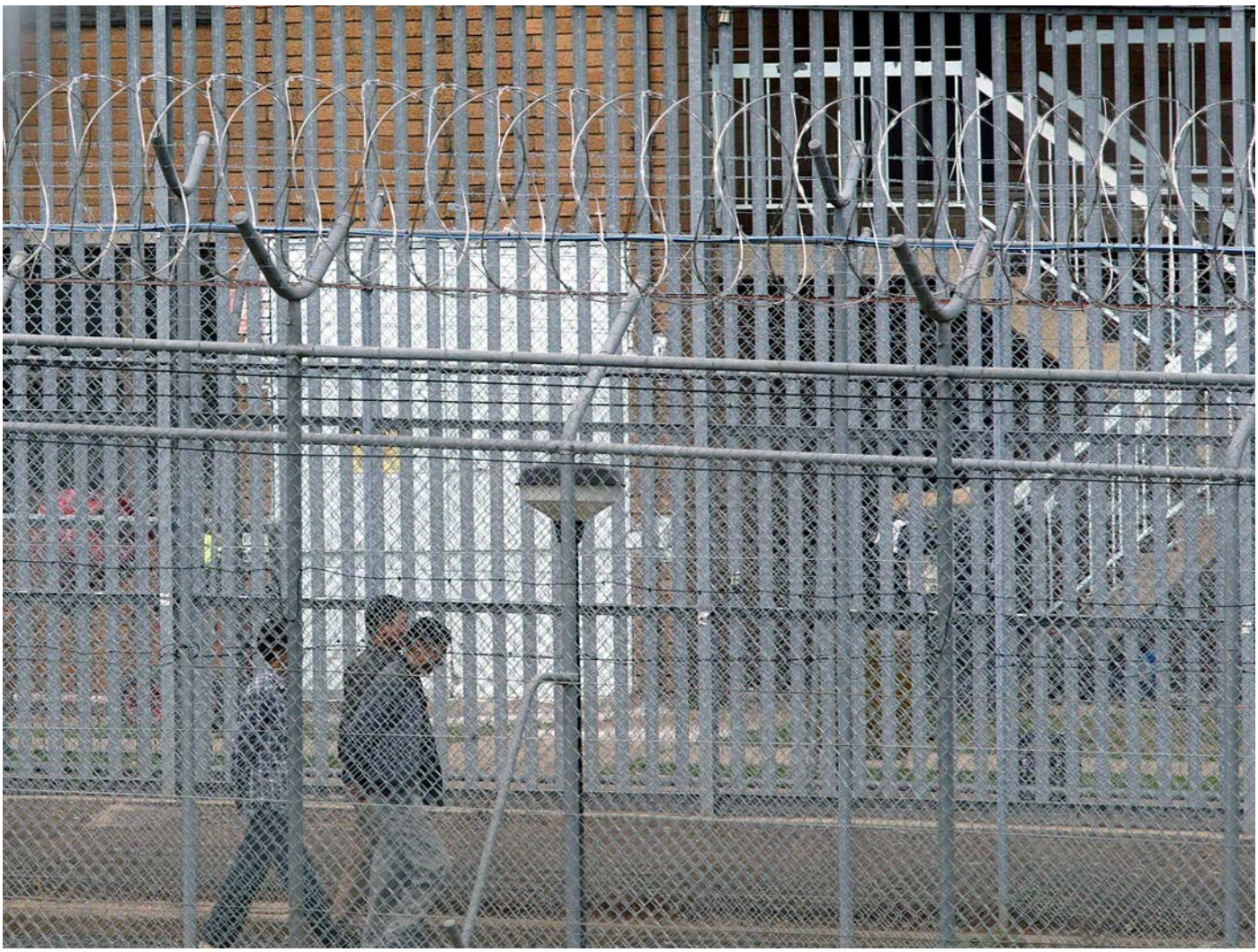
Mr Falzon's principal submission was that the non-judicial detention of a person was punitive and thus involved the exercise of the judicial power of the Commonwealth.[2] He submitted that the only way in which a law by which a person is detained by the Executive may escape characterisation as penal or punitive is to justify it by reference to a non-punitive purpose. That required consideration of whether the law was proportionate to a non-punitive end. Mr Falzon's submission in turn relied upon the argument that there existed a constitutionally guaranteed freedom from executive detention.

The minister submitted that s 501(3A) cannot sensibly be said to authorise detention in its legal and practical operation.[3]

Reasoning of the High Court

The High Court rejected the plaintiff's argument.

In a joint judgment, Kiefel CJ, Bell, Keane and Edelman JJ noted that in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (Lim)*,[4] the High Court had confirmed that under the Constitution the power to adjudge and to punish guilt for an offence against a law of the Commonwealth is exclusive to the



Villawood Detention Centre. Photo: Robert Pearce / Fairfax Photos

Chapter III judiciary. However, there was no constitutionally guaranteed freedom from executive detention.[5] Their Honours held that decisions relied upon by Mr Falzon[6] did not support the notion that any restriction on such a freedom must be justified by showing that the legislative restriction is proportionate.

Kiefel CJ, Bell, Keane and Edelman JJ said that the power to remove or deport aliens from a country is executive in nature and it is non-punitive.[7] However, their Honours also noted that it may be accepted that a legislative power to detain must be justified, in the sense that it must be shown to be directed to a purpose other than to punish.[8] The exercise of a power of cancellation of a visa by reference to the fact of previous criminal offending does not involve the imposition of a punishment for an offence and does not involve an exercise of judicial power.[9]

Their Honours held that s 501(3A) did not authorise or require detention. It operated on the status of Mr Falzon by permitting the cancellation of his visa because of his criminal convictions. That changed his legal status from lawful non-citizen to unlawful non-citizen, and this change meant Mr Falzon was liable to removal from Australia. The detention was associated with facilitating his removal, consistently with s 189 of the Act.[10]

Gageler and Gordon JJ agreed with the joint judgment that the application should be dismissed. Their Honours held[11] that the principle in Lim was concerned with laws that require or authorise detention. However, s 501(3A) neither required nor authorised the detention of non-citizens. Their Honour described the power to cancel a visa under s 501(3A) as one which was administrative in character.[12]

Therefore, the fact that a person whose visa was cancelled under s 501(3A) would become liable to detention was not enough to attract the principle in *Lim*. Gageler and Gordon JJ noted that the provisions of the Act permitting detention were not challenged by Mr Falzon.[13]

Nettle J agreeing with Gageler and Gordon JJ. His Honour drew a distinction between punishment and deportation, concluding that Mr Falzon's detention was not punitive in nature and therefore involved no exercise of judicial power.[14]

END NOTES

1 [2018] HCA 2 at [8].
2 [2018] HCA 2 at [23].
3 [2018] HCA 2 at [22].
4 (1992) 176 CLR 1.
5 [2018] HCA 2 at [25].
6 e.g. *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393; [2014] HCA 13; *McCloy v New South Wales* (2015) 257 CLR 178; [2015] HCA 34.
7 [2018] HCA 2 at [29].
8 [2018] HCA 2 at [33].
9 [2018] HCA 2 at [47].
10 [2018] HCA 2 at [48], [52], [56], [59], [62].
11 [2018] HCA 2 at [69], [83], [84], [86], [87]-[88].
12 [2018] HCA 2 at [88].
13 [2018] HCA 2 at [69], [87].
14 [2018] HCA 2 at [96].

The limits of protected industrial action

Natasha Laing reports on *Esso Australia Pty Ltd v The Australian Workers' Union; The Australian Workers' Union v Esso Australia Pty Ltd* [2017] HCA 54 (6 December 2017)

By majority (Kiefel CJ, Keane, Nettle and Edelman JJ) the High Court held that a contravention of an order in respect of bargaining for a proposed enterprise agreement prevented any further industrial action in respect of that agreement being 'protected' pursuant to s413(5) of the *Fair Work Act 2009* (Cth) (Fair Work Act). This meant that industrial action that the Australian Workers' Union (AWU) had taken in the mistaken belief that it was 'protected' was capable of constituting action contrary to ss 343 and 348 of the Fair Work Act.

The High Court unanimously held that taking unprotected industrial action with the intention of negating another person's choice is unlawful pursuant to ss 343 and 348 of the Fair Work Act regardless of whether it is known or intended that the action be unlawful, illegitimate or unconscionable.

Fairfax Photos

Factual background

Esso Australia Pty Ltd (Esso) and AWU were bargaining for a new enterprise agreement. In connection with this, the AWU organised various forms of industrial action in 2015. The AWU claimed that all such action was protected industrial action under s 408(a) of the Fair Work Act. Esso maintained that certain aspects of it were not, including bans on the performance of equipment testing, air freeing and leak testing because they were not industrial action as described in a mandatory statutory notice under s 414 of the Fair Work Act.

Esso obtained an order from the Fair Work Commission under s 418(1) of the Fair Work Act that prohibited the AWU from organising certain industrial action, including bans on the performance of equipment testing, air freeing or leak testing between specified times and dates in March 2015. That order was breached by AWU.

Proceedings at first instance and before the Full Court

Esso brought proceedings in the Fair Work Division of the Federal Court seeking, inter alia, declarations that AWU had contravened the March 2015 order and that subsequent action organised by AWU in relation to the agreement was not 'protected industrial action'. Esso asserted that the effect of s 413(5) was that after AWU had contravened the order no further industrial action by AWU in relation to the proposed agreement was able to qualify as protected industrial action.

The primary judge (Jessup J) followed the decision of Barker J in *Australian Mines and Metals Association Inc v Maritime Union of Australia*[1] in finding that the previous contravention of an order that had ceased to apply would not preclude s 413(5) from being satisfied in relation to subsequent industrial action. Accordingly, Esso's claim was dismissed at first instance.[2]

An appeal was dismissed by the Full Court of the Federal Court (Siopis, Buchanan and Bromberg JJ) (FCA Appeal).[3] Justice Buchanan delivered the leading judgment and held (with Siopis J agreeing) that s 413(5) applies only to such orders that are in operation at the time of the proposed protected industrial action.[4]

Before the High Court

Esso appealed to the High Court regarding the Full Court's interpretation of s 413(5). An appeal was also advanced by AWU, asserting that ss 343 and 348 require that there be actual knowledge or intention that the action be unlawful, illegitimate or unconscionable. The majority allowed Esso's appeal. The AWU's appeal was dismissed unanimously.[5]

The court held that a contravention of ss 343 and 348 will occur where there is organising, taking or threatening action against another with the intention of negating that other person's choice. It is unnecessary for the purposes of those sections for the person organising, taking or threatening the action to know or intend that the action be unlawful, illegitimate or unconscionable.

The majority held that s 413(5) of the Act applies to past contraventions of orders, whether or not those orders are still in operation at the time of the proposed protected industrial action. This conclusion was reached after considering the lineage, context and language of the provision. The majority held that it was not open to construe the provision as if it were restricted to orders that continue to operate, or which apply only to the proposed protected industrial action.[6]

In result, the industrial action organised by AWU after its contravention of an order failed to meet the common requirement specified in s 413(5), and so was not 'protected industrial action' which meant that it could constitute action contrary to ss 343 and 348. The matter was remitted to the Federal Court for determination of Esso's claims for pecuniary penalties and compensation.[7]

Justice Gageler agreed with the reasons of the majority in dismissing AWU's appeal. In dissent, his Honour considered that Esso's appeal should also be dismissed. His Honour preferred the construction of s413(5) advanced by AWU and adopted by the Full Court of the Federal Court. His Honour repeated the words of Buchanan J in considering the focus of s 413(5) to be on: 'whether there is, at the relevant point of time, an existing or current order with which it is not complying, rather than whether at some time in the past it has failed to comply with an order'. In coming to his conclusion, Justice Gageler considered that Esso's construction came at the price of linguistic consistency. His Honour considered that the section was otherwise conspicuous in its use of the present tense to refer to the present. Justice Gageler also found such a 'sweeping denial' of the capacity to take protected industrial action in consequence of an earlier breach to be at odds with the context and purposes of the statutory scheme.[8]

END NOTES

1 [2015] FCA 677; (2015) 251 IR 75.
2 *Esso v AWU* [2015] FCA 758.
3 *Esso v AWU* [2016] FCAFC 72; (2016) 245 FCR 39.
4 FCA Appeal at [162] (Siopis J agreeing at [1]).
5 At [2] and [54] to [64].
6 At [29] to [53].
7 At [64].
8 At [65] to [106].

NSW Council for Civil Liberties Annual Dinner 2017

Westfield Plaza, Sydney, 24 November 2017

Return to the CCL: Advocacy and unthinkable challenges

The Hon Michael Kirby AC CMG*

Shared things in common

I am glad to be at this dinner. I insisted that I should pay my own way. This is the rule of this occasion. No freeloaders. We must dig into our pockets and give generously. As the president has pointed out, there are many projects for the CCL just now. I suspect that after Bret Walker SC has delivered his address, there will be still more. The needs for the defence of civil liberties are even greater today than they were in my time. They are greater than they have been for many years.

I am proud to be here with my brother David Kirby. He was secretary of the CCL in the 1960s-70s. As young solicitors we gave up a lot of time to appear *pro bono* in the interests of the CCL and its clients.

I am also glad that David's son, my nephew, Nicolas Kirby, a barrister, is also here.

David Kirby went on to serve as a judge of the Supreme Court of New South Wales. Most of the lawyers who served on the council, when it was established in the 1960s, were later appointed judges. It was here that they met CCL supporters who, as ministers, later had the power to appoint judges. Happy is the land that leavens its judiciary so that top corporate lawyers serve alongside those who have engaged with all types of people, problems and demonstrated a commitment to defending civil liberties for everyone.

Back in the 1960s I attended the monthly meetings of the CCL. These took place in an unpretentious meeting room in Castlereagh Street in the city. In my mind's eye, I can still see the table, the countless papers and the earnest conversations we had at those meetings. Swimming into my memory come the memories of the CCL notables of those days.

They included Robert Hope QC (later my colleague on the Court of Appeal and royal commissioner into espionage issues); Jim Staples (later advocate and judge); Dick Klugman (medical practitioner and later MHR); Bob St John QC (later a Federal Court judge); Marcel Pile QC (later a District Court judge); Tab Lynham (solicitor); Gordon ("Bunter") Johnson (barrister); Associate Professor Ken Buckley (economic historian and long-time CCL Secretary) and his wife Berenice Buckley (Applause); Neville Wran QC (later Premier); Lionel Murphy QC (later federal attorney-general and High Court Judge); and Carolyn Simpson (later Supreme Court judge). There were others. This list suffices to show the distinction of the CCL Committee in those early days.

The importance of advocates

This history also emphasises the central role that leading barristers performed in its work. Pauline Wright has told me that the number of barristers now participating in the CCL has declined. The CCL should start planning a recruitment drive. It could be based on a business plan that tells what happened to the early barrister participants. One is more likely to get appointed to the Bench (if that is desired) if you are seen by people of influence and good opinion. And especially seen doing pro bono work for others. This is actually a strength of our judicial appointments system. No barrister should forget it.

As Bret Walker SC demonstrates so clearly, the most able barristers are often engaged with civil liberties. This is not a political thing. It includes all sides of politics. The ideals of civil liberties and the rule of law are basically conservative notions about access to law and justice. The best advocates for civil liberties are those who have learned black letter legal skills in other fields. As I always told my associates in the Court of Appeal and the High Court of Australia, those lawyers who have a big heart but lack legal skills and techniques can be a menace. The CCL always went to the top in its test cases. Often it needs a top silk to see that there is a case, and one deserving of support preferably, with a prospect of winning. This is why it is vital to attract more barristers into the CCL. The effort should start at once.

Back in 1965, when I was 25, I persuaded the CCL to support a group of Sydney university students who had been arrested in Walgett. With Aboriginal colleagues, they challenged the discriminatory practice at the local cinema. Aboriginals were allowed in the stalls, where the floor was lino and the seats vinyl. But they were not allowed upstairs where the floor was carpet and the seats were velvet. The CCL went for the top. I briefed Gordon Samuels QC (later judge of the Court of Appeal and State Governor) with Malcolm Hardwick (later a QC). We went to Walgett. We had a partial victory. Within

weeks, the discriminatory policy was abandoned. This was not the deep south of the United States. It was not even Queensland. It was Walgett, NSW in 1965. And the CCL was there.

Breaking the silences

In my days at Sydney Law School, not long before the Walgett case, I never questioned the denial of Aboriginal land rights. I never questioned why women took their domicile (to found jurisdiction in a divorce case) from their husband. I never questioned White Australia. I certainly never questioned the brutal criminal laws against gay Australians, including me. No-one questioned these things. We were an unquestioning lot in those days.

The right to swing my arm finishes when my arm hurts another person.

But this was an advantage of the CCL in those days. It did ask the difficult questions. Moreover, it did something about them. It supported test cases. The CCL, including today, needs more test cases. It needs more pro bono lawyers, including barristers to bring those cases. It needs top silks to see the potential for such cases. I get a feeling that such cases are less frequent today. There should be a revival. This is urgent.

The CCL was slow to enter upon the issue of gay rights. All Australians were slow in this area, despite the Kinsey reports of the 1940s; the Wolfenden report of 1957; the English statutory repeal of 1967; and the South Australian repeal of 1974. But here too the CCL played an important role.

A recent book has described the important part the CCL played in finally getting politicians to the barrier over the repeal of criminal laws against gay men in New South Wales.[1] In the 1970s the CCL began appearing for men arrested by handsome young police officers, acting as *agents provocateurs*. Whereas NSW Police Commissioner Delaney said that this was one of Australia's greatest dangers, the CCL began to stand up against the prosecutions. When the New South Wales Parliament dragged the chain and refused to follow Don Dunstan's lead in South Australia of 1974, it was at the CCL dinner in Sydney in 1984 that the powerful and popular Labor Premier, Neville Wran QC, was booed and heckled for his inaction. According to Joseph Chetcuti in his new book on *Sydney's First Gay Mardi Gras*[2] it was the equivalent of this dinner tonight, in 1984, following the widespread arrests at the first LGBT public protest in Kings Cross, that finally strengthened Neville Wran's resolve. He did not want to lose face before his old friends in the CCL. He wanted no repetition of their calumny. Amendments to the Crimes Act of NSW were adopted in 1984.[3] Further reforms followed later.

Within the last month, the journey for equality for gay citizens has continued. On 15 November 2017, the outcome of the postal survey on the enactment of marriage equality for LGBTIQ people was announced. It revealed that 61.6% of the participants in the survey voted 'yes'. Only 38.4% voted 'no'.[4] The process of submitting the legal rights of one group in the Australian community to the votes of the public at large was objectionable. It was contrary to our constitutional tradition. It departs from our constitutional text establishing the Commonwealth of Australia as a representative democracy.

Even at this dinner I was told by a participant that her nephew, struggling to accept his sexuality, felt humiliated by the hostile statements being made against LGBTIQ citizens by churches and others during the postal survey. On a journey to Wollongong last month to give lectures, I saw a number of churches on the Princes Highway carrying the banner 'It's OK to vote "No"'. Well, from the point of view of human rights and equal civil liberties for all in a secular society, I do not believe that it was 'OK to vote No'.

I stick with the Anglicans; but it is not easy.

The fact that two-thirds of marriages in Australia take place in parks and vineyards, not churches, should have persuaded the 'religious' citizens to proper respect for their fellows. Would we tolerate today, in Australia, the claims of religious citizens to refuse basic legal equality to people on the grounds of their race, Aboriginality? Or gender? Or skin colour? Would we consider restoring laws against miscegenation or forbidding mixed race marriages?[5] Religious texts can be found to support a wide range of prejudices. Civil libertarians will resist these. They will uphold the secular principle of the Australian Constitution.[6] There is a right to freedom of religion. But where such beliefs purport to diminish the equal rights of other citizens, the religious freedom must adapt. The right to swing my arm finishes when my arm hurts another person.

It will take a very long time (if ever) for Australian religious institutions to win back the confidence and respect of many citizens, and most LGBT citizens and their families, for their ethical and moral judgments. All but two religious denominations (the Quakers and Uniting) banded together to urge a 'no vote'. The Anglicans found a million dollars to back their campaign, whilst devoting only a miserable five thousand dollars to the cause of domestic violence, in which notions of patriarchy probably contribute. The Roman Catholic Archbishop of Sydney devoted a critically timed Sunday homily to instructing the faithful effectively to vote 'No'. After the wrongs of recent decades a prudent respect for diversity might have been called for. Especially from churches with their central tenet to love one another. I stick with the Anglicans; but it is not easy.

I suspect there will be more work for civil libertarians to undertake in the days ahead, on this score and others. We can take encouragement from the leadership of the CCL on this issue under the presidency of the late John Marsden AM. He was a vigorous, early advocate of equality, for women and for gays.

Thinking the unthinkable

An important lesson of the last six decades in civil liberties in Australia should always be remembered. We are often blind to the departures from civil liberties of our own time. Initially we were blind and silent for those wrongs affecting Australian Aboriginals; for women; for non-white Australians; and for gays. We must ask ourselves what are the issues we do not see today that will seem so obvious thirty, forty, fifty and sixty years from now?

Amongst today's issues will probably be the treatment of refugees; the Australian response to climate change; the approach to global poverty and sustaining foreign aid; the reaction to animal slaughter and cruelty; and the existential dangers of the proliferation of nuclear weapons. We need to be braver and stronger in Australia than we have been of late.

Ironically, the vote in the postal survey suggests that our people are ready for courage and principle. The survey was meant to kill off same- sex marriage. It has done the opposite. The CCL must be more engaged with our country and with the world. The history of the CCL gives us a message of encouragement and strength. We need to think the unthinkable and take on the unwinnable and unpopular causes of liberty. The work of the CCL is not a popularity contest. It is a never ending challenge to engage our better angels.

END NOTES

* Justice of the High Court of Australia (1996-2009); President of the International Commission of Jurists (1995-8); Honorary Life Member, NSW Council for Civil Liberties (1996).

1 Crimes Act 1900 (NSW), ss 79-81B ("Unnatural Offences").

2 J. Checuti, Sydney's First Gay Mardi Gras – What Brought it on and how it Changed Us (Sydney, February 2018).

3 Crimes Act Amendment Act 1984 (NSW).

4 https://marriagesurvey.abs.gov.au/results/

5 Loving v Virginia 388 US 1 (1967)

6 Australian Constitution, s116.

The people are not instruments or Peter Dutton is not Immanuel Kant

This is a transcript of an unwritten speech delivered by Bret Walker SC at the NSW Council for Civil Liberties 2017 Annual Dinner.

Why would I want to link Kant, to whose work reference is vital if you wish to discuss, in normative terms, the ethics of political science – ethical politics if you like – and a current minister of our current government (to whose activities no such reference will ever be appropriate)?

And I want to start in Germany. I have two stories, both, as it happens, about aeroplanes… At least they weren't boats. The first happened forty years ago. 1977 in the then Federal Republic that we called West Germany was a very bad time indeed. Emergencies, violence, and the politics of terrorism affecting society in a way that no Australian Government in peace time has ever faced to any comparable degree.

The Red Army Faction, the Baader-Meinhof Gang, specialised in the practice of politics by violence and killing of a kind which, in Germany, one might have hoped would have been eliminated after 1945.

There had been, in about 1975, some kidnappings of officials, people in civil society, which had produced, by way of the hostage and threat of violence, the release of convicted terrorists. They were flown, with some money, to the then Republic of Yemen. One of them later came back and, in 1977, kidnapped the president of what I'll call in English 'the German Business Forum', Hanns-Martin Schleyer. It was a very large event, widely publicised, no media blackout. And the demands included not only the release of yet more convicted terrorists but other matters of a kind which showed that there had been a magnification of effect and an appreciation of the leverage available by that kind of violence. The government, Helmut Schmidt's government, decided to stand firm.

In that ghastly web of international terrorism that existed then - it's not new today – the Popular Front for the liberation

of Palestine took on, as it were, a referral job and hi-jacked a passenger aircraft carrying German holidaymakers home from Majorca. They killed the pilot; the captain. And they too publicised their usual kind of demands for the German Government to release the German terrorists and, for good measure, some Palestinian prisoners as well. And the government stood firm.

Herr Schleyer's son realised his father was going to be killed in a ghastly kind of reality show. He tried secretly to pay the ransom in money that might have been sufficient to free his father, to save his father. Inadvertent publicity scotched that possibility. The government, in any event, did not want to deal with terrorists. And so he sued. He sued in a court which is only superficially similar to our High Court, only superficially similar to the United States Supreme Court, the *Bundesverfassungsgericht*, that sits in Karlsruhe. It's not frightened of political questions (although certain commentators have thought that it has tended to be sometimes excessively deferential to the Executive). There are a number of provisions of what the Germans modestly call the *Grundgesetz*: the basic law. The *Grundgesetz* is said, in its terms, to be provisional but it is probably now cemented by way of it being acceded to upon reunification by all of the states of the former East Germany.

The son of the hostage said to the court that there are various provisions of the *Grundgesetz*, in particular Article 1.1, that speaks of the inviolable nature of human dignity, that mean you, the government, must do more than you are doing and preferably you should do something so as to strike a deal with these wretched criminals to free my father to save his life.

The court received the formal complaint about one o'clock on Saturday afternoon; convened a hearing at 9.30pm that day; delivered a judgment at quarter to six in the morning on the Sunday. And they said no, for reasons I'll come to in a moment, the government does not have to do what you, the grieving son, seeks for the father.

And I think it was the very next day that a number of the Baader-Meinhof prisoners including Andreas Baader himself suicided, or at least that is the inquest's finding. And the day after that, on the basis that that constituted something in the nature of murder, in the warped view of the terrorists, Hanns-Martin Schleyer was shot in the head including by one of the terrorists who'd been freed two years before when a bargain had been reached with hostage takers.

Now what's that got to do, you ask, about the inviolable nature of human dignity. Well, I am coming to the categorical imperative. One aspect of the categorical imperative, of course, is that it is a starting point of ethical thinking about social relations that none of us use any of the rest of us as instruments or means to an end. And, of course, the hostage takers are doing just that. To be taken hostage is to be taken as an instrument or means for ends. And that is one of the philosophical explanations of why hostage taking is a monstrous crime.

Much more recently, 2006, the Constitutional Court in Karlsruhe received another complaint, from a number of different

The Manus Regional Processing Centre on Los Negros Island Manus Province Papua New Guinea on Friday 11 September 2015. Photo: Andrew Meares

groups. They included the associations of the flight crew staff, the cockpit crew staff and a number of other groups who are affected by the conduct of safe aviation. There was an Act which I think, without any intended irony, was called The Aviation Security Act. Now by 2006, as you know, the Twin Towers had been destroyed by the use of two passenger airliners as weapons. In a rather gruesome image during argument in the *Bundesverfassungsgericht* the hapless passengers, innocents as they're called in the jargon, had been turned into weapons. They had been weaponised, not only physically but for propaganda as well. And the German *Bundestag*, by huge majority, bipartisan or multi-partisan, had enacted laws, which had a very carefully graded set of lawful response by the military in liaison with the police. It concerned situations where, in German airspace, something like the hi-jacking of an aeroplane threatened to become a weapon, which threatened the German public and the security of people in German territory. It was an ascending familiar proportionate response notion which had, at its apex, the possibility of the Air Force shooting the passenger airliner down.

There are, I think, no commentators at the time who thought that being able to shoot an airliner down meant anything really than the virtually certain death of everybody on the aeroplane.

The government put a nuanced argument which I will, no doubt, unintentionally travesty by summary, but it included a familiar utilitarian notion that the several hundred, perhaps two hundred, on the airliner were doomed anyhow, their lifespans were to be measured in hours, whereas the lifespans of perhaps the thousands in the populated areas which might have been the targets of the aeroplane under the control of the terrorist could look forward to much more. And you'll see an unpleasant quantitation involved. But being unpleasant doesn't make it unlawful because part of the art or challenge of government will obviously be dealing with the so-called 'wicked problems' to which there are no happy answers, but to which there must be an answer.

That you would never ever use fellow inhabitants of the earth (let alone your fellow citizens) as instruments for some governmental or personal project.

The court preferred the argument of the plaintiffs, the various claimants. And they did it in terms which the sage of Königsberg would have recognised. Because the categorical imperative, in two senses that I'll come to in a moment, can be seen virtually explicitly on the pages of the reasons. The state has no right to render these people, who are victims of crime, objects for the state purpose. They are not to be regarded as instruments for the end of preventing whatever mayhem is intended by the terrorist on the ground. And of course one thing you will have noticed about the situation that the plaintiffs had brought to the court in Karlsruhe was that the death of the passengers was certain if the lawfully authorised military force was engaged. Whereas the death of anybody on the ground was by no means certain. As the tremendous act of self-sacrificing, I stress self-sacrificing, heroism of the passengers of the third aeroplane that crashed in Pennsylvania in 2001 will remind us.

The categorical imperative comes in a primary form that we should act in our relations with others on the basis of a rule or maxim, a principle, that we can think should be universally applied. Some people have thought, I think too glibly, that the English translation is 'do as you would be done by'. I think we need to understand, particularly with governments that don't always have decisions made by people who do identify with the plurality of the population, that it's not 'do as you would be done by' it's 'do as you would have you and everyone else done by'.

Now a slightly elaborated but much more immediate form of the categorical imperative is an obvious one and I've already mentioned it. And it follows from the principle that you

should act only in accordance with the rule, that you can universalise; that you would never ever use fellow inhabitants of the earth (let alone your fellow citizens) as instruments for some governmental or personal project. There are many ways in which the English can paraphrase the German. But the familiar English locution is that people are never a means, they can only ever be an end. Or perhaps slightly teased out, the welfare interests of people, in order that they have their dignity as people, is an end; you may not cause them to suffer as a means to produce some advantage for others.

Now, at this point, it seems to me that a philosopher whose work is still read, who is still tremendously important for not just Germanic and other continental but I think all civilised legal systems in their wrestling with the normative justifications of their rules, Immanuel Kant, teaches us to ask: how did we end up with enacted legislation, executive policy and daily administration of a system that has just – today – lent itself to such sad and terrible language as the facility at Manus having been 'cleaned up'? How did we get there? Well we got there by a policy that renders it a little unfair for my subtitle to have picked out Peter Dutton. Only a little unfair because he does render himself egregious in the relish with which he justifies what decency would expect to be always uttered regretfully even if you are a partisan in favour of it. It's a little unfair because it's not just his colleagues in government, (and I don't mean those bound by Cabinet solidarity), I mean those who vote on the backbenches for the government. And it is also the Opposition, at least with a capital O. Indeed the Opposition with a capital O, when they were in government, can probably be credited as the true authors of the policy. But by now such enthusiasm has been given to the project that however numerous our ministers and their parliamentary supporters who may be attributed as the authors, what matters is that we as members of the polity – as members of the society of which the Commonwealth is the polity – need to reflect in terms which do go back to what Immanuel Kant had to say about such matters.

What would he say? What would any of the prophets or divinities of the three great religions of the Book say about referring to the treatment of people who are either asylum seekers or, having been asylum seekers, are now accepted as refugees with Convention protection being held in places and under conditions designed – not accidentally produced – designed and executed for a declared purpose. That declared purpose being, as recently as yesterday you could hear it again from a minister, deterrence.

It is, I think, the most barefaced and revolting instrumentalism that I have heard from a non-authoritarian or non-totalitarian government while I've been alive.

I practise a bit of criminal law. I'm used to the idea of deterrence. But that's not instrumental in criminal law because it's an element in the sentencing of a person for his or her offending. And it is understood that a civilised view of sentencing, classically expounded in Veen v The Queen (No 2) by the High Court, necessarily involves consideration of deterrence. I personally happen to have lost faith in its social reality, but it is nonetheless appropriately part of the jurisprudence about sentencing. That's not instrumental. And it's not instrumental because it's understood the person must be punished, it will be done in public, there will be something in the nature of a lesson, maybe, for that person, maybe for others. At least that's the hope.

But the idea that you would select people who under the rule of law have not made themselves susceptible to punishment and visit upon them adversity in order to teach some lesson and mould other people's conduct is to use them as a means and to abrogate their human dignity as an end.

Why is it that it's thought proper for a civilised nation to use other people as mere instruments without respecting their individual human dignity?

And there should be no mistaking the deliberateness of this as a policy, revealing the intellectual and, I think, moral bankruptcy of those who advised, promoted, and reinforced the scheme. The responsibility is not just the parliamentarians'.

How can you seriously say that it is the right thing to make asylum seekers and acknowledged refugees suffer in order that others not undertake the same risks as that first group took on their way to being so scurvily received by Australia? If we really believed, if we as a society, really believed this was about preventing drownings – and of course the drownings have to be prevented, if at all possible, just as a matter of mercy and charity – then we wouldn't be stopping boats, we'd be sending boats. We'd be sending good boats, and good crews.

And better still we'd be doing something about the conditions which drive these people to have the well-founded fear of persecution which leads to them getting Convention protection in the first place.

And it wouldn't just be sneers at New Zealand to spend their money in Indonesia at peril of endangering the Anzac relation. What nonsense. What a juvenile and impolite threat. It would be us spending vastly greater sums of money than New Zealand was offering – at source. Stop obsessing about getting rid of the pull factor and start doing something – perhaps at the UN (reforming the Security Council and its monstrous veto system) – about the push factor.

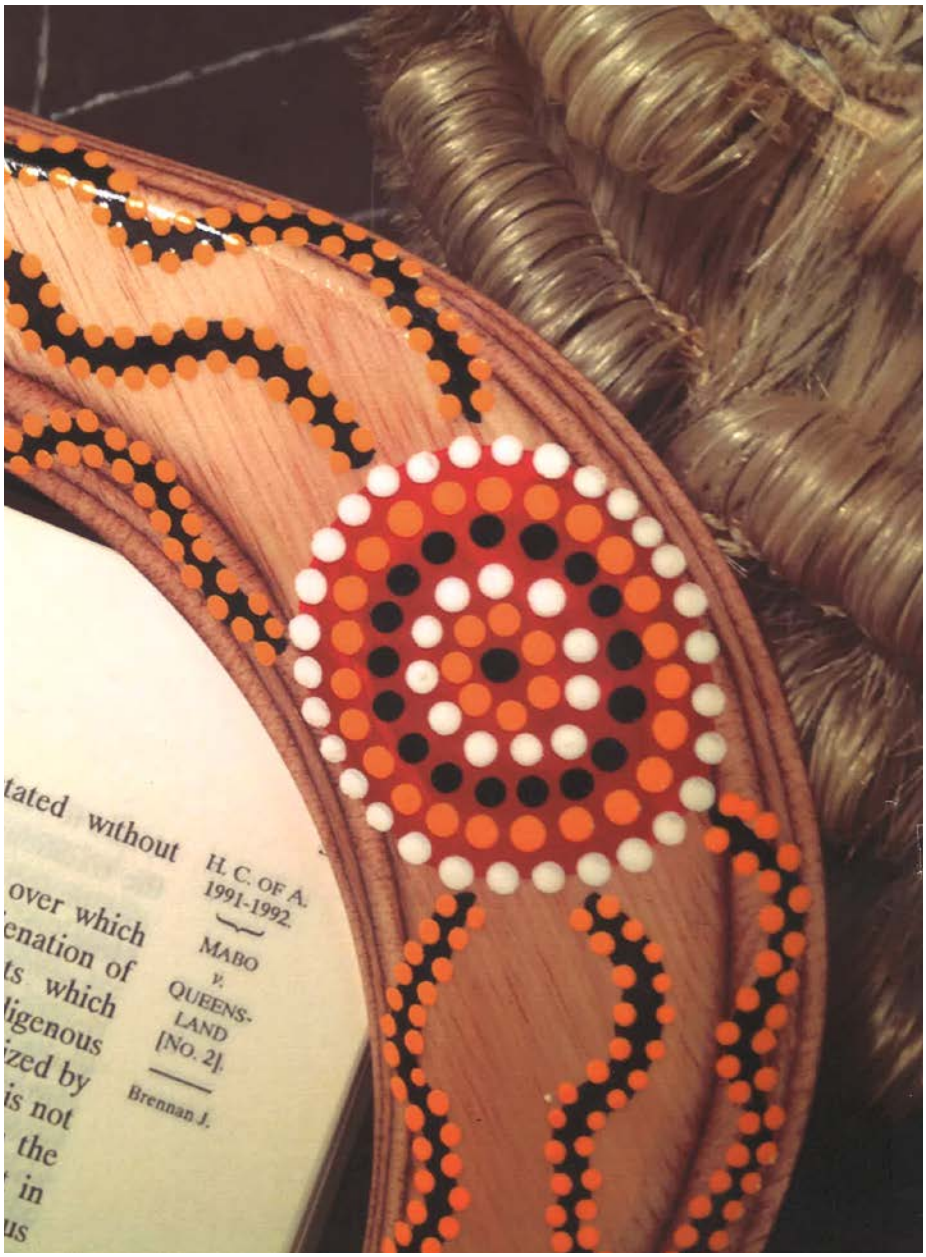
But instead, what we have is a policy that says we will make this as miserable as possible for this group that has done no wrong (neither seeking asylum nor becoming recognised as a refugee with Convention protection is of course a wrong, except in a very distorted moral universe) and we will do so in order to make it an even more miserable calculation of fear of persecution and risk of the voyage ahead for those who are in like position. What an astonishing reversal from the near universal global acceptance of a duty to assist the afflicted and miserable that we saw in the aftermath of World War II.

Now I don't suggest that these are simple problems. They are wicked problems. And neither do I suggest that we need a court like the *Bundesverfassungsgericht* to practise pretty open politics in its decision making by reference to Article 1.1 of the *Grundgesetz*. As has been remarked before tonight, we don't have anything like that – either the court or the Constitution. And I don't think, with my cultural inflexibility, I would like to see that descend upon us, at least not suddenly. What we do have, however, is the vote.

Not all of us, at least for the Lower House, will be able to vote for any candidate who has any realistic prospect of doing anything about these matters. And, of course, no Commonwealth election should ever, I hope, at least in peace time, be a single-issue election. But with those whom we can influence by conversation, discussion and persuasion, serious thought should be given to asking the candidates, either directly or through joining united voices in public, why is it that it's thought proper for a civilised nation to use other people as mere instruments without respecting their individual human dignity, and what can be done to get Australia back on a track where (believe it or not) we acceded to a treaty that had in Article 34 a duty to facilitate the naturalisation and assimilation of refugees. When did you last hear discussion by any politician about Article 34? Correctly, I think, their calculation is that the tabloid overseers of public opinion would destroy the political fortunes of any party that seriously proposed that we comply with those almost-defunct obligations. And it may be that following the now (thank God) distant days of the 1940's and a shattered Asia and Europe it is appropriate for the world to revisit the Convention and to take a totally fresh view of the dignity of individuals miserably driven from their homes, perhaps differing from that idealistically conveyed by Article 34 of the Convention. But it won't happen – nothing will happen – unless we do something which is a native substitute for taking a case to Karlsruhe.

We can't take cases to Karlsruhe, literally or figuratively. But we can vote.

Bret Walker SC
NSW Council for Civil Liberties



First Nations and the NSW Bar

by Anthony Cheshire SC

The 2016 Census of Population and Housing, released by the Australian Bureau of Statistics, recorded 216,176 Aboriginal and Torres Strait Islander people in New South Wales, being 2.9 per cent of the state population. There are 2,364 recorded practising barristers in New South Wales, so that to be consistent with the overall population there should be at least 68 First Nations barristers in New South Wales. Unfortunately that is not the case, neither in New South Wales nor nationally.

This problem has been recognised in the legal profession for some time. In the December 1996/January 1997 edition of the Northern Territory Law Society magazine 'Balance' a piece was published on the very low retention rate of Aboriginal and Torres Strait Islander law graduates. Fiona Hussin, the Aboriginal Pre-Law Program Co-ordinator at the Northern Territory University told Balance that even if Aboriginal students did have access to law studies, the social factors, cultural factors and inappropriate curricula conspired to make completion very difficult.

In 2011 Phillip Rodgers-Falk published a paper on the attrition rates of Aboriginal and Torres Strait Islander law students in Australian law schools. The figures he presented disclosed a tertiary education system in which

concerted efforts were leading to increased enrolments in law, but those enrolments were not being converted into completed study. He reported that although there were no first year enrolments by Aboriginal or Torres Strait Islander students in any law schools in Australia in 1970, the number had risen to 92 by 2009, although there was only a 45% completion rate.

Mr Rodgers-Falk identified similar failings to Ms Hussin that continued to lead to low retention rates, but he recognised as a positive factor an emerging and increasing level of support from within the legal profession.

In the late 1990s, a number of barristers in New South Wales took action to address this problem of underrepresentation at the Bar. At that time, there was only one First Nations barrister at the New South Wales Bar, a situation which was described as *pretty dismal*. That led to the Bar Association establishing the Indigenous Barristers' Trust - The Mum Shirl Fund on 6 August 2001.

Shirley Colleen Smith AM MBE (1924-1998) was a Wiradjuri woman who dedicated her life to welfare services. She visited many Aboriginal prisoners in gaol, which led to her being given the name Mum Shirl. She raised over 60 foster children and was involved in setting up the Aboriginal Legal Service in 1971 and also the Aboriginal Medical Service, the Aboriginal Black Theatre, the Aboriginal Tent Embassy, the Aboriginal Children's service, the Aboriginal Housing Company and the Detoxification Centre. It was fitting that the trust be named after her.

The recitals of the Trust Deed were as follows:

> a) It is recognised by the body of members of the New South Wales Bar Association that Indigenous persons seeking to make a career at the New South Wales Bar are frequently in circumstances of poverty, suffering or misfortune, both financially and culturally, which constitute a significant obstacle to the pursuit of their chosen career.
>
> b) The body of members of the New South Wales Bar Association consider that it is in the interests both of Australians generally and of all Indigenous persons for the number of such persons practising at the New South Wales Bar to increase.
>
> c) For the purposes of facilitating the pursuit of the practice of the law by Indigenous persons and in order to make provision for the objects set out in this deed, the settlor wishes to create the trusts hereinafter set out and thereby to establish a Trust Fund, with a physical presence at the offices of the New South Wales Bar Association, which will be a public benevolent institution for the relief of such poverty, suffering, helplessness, misfortune or other disability of indigenous persons as may constitute an obstacle in the way of their being able to practice at the New South Wales Bar.
>
> d) For the purpose of giving effect to such desire the settlor has, upon the execution of this Deed, transferred to the trustees the sum of Ten Dollars ($10) (hereinafter referred to as 'the Settled Property').

The settlor was Justice Ruth McColl, then president of the New South Wales Bar Association; and the original Trustees were three barristers (Mullenjaiwakka, Bret Walker SC (as president of the Bar Association) and Chris Ronalds AO SC) and one solicitor (Daniel Gilbert). The current Trustees are Arthur Moses SC (as president of the Bar Association), Justice Michael Slattery, Chris Ronalds AO SC and Tony McAvoy SC.

It was anticipated that monies would be raised for the trust through fundraising from members of the Bar and so an application was made for deductible gift recipient status. Unfortunately this was refused by the Tax Office, which led to a successful challenge to that decision in the Federal Court (*Trustees of the Indigenous Barristers Trust – Mum Shirl Fund v Commissioner of Taxation* (2002) 127 FCR 63).

In that case, Gyles J dealt with the central issue of whether the trust was a *public benevolent institution* thus:

> In my opinion, the undisputed evidence leads to a finding that, at the time the trust was settled, and for the foreseeable future, many, indeed most, indigenous persons in Australia could properly be described as 'disadvantaged' generally and, in particular, in relation to education and the ability to take a place in the business and professional world of Australia. Further, in my opinion, the benefits which can be afforded by the trust are calculated to relieve that disadvantage. It is not to the point to advert to the fact that there are, no doubt, many non-indigenous Australians who suffer similar disadvantages of one sort or another, and that there are many other Australians who do not have the means or motivation to enter a profession, even assuming that they have the intellectual ability to do so. I am satisfied that there are special disadvantages in advancement in life suffered by indigenous Australians. Neither is it to the point to liken the benefits to be offered by this Trust to the giving of unnecessary luxuries to persons suffering from poverty. Whilst, at one level, assisting persons to become practising barristers may be seen by some as a luxury, I see it as the grant of assistance to persons to take a place in the world which the ability of the person would warrant but which might be denied without the assistance provided in order to overcome economic and social disadvantage.

The manner in which it was anticipated the trust was described in evidence:

> The applicant trustees anticipate that in due course there will be fund-raising exercises undertaken, primarily with the membership of the Bar Association to whom the existence of the Fund will be promoted. The existence of the Fund will also be promoted to the faculty staff and students of law schools, in association with their indigenous programs, and with other agencies associated with indigenous law programs and indigenous law graduates. The applicant trustees anticipate that between $25,000 and $50,000 should be available annually to provide assistance to applicants who qualify under the terms of the deed and that in due course the applicant trustees will develop protocols and guidelines to assist them in evaluating applications to the Fund for assistance.

Since that time, the trust has operated consistently with those aims and provided financial support to many First Nations lawyers and law students. It has been funded almost exclusively by judges and practising barristers, especially by donations at the time of practising certificate renewals and from the charitable donations of most year's silk appointments. In the last two years, its revenue was $231,841, made up almost entirely of donations, and grants were made totalling $215,920. Its net assets have remained stable at around $500,000.

There are regular donations from the trust, such as to fund law students to attend the annual National Indigenous Legal Conference and junior lawyers to attend advocacy courses and international conferences. There are also donations to meet individual needs, such as emergency or urgent financial assistance, attendance at the College of Law and undertaking specialist advocacy courses. Ronalds AO SC gives as one example a student who was discovered sleeping in a library due to family breakdown and received urgent assistance from the trust to ensure that she was accommodated in a university college.

In 2002, the Bar Association established the Indigenous Barristers' Strategy Working Party with members from the New South Wales Bar, the judiciary and local universities. It was chaired by Chris Ronalds AO SC and three of the nine members identified

as Aboriginal or Torres Strait Islander. Its objectives are as follows:

> Further develop & implement the Indigenous Barristers' Strategy approved by the Bar Council
>
> Devise and implement fund raising strategies for the Indigenous Barristers' Trust
>
> Liaise with the Equal Opportunity Committee on issues involving Indigenous barristers
>
> Create further employment opportunities at the NSW Bar for Indigenous law students
>
> Liaise with other agencies to create further employment opportunities for recent Indigenous law graduates to work as solicitors, judges' associates and in other appropriate areas of legal work.

In addition to the financial support from the trust, the Bar Association (in particular through its Working Party) has set up various programmes to assist Indigenous law students and lawyers.

Since the early 2000s, the Bar Association has hosted students attending the Indigenous Pre-Law Course at the University of New South Wales, with those students attending a seminar, meeting barristers and attending court with barristers and judges. In 2013 this was extended to students at universities across the state. In 2014, 33 First Nations law students attended a Share a Judge's Day where they sat in court with judges and also had discussions with them and court staff behind the scenes. This was repeated in 2017 and involved judges from the Federal Court, the Supreme Court and the Land and Environment Court, concluding with a social event.

Since 2005, the Bar Association has run an employment scheme where First Nations students work for one day a week for a barrister or for a group or floor of barristers.

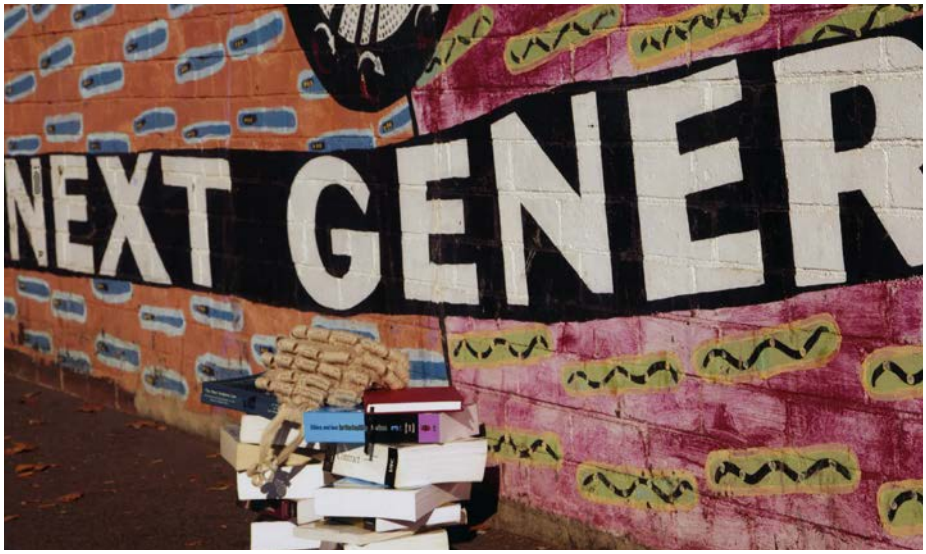
In 2008, the trust funded a students' forum for all First Nations law students across the state and funded travel costs for attendees from regional universities. There was a focus upon career opportunities within the law and in particular at the Bar. The students themselves suggested that they would benefit from having mentors at the Bar and this led in 2009 to the establishment of a First Nations mentoring scheme.

In that scheme, law students are mentored by a practising barrister. Regular contact and mentoring is provided and this has included work experience opportunities, reviewing essays to develop analytical and writing skills, assisting in preparation for mooting competitions, exposure to the legal system and barristers' work and some pastoral care. It has also meant that the mentor has been in a position to refer the student to the trust for financial assistance should that become necessary and to provide a reference when the student is seeking work as a solicitor. There are currently 22 First Nations law students being mentored by New South Wales barristers. Over 140 students have been mentored in the last 10 years.

Tony McAvoy SC estimates that dozens of students who might otherwise have dropped out of their law studies have, with the assistance of the mentoring program, gone on to complete their degree. As he says:

> Of the many who have completed their degrees with or without our assistance, we have seen the practice of law come back into favour as a viable and valid career choice.

In 2006, at the initiative of the Bar Association, the first National Indigenous Legal Conference was held in Sydney, with financial support being provided by the trust. This is now the premier law conference for First Nations lawyers and law students and has provided the opportunity for the creation of effective national networks. It is now held annually at different locations around Australia,



There are now five First Nations barristers in New South Wales and in 2015 McAvoy SC was the first First Nations barrister in Australia to be appointed as Senior Counsel.

The mentoring programme has also given the Bar Association a better insight into the extent and causes of the attrition rate in First Nations students completing law degrees; and enabled it better to target its efforts.

In January 2013, the Bar Association established a Reconciliation Action Plan, which was described by then president, Phillip Boulten SC, as having the explicit aim of increasing the number of Indigenous barristers at the New South Wales Bar. The plan documents the Bar Association's responsibility to ensure that the New South Wales Bar reflects the values of equity and diversity and sets out the Bar Association's goals for the future and the way in which those goals can be achieved. That plan has recently been published for 2017-19. The Working Party is then responsible for the further promotion and implementation of the plan.

In January 2018, the president announced the establishment of the First Nations Committee, to be chaired by Tony McAvoy SC. The role of the Working Party has become a sub-committee of this new Committee, which has a wider focus on policy development and the Association's participation in important public debates.

Tony McAvoy SC, Sarah Pritchard SC and Chris Ronalds AO SC are also on the Law Council of Australia's Indigenous Legal Issues Committee, which provides advice to the council and assists in the formulation of policies.

There is no doubt that First Nations people face significant difficulties and disadvantages, not only generally but also specifically in relation to pursuing a career in the law and at the Bar. The Bar Association, in particular through the First Nations Committee, continues to offer active support and initiatives with the aim of increasing the number of First Nations barristers at the New South Wales Bar; and the Indigenous Barristers' Trust - The Mum Shirl Fund offers the financial support for those initiatives and for First Nations law students more broadly.

In January 2018, Chris Ronalds SC was made an officer of the General Division of the Order of Australia (AO) for 'distinguished service to the law and the legal profession, particularly in supporting, mentoring and developing the careers of Indigenous lawyers and law students'. As she says:

> The picture is slowly improving, but it does require the ongoing support (financial and otherwise) of members of the New South Wales Bar, which has been so generous and long-term to date.

Memories of the liberation of Walgett 1965*

The Hon Michael Kirby AC CMG**

Photo from the Walgett Case 1965 showing Gordon Samuels QC, Malcolm Hardwick and the defendant.

You can all go downstairs, if you like. But they (meaning the Aboriginals) cannot come up here.

It is amazing whom you meet when walking along the streets in the Sydney legal precinct. Recently I encountered someone who looked, and sounded, uncannily like a barrister I had known in the 1960s: Malcolm Hardwick of 7th Floor Wentworth Chambers. It turned out that he was the son of Malcolm, who died some years ago. He told me that he was Nicholas Hardwick and that, unlike his father and grandfather, he had renounced the law and pursued life as an antiquities curator. He mentioned that he had been going through his father's papers:

> 'You didn't happen to see any papers on the liberation of the Walgett cinema did you?' I asked.

He looked perplexed, so I explained a case in which I had briefed his father as junior to Gordon Samuels QC in a matter involving a challenge to the discriminatory policies of the Walgett cinema in 1965.

At that time, I was a partner in Hickson, Lakeman and Holcombe, an up and coming law firm in Hunter Street in Sydney. In my spare time I served on the committee of the NSW Council for Civil Liberties (CCL). We would meet every other Tuesday night above an upstairs Greek restaurant in Castlereagh Street, Sydney, to talk about the cases that had come to attention. One such case involved the Walgett picture show.

The case followed closely on an earlier 'liberation' case, in which Charlie Perkins and Jim Spiegelman (two leaders in student politics at the University of Sydney) had travelled by bus with students to challenge the segregation of the Moree and Kempsey public baths. This time, in Walgett, the challenge was brought by a young student, Owen Westcott. He was the son of Noel Westcott, a judge of the Workers' Compensation Commission, another very talented Sydney lawyer. Owen Westcott heard that the cinema in Walgett discriminated against Aboriginal patrons. It would allow them to purchase tickets in the downstairs stalls. There the seats were

covered with vinyl and the floor covering was lino. Aboriginal patrons were not allowed to ascend the grand staircase to the upstairs lounge section of the cinema. There the floor covering was carpet and the seats were covered in red velvet. That part of the cinema was reserved to 'white' patrons.

For the most part, this differentiation did not apparently shock the good citizens of Walgett or, for that matter, most Australians of those days. These were the times of 'White Australia'. There was a lot of discrimination against Aboriginals and other people of colour. Including in the law. Doubtless taking inspiration from the Moree bus rides and from the earlier challenges to racial segregation in the Deep South of the United States of America, Owen Westcott was determined to do something.

Together with a small group of Sydney University students, he travelled to Walgett, an outback town in central New South Wales. There he met local Aboriginal leaders. Accompanied by a few of them he went to the cinema and purchased the required number of seats. Arm in arm, with his new Aboriginal friends, he climbed the grand staircase, only to be denied entry by the manager.

> 'You can all go downstairs, if you like. But they (meaning the Aboriginals) cannot come up here.'
>
> 'But we have tickets', Owen Westcott protested. 'We demand entry.'

A scuffle broke out. The Walgett police were called. Owen and his friends were arrested and locked in the police cells. The next day they were taken to the Walgett Courthouse where they pleaded not guilty in the Court of Petty Sessions to the offence of trespass. They relied on the right of entry that they had secured by the tickets purchased by Owen, acting alone.

Owen Westcott was not a law student. But he thought he had a good case. He went to the Council for Civil Liberties. They sent for me. I decided to go right to the top. So I approached Gordon Samuels, whom I had come to know in compensation cases where he was briefed when the insurers needed 'big guns'. With his cool demeanour and magnificent voice, he was always impressive. He had been born in England, educated at Balliol College, Oxford University and migrated to Sydney in 1949. He had been appointed silk the previous year. Later he was to serve a quarter century as chancellor of the University of New South Wales. I became his colleague on the Court of Appeal of New South Wales. He even rounded off a remarkable career as governor of the state (1996-2001). But back in 1965 he was a freshly minted silk with chambers facing Phillip Street on the 8th Floor of Wentworth Chambers. He immediately agreed to undertake without fee the defence of the Aboriginal accused and Owen Westcott.

Malcolm Hardwick an Australian who had also attended Balliol College, Oxford and was later appointed Silk in 1980, was known for his conservative opinions and black letter approach to the law. Malcolm a strong supporter of the CCL. 'True conservatives', he would tell me, 'want to make sure that law is there for every worthy case.' He agreed to become Gordon Samuel's junior, also without fee. In the heat of Walgett, I never saw either of them remove their coats. Their arrival at the courthouse with the accused caused quite a stir in the town.

We mounted a formidable argument, invoking a famous case where a passenger, half a century earlier, had gone to the Privy Council to uphold his claim based on a penny ticket on a Sydney Harbour ferry.[1] In the end, the magistrate, a benign and, we thought, sympathetic judicial officer, rejected our legal arguments. However, he discharged all of the accused without imposing a conviction, under the then well known 'first offenders' provision' of the NSW Crimes Act, section 556A.

Lawyers, like Rosencrantz and Guildenstern, walk across the dramas of their clients and then depart, knowing little or nothing of how the dramas continue and are eventually play out.

Years later in quiet moments in the Court of Appeal, Gordon Samuels would reminisce about the Walgett case. He would allege, to the mirth of our colleagues, that not only did I never remove my suit coat but had actually turned up in Walgett wearing a waist coat, a most unlikely story.

I had no expectation of hearing further from Nicholas Hardwick about my request. I was pleasantly surprised when, a few days later, he turned up in my chambers.

> 'I did not find any legal opinions of my father about the Walgett case. But I did find these photographs, apparently purchased from the *Sydney Morning Herald* on 18 October 1965', Nicholas Hardwick said.

He then produced three file photographs showing Gordon Samuels, Malcolm Hardwick and, in one of them, a young Aboriginal man, inferentially one of those who, with heart pounding no doubt, climbed the staircase at the Walgett cinema that had previously been forbidden territory for him and members of his race. There were no photographs of Owen Westcott; nor of me, the instructing solicitor for the defendants. But we were minor players in a drama concerned with the slow emergence of Australia and its laws from the racial overtones of colonial and post-colonial times.

There are three footnotes to this story. Years afterwards, I heard that Owen Westcott was involved professionally on the periphery of the HIV epidemic. He was still battling for good causes, in this instance, access by prisoners to protection and medication for HIV infection that was then a serious problem without a cure or effective treatment. Later still I heard that Owen had died. Although he was not a lawyer, he had faith in the law. Although we had not won the case on the merits, at least he and his Aboriginal friends walked away from their trial without the stain of a conviction. And they had made their point.

I did not hear again from the magistrate who presided in the Walgett Courthouse that hot day in 1965. But in the week of my retirement from office in the High Court of Australia, a letter arrived for me, out of the blue. The magistrate, long since himself retired, wrote to me to remind me of the confrontation at Walgett. He paid a tribute to the presentation of the case by Samuels and Hardwick. He wanted me to know that he had not forgotten that occasion and the discriminatory realities that the case had brought to light. He had the good manners not to mention my waistcoat, if any.

The last footnote was contained in the magistrate's letter. It filled in a gap in my knowledge. Lawyers, like Rosencrantz and Guildenstern, walk across the dramas of their clients and then depart, knowing little or nothing of how the dramas continue and are eventually play out. According to the magistrate, a few weeks after his decision in the Walgett Courthouse, the cinema let it be known that the previous upstairs/downstairs policy of discrimination was no more. It was dropped. Aboriginal Australians could, if they had nine pence, ascend the grand staircase, savour the rich carpet and sink into the red velvet seats in the lounge. Once again, justice had prevailed.

A little story from 50 years ago to illustrate the vital need for pro bono lawyering. For guardians of civil liberty at the Bar. And for strict scrutiny of discrimination involving the unequal application of the law.

END NOTES

* Derived from a talk at the Common Room of the NSW Bar Association on the occasion of the celebration of RACS which provides free legal advice to refugee applicants in NSW.

** President of the NSW Court of Appeal (1984-96); Justice of the High Court of Australia (1996-2009); Honorary Life Member of the NSW Bar Association (2009).

1 *Robertson v Balmain New Ferry Company Ltd* [1910] AC 295 (PC). A case of false imprisonment, the story is told in Mark Lunney, 'False Imprisonment, Fare Dodging and Federation – Mr Robertson's Night Out' (2009) *31 Sydney Law* Review 537. See also *Balmain New Ferry Co v Robertson* (1906) 6 CLR 397

Megan Davis, Pat Anderson from the Referendum Council with a piti holding the Uluru Statement from the Heart, and Noel Pearson, during the closing ceremony in the Mutitjulu community of the First Nations National Convention held in Uluru, on Friday 26 May 2017. Photo: Alex Ellinghausen / Fairfax Photos

A special Bar Association seminar

The Uluru Statement

Professor Megan Davis, Associate Professor Rosalind Dixon, Associate Professor Gabrielle Appleby and Noel Pearson

On 24 October 2017 the Bar Association, in conjunction with the NSW Judicial Commission and the Law Society, hosted a seminar on the Uluru Statement from the Heart. The following is an edited transcript of that historic event.

Introduction by President Arthur Moses SC

We've gathered to discuss a matter of considerable national importance. Five months ago, delegates gathered at Uluru for the 2017 First Nation's National Constitutional Convention and made the historic Statement from the Heart regarding constitutional recognition to Australia's Aboriginal and Torres Strait Islander peoples. The wording of the Uluru statement is succinct and powerful. It tells us that Indigenous sovereignty is a spiritual notion, the ancestral tie between the land and the people who remain attached to it. That sovereignty was never ceded or extinguished and co-exists with the sovereignty of the Crown. It is of no small import to note that after annunciating this view of sovereignty, the Uluru Statement precedes to the matter of criminal justice.

As members of the legal profession, we need no reminding the indigenous Australians are proportionately speaking the most incarcerated on earth. Sovereignty and dispossession, recognition and representation of interests, they are different facets of the same problem. It is something that we as lawyers have a duty to help solve. Whilst it remains unsolved, we are diminished as a nation.

In the months following the Uluru statement the political momentum in parliament seems to have drained away, our purpose

tonight is to discuss what can be done to put it back on the agenda. What does the establishment of a First Nation's voice in the Constitution mean, and what are the implications of the sovereignty of parliament?

The Uluru Statement calls for a First Nation's voice to be enshrined in the Constitution and a Makarrata Commission to supervise a process of agreement, making between governments and First Nations. Aboriginal and Torres Strait Island affairs in this nation has faltered in a large part because we have not listened to the voices of Aboriginal and Torres Strait Islander people. The Uluru Statement is a roadmap that allows Aboriginal and Torres Strait Islander people to be heard and it is an invitation to all Australians to walk that road together. And the notion of being head must resonate with us as lawyers and it's why the three branches of the profession are hosting this evening, and we have this evening four speakers, Professor Megan Davis, Professor Rosalind Dixon, Associate Professor Gabrielle Appleby and Noel Pearson. Thomas Mare will also join us this evening to unveil The Uluru Statement from the Heart.

Professor Megan Davis is a Cobble Cobble woman from Queensland who is a pro vice-chancellor and professor of law at the University of New South Wales. Megan is a renowned human rights expert and has led much of the work of the Referendum Council, which culminated in the Uluru Statement from the Heart and laid the referendum council's report to the parliament.

Megan has written about the challenge of walking between two worlds. In this way she reflects the anxiety I believe of a younger generation of Aboriginal people that have mastered both worlds, but find there is still a missing link, that there is an unreality to the framework of our society that ignores the truth of history and the truth of the present.

As a lawyer Megan has spoken of the capacity of the law to oppress Aboriginal and Islander people, but she's also spoken just as strongly of the power of the law to redeem, and redemption comes from clear, direct and empowering action. In the simple language of the Uluru Statement, it comes from giving Aboriginal and Islanders a voice.

Megan believes in the rule of law and she's sought to find the balance between a horse and buggy constitution as former Prime Minister Keating described it, and the complex realities and legitimate grievances of Aboriginal and Islander people throughout Australia. And like Noel, she must come here tonight wondering who really stands with her people, are the lawyers of the nation listening? Do they care? Can they make a difference, will they? And if so, what will they do to put their shoulders to the cause?

Our second speaker will be Professor Rosalind Dixon and she'll address us on voice. Professor Dixon is currently a professor of law at the University of New South Wales, having previously served as an assistant professor at the University of Chicago Law School. And Professor Dixon has been referred to as the 'renegade constitutionalist from down under', which surprised me because she was a former associate to Chief Justice Murray Gleeson. She's been referred to as the leading comparative constitutional scholar of her generation.

Our third speaker will be Associate Professor Gabrielle Appleby from the University of

Professor Megan Davis

New South Wales Faculty of Law. Gabrielle has had extensive experience working in the Crown Solicitors' Office in Queensland and Victoria and relevantly Gabrielle provided pro bono assistance to the Referendum Council in the First Nation's regional dialogues and the First Nation's Constitutional Convention Uluru.

Thomas Mare will then unveil the Uluru Statement from the Heart and Thomas was one of the Uluru delegates and co-chairman of the Uluru working group.

Finally, Noel Pearson will provide a commentary and will take questions, and I want to say a few words about Noel who, despite being a Cowboy's fan, I admire. He stirred me up at a Parramatta Eels match in the semi-final but I'll forgive him for that. Noel is the chairman of the Cape York Institute and a leader of the Kuku Nyungkal people. Noel's great grandfather, Arrimi was a landowner of country around Cooktown who became a freedom fighter and renegade from those who came and forcibly without his consent took his land and everything that went with it. Noel's grandfather, his grandmother, his father and his mother were raised in missions which were places foreign to them and their ways and which were, we have to be honest about this, designed to keep them from what was rightfully theirs. As he has written, he has come up from a mission and from that place he has confronted and challenged us whilst never losing faith or belief in his fellow Australians.

The Yolngu people of north east Arnhem Land have recognised his brilliance and his effectiveness, they have given him the name 'Kerpa' the name means 'the tongue of the sacred fire' and the rest of us have felt the power of those words and watched his progress as he's given his life over to the causes of his people – education, empowerment, perseveration of our ancient heritage and now the coming together of Australians by way of constitutional recognition as the first Australians.

Noel prompted John Howard in 2007 to first put constitutional recognition on the political agenda. He was a member of Julia Gillard's expert panel on constitutional reform and later a member of the Referendum Council which has now reported to the parliament.

The success of this work is now teetering on the edge as we wait for the prime minister to respond to the Referendum Council report. And we should also excuse Noel if he came here tonight wondering whether there was anybody who was really with him and his people, for it must seem to him and to Megan that many of us who profess to be fellow travellers, are really little more than idle observers, that many of us with power and prestige of office do not wish to truly risk our positions with outright effusive support for the simple things that are sought by the Aboriginal and Torres Strait Islander people – recognition, respect and unity. And I suspect that what Noel and Megan and many, many others must share, what Galarrwuy Yunupingu has described as the splinter in his mind, the fear of all of who you are and all of what you represent will fade away and be no more, slowly destroyed by an outside force that is not prepared to cede its absolute control – that we're really not listening.

So, I look forward to the commentary this evening by Noel Pearson and the presentations of Professor Megan Davis and that of the other presenters, Professor Rosalind Dixon and Associate Professor Gabrielle Appleby, as well as the unveiling of the Uluru Statement from the Heart by Thomas Mare, we are honoured to have each of you here this evening and welcome to our home here at the Bar Association. Thank you,

Professor Megan Davis

The important point that I want to make in relation to the Referendum Council's work is that I was a member, as was Noel, of the expert panel on the Recognition of Aboriginal and Torres Strait Islander people that Julia Gilliard put together in December 2010. It was the result of the negotiations she entered into in relation to the hung parliament, where the Greens and the Independ-

ent, Rob Oakeshott, said to her: 'all agree on constitutional recognition - you need to put together a formal process that will put that into action and get us to a referendum in relation to recognition'. And that was the work of the expert panel.

The expert panel worked over the period of 2011 and handed its report to the prime minister in 2012. There are a number of important recommendations that the expert panel made. One was the deletion of the race power and the insertion to the head of powers a new provision; a sort of federal parliament to make laws with respect to Aboriginal and Torres Strait Islander peoples that had in its preamble, a statement of recognition of Aboriginal and Torres Strait Islander people. One of the primary recommendations that came out of the expert panel, though, was section 116A, which was a, a non-discrimination clause.

Post 2012 we, as Aboriginal and Torres Strait Islander leaders, never received any formal response from the government in relation to that report and those recommendations. There was a change of government in which a joint parliamentary committee was set up. That committee, led by Ken Wyatt and Nova Peris, handed down three reports, with recommendations that were, by and large, variations on the work of the expert panel.

In addition to that, the Commonwealth funded the creation of a campaign arm which was known as Recognise and that campaign's job was to educate the public on the need for constitutional recognition and the recommendations of the expert panel.

It's really significant to understand what happened at Uluru. The policy of the incoming government of Prime Minister Tony Abbott was to reconfigure Aboriginal funding in a way that all of the buckets of money for Aboriginal and Torres Strait Islander communities were taken out of each of the departments and put under a new framework that was known as the Indigenous Advancement Strategy.

What this then meant is that Aboriginal communities and organisations had to apply through a very unwieldly process for the funding to run their organisations in their communities. Many weren't successful. I think up until last year something like 60-70% of the money from the IAS went to non-Indigenous organisations, including big corporations with reconciliation action plans. But significantly we found in the dialogues, communities have been gutted of the funding that had sustained community governors and community autonomy for a long time. So, the IAS was a very significant influence and a very prominent issue in all of the dialogues as we did our work.

So, leading up to the Referendum Council's creation we got no traction on Section 116A. We did try to transform the civil society movement in relation to Section 18C into a Section 116A type public campaign and that was not successful.

The recognised campaign is the second element that was problematic for us. Although it was a public education campaign, it focussed on those recommendations of the expert panel that didn't have really significant support from Aboriginal and Torres Strait Islander communities. And then the IAS. So as a consequence of that, in 2015 Noel Pearson, Patrick Dodson, Kirsty Parker and I went to the prime minister and said: we have a problem here. You cannot move to a referendum because you need to go back and consult Aboriginal and Torres Strait Islander communities and ask them what it is that they want.

They were convinced that our communities would vote in favour of a minimalist reform. We weren't and inevitably they did set up the Referendum Council of which Noel and I were members. The primary goal of the Referendum Council was simply to go out to Aboriginal and Torres Strait Islander communities, run a series of dialogues in those regions with a sample of Aboriginal and Torres Strait Islander people and really get to the heart of whether or not it was that they would support a minimalist model or was there something else that people wanted. So that was our key role, to ask: What is it that Aboriginal and Torres Strait Islander people want? What is meaningful recognition to them?

We did that through this dialogue process: a deliberative decision-making process that a number of us designed, including Professor Cheryl Saunders, myself, Noel, Patrick to take a dialogue out to 13 regions and walk a sample of our mob through that.

We designed a process. We got the permission of the prime minister and the opposition leader as to what options we took out. They said we could take out the expert panel recommendations, we went back and said we would like to take out the idea of a voice to the parliament, in addition to agreement raising or treaty – that we couldn't go back to communities without that being a discussion given that Victoria had a treaty process and that South Australia was moving to one.

So, we had a series of meetings because the dialogues were designed on a 60/20/20 basis. 60% of participants had to be from our land base. They had to be traditional owners. They had to come from the land councils or the PBCs. That was very important for us to have that cultural authority. 20% were from our Aboriginal organisations, that is to say how we organise, how we run our community, and 20% of the invitees were other interested individuals and significant leaders in the movement.

We ran the entire design by those three groups, so we had a series of pre-dialogue, not pre-dialogue but pre-meetings with traditional owners in Broome, with Aboriginal organisations in Thursday Island and with individuals in Melbourne to run the entire dialogue process by them, walk them through it and get their permission and sign off on the way that we wanted to run this. And they gave us the okay to go out and conduct that, mostly under the auspices of the Land Council. So, the bulk of the organisation who helped us run these dialogues in the regions were our Aboriginal Land Councils around the country.

The feedback that we got during the dialogues was the importance of involving this Constitutional recognition process or situating it in the history of the struggle. We heard that it would be difficult to go out to communities, particularly the places we were targeting, that had been gutted by the Indigenous Advancement Strategy to talk about recognition which by that point our mob assumed was merely constitutional symbolism, perhaps a preamble, perhaps a statement of recognition.

In consultation with those groups of people and produced by Rachel Perkins we put together a DVD of the movement for the mob, which would help them have the discussion in the dialogue about where this recognition project fits on the spectrum of the Aboriginal and Torres Strait Islander struggle for addressing unfinished business.

The important feedback I suppose, or feedback that we got during the dialogues was the importance of involving this Constitutional recognition process or situating it in the history of the struggle.

The dialogues in Uluru

The dialogues were a very structured process that involved three days, mostly a Friday, Saturday and Sunday. It involved the first day which would be quite a broad conversation with the community about what recognition or what meaningful recognition would mean to their community. Part of that first day, the first day was extremely important to settle people down because people were very angry. People were very exhausted from always participating in consultations and nothing coming of it. What they would say is that nobody listens to what we say, so why should we go through this process? People were very concerned in relation to recognition, about well two, two primary things, one was sovereignty and the second thing was this idea, well not this, people's very earnest belief that this process might be a process of forced assimilation, that people felt that our

old people were dying, our young people were increasingly becoming assimilated and they felt that they didn't want to be part of a project that was one that, that they felt was forced assimilation. That was their language.

The community were very tired and I think part of the conversation around truth is that it was inextricably linked to this notion of peace: communities feeling like they wanted some peace in their lives and peace for their children and their grandchildren and that there are a number of ways that that could be done. Part of the dialogue process was, for example, they saw the Makarrata Commission, an agreement making commission, as fast tracking native title, native title determinations, which most communities felt had led to a lot of tension and fighting in communities over what they called 'crumbs' although not all communities were like that. Obviously, up in Broome there was a very different opinion of native title.

One of the things we have to do in terms of the anger (and we have to let people vent before we could get into the process) was to ask them to walk through this law reform process with us, to see it as a law reform process, that part of law reform is imagining that the world can be different to what we live in now, that they needed to suspend their disbelief, that the system could change, that politicians would listen, that something might come of this. And as I've written before, we talked about the capacity of the law to oppress our people, but also the capacity of the law to redeem.

The workshops were very structured. They involved civics, lectures on the Australian legal and political system. We had a group of constitutional lawyers come out with us and lead those discussions alongside a community member who was a working group leader, they would discuss the options, we would come back and discuss it as a group and then we would cross pollinate the groups so that people from all of the options got to have a conversation. Then we would introduce issues of political viability. So, we had to be very careful of where we introduced political viability and policy viability, because if you introduced it up front people tended not to want to discuss the options. So, we introduced it towards the end and then they would shift their preferences according to what the political viability conversations were about and then essentially issued a final communique and came to an agreement on what was the priority in the region in relation to the reform. All the dialogues were run in exactly the same way and in exactly the same form.

Uluru

The dialogues elected 10 people at each dialogue to attend Uluru. People would nominate themselves, then they would get up and speak for about five minutes on why their community should elect them to attend Uluru. Uluru was not a decision making or deliberative process like the dialogues. The Referendum Council took all of the data from the dialogues which is basically the communiques and the preferences and we presented it to the group. The group agreed. They agreed on the narrative which is the Uluru Statement from the Heart, and so the outcome of the dialogues was endorsed there at Uluru.

I suppose then the Referendum Council wrote up its report that reflected the Uluru

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outcome with the primary recommendation being for a referendum to be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nation a voice to the Commonwealth Parliament. The important thing to keep in mind there is that it's a First Nation's voice. So, it's not like ATSIC where individuals will run, it is First Nation entity, it's a First Nation structure. And that was really important to the community in terms of what they thought was important, that is to say having cultural authority participating in decision making about Aboriginal and Torres Strait Island law and policy.

The other thing the dialogues thought would be a useful thing that this voice could do, would be to monitor the use of the heads of power in Section 51, 26 and Section 122l and Ros will talk a bit more about the voice. But that was seen as a front-end way of dealing with some of the issues that gave rise to the argument for a non-discrimination clause.

The other recommendation was with respect to an extra-constitutional declaration of recognition. The symbolic statement of recognition was rejected by all of the dialogue, overwhelmingly. So, there was no desire to have any form of symbolic recognition of people, of us, in the Constitution and that is where that declaration comes from. The Makarrata Commission and the localised truth telling that would sit under the Makarrata Commission would be done in legislation.

Those ten guiding principles are that any reform does not diminish Aboriginal sovereignty and Torres Strait Islander sovereignty. That it involves substantive structural reform. That is advances self-determination and the standards established under the United Nations Declaration on the Rights of Indigenous People. That any reform recognises the status and rights of First Nation, that any reform tells the truth of history. That any reform does not foreclose on future advancement, that it does not waste the opportunity of reform, that it provides a mechanism for First Nation's agreement making. That is has the support of First Nation and that it does not interfere with positive legal arrangements. And the Referendum Council Report has a much more lengthy explanation of what each of those guiding principles are and where they come from.

Associate Professor Rosalind Dixon

I begin by acknowledging the Gadigal people who are the traditional owners of the land on which we meet and paying respect to their elders past and present.

I want to congratulate Megan and Noel and Thomas for the amazing process that they helped lead that you've just heard about. It's a huge feat if you think organising a bar seminar is a challenge, imagine what those dialogues entailed with very little infrastructure and support and the level of real genuine engagement and dialogue and the serious thought and very viable proposals that have come out of it, I think it means that we should all congratulate them for their enormous effort, dedication and leadership.

I also want to congratulate the Bar Association and the Law Society and the Judicial Commission for this evening. I think the kind of proposals that come out of Uluru are ones that really critically depend on the support of the legal profession and the leadership of the legal profession and so having an evening like tonight where we can debate amongst ourselves the strengths and weaknesses in the way forward I think it critical.

Lawyers have played a critical part in the reform that that marvellous video showed in the past and I think they will play a critical role in this reform for the reasons that I'll talk about in just a moment. But which have to do with the fact that there are a lot of questions people may have about the details and mechanisms of this reform, which lawyers can easily answer and I think that that is our role in supporting the very important work that the dialogues and the Referendum Council have done.

So, I want to speak just briefly about three aspects of the voice proposal. I think Megan has eloquently spoken about its origins, its

origins are of course a mix of pragmatism on Noel's part and others about what is achievable in the current political climate, and a very serious bottom up process that has heard people's voices. I think as lawyers we often think, well why don't we want a 116A or a non-discrimination guarantee? We're the only people in the community that like litigation and believe the courts are a critical guarantee of our freedom, but that ship has sailed so whatever particular views we might have as individuals on that question, people have spoken at Uluru and through the dialogues and the action is now very much on the issue of voice. And the issue of voice is one that puts the locus of change in the parliament and in the legislative process and it's supported by this mix of principle and pragmatism and may say also by international law. I look at Sarah Walker who would know this better than anyone in the room, but the idea that there are very significant precedents in the UN Declaration, in the ILO Convention in Article 6 and in comparative precedent for this kind of consultation as a mode of self-determination and reform.

I want to say now three things: something about the precedents within Australia, secondly about the level of detail that the Referendum Council gives us and what needs to be decided before and after a referendum; and thirdly something about the notion of risk.

So, on precedent one of the other areas in which I work is on human rights and comparative human rights and I think many of us will be aware of, but not have spent significant time studying, the Human Rights Parliamentary Scrutiny Act and the committee it creates. Why? Because it doesn't generate litigation. That committee was created under the 2011 reforms to the Commonwealth Parliament. That introduced a specialised committee responsible for scrutinising legislation for its compatibility with seven international conventions. That committee has had some teething difficulties, but has got off the ground relatively successfully, and is fast becoming an important part of the Federal process.

That is obviously not going to be the exact model that you will see for a voice for First Nations but a recent and very successful experiment around innovation in the Commonwealth Parliamentary context of embedding a very serious commitment to write in a legislative oriented way. I think it is a model that gives us a status for optimism that that is eminently achievable and with some amount of, you know small amount of institutional reform and refinement can be very successful.

The second thing I want to talk about is detail and how much needs to be articulated prior to or after a referendum. The Referendum Council is very posthumous in the model it proposes. It says there are some non-negotiables, but Megan says this has to be a body that reflects First Nations and their membership, it has to be a body elected and drawn from community. It has to be a body with serious power to provide input and voice in the legislative process. It cannot be seen as purely optional and consultative, nor realistically can it be a hard veto. It has to have a function that is somewhere in between.

But the Referendum Council gives rise to at least five issues. The issue of the mode of election of such a body, its jurisdiction, its resources and institutionalisation, its interface in precise terms with the Commonwealth Parliament, and the issue of the timing of its creation.

That has caused some concern and my understanding is that it has led the government and the leader of the opposition to raise some questions about how much should be decided now verses in the future.

One of the reasons that Megan's involved me in some of these discussions is that some of my work comparatively has been on what Tom Ginsberg my co-author at the University of Chicago and I call, the phenomenon of deferral. The idea is that many constitutions nowadays make key decisions but leave critical aspects of the detail of those decisions to the future. If you go and look at the Commonwealth Constitution it is of course a Constitution that creates the federal judiciary and yet leaves to later legislation to create both the High Court, very soon after federation, and the Federal Courts in the 1970s. There are numerous examples in our Constitutional system of these two-part design model. Essentially deciding the key details of an institution at the Constitutional level and filling in the particulars through legislation. That model has the advantage of flexibility. If there are errors they can be readily corrected. It also has the advantage of parsimony in a question that is put to the Australian people, that there is not an overload of detail presented at a Referendum question which will be likely to confuse electors.

The issue of voice is one that puts the locus of change in the parliament and in the legislative process and it's supported by this mix of principle and pragmatism and may say also by international law.

I do think that there are one or two aspects of that detail that could usefully be resolved prior to a referendum, but one should not confuse resolving some critical questions with resolving all of them.

The two that I have in mind are interface and timing, although I think a third is a plausible candidate for resolution. By interface I mean the question of the status of the voice as it is inputted into the Commonwealth legislative process. As I said before, it cannot be merely advisory but nor can it be a hard veto and it would be useful I think in explaining it to the Australian people to have formulated some language that explains that concept and that is capable of commanding the support of First Nation and giving confidence to the government as to what exactly will be involved.

The second issue is timing. There are a number of instances of deferral within Australia and comparatively, to put it plainly have taken too long. If one is going to create Constitutional reform the expectation and hope that would be that a First Nation's voice would follow very soon thereafter, but as that very powerful documentary reminds us, expectations are often dashed in this context and I think it could be useful to ask in a referendum do you support this within say two or five years, to put time actually in the question in a way that makes absolutely clear to the parliament, should there be a change in government or a change in political context that there is a time limit on the implementation of the Constitutional mandate. I don't think that's a deal breaker, I just think it could be something that would be useful to consider.

The third thing is the jurisdiction of such a voice. I think there are a number of potential ways of resolving this and I'm not going to try and draft those solutions this evening. Others will do a better job than me no doubt in formulating the relevant language. But I think it is clear that the expectation would be that where the race power and likely section 122 were engaged by the Commonwealth in the formulation of legislation, the role of such a body would be mandatory and that the legislation should make that clear, and that where other heads of power were engaged, it would be open to the body to provide its voice and input into the legislative process. So, if you like that there would be a two-part jurisdiction, a mandatory role and a permissive or optional role where the body itself might decide whether to engage a particular piece of legislation, but that wherever the Commonwealth are purported to rely on 11, 122 or the race power it would have an obligation to refer the legislation to the relevant First Nation body. Michael Cromlin has come up with some language that I think is promising in that regard. I do not think that would need to be included in a referendum question, but I do think that some thought around that issue would be useful in explaining the idea to the broader public.

So, the last question, and I should say that the other issues around election and resourcing and institutionalisation there is plenty of very thoughtful work that has been done including by the Cape York Institute in providing that information and detail which again I think should be available and part of the public debate around this issue but need not delay the process or overload the perplex-

ity of a proposal that goes to the electorate.

So last thing on risk. I've had some very interesting discussions with other academics on this issue and I think there is a concern that with any form of Constitutional change there is risk associated with it. But I think that one needs to be mindful of both the degree of risk and the base line for comparison. Any legislation centred model of constitutional reform runs the risk that it will prove either somewhat weaker or somewhat stronger than those who design it envisage. That is an unavoidable risk. But I think in this context the risk is largely that the body will be weaker, not stronger than its designers hope for and I think for non-indigenous Australians, that is obviously a risk that they do not bear and therefore cannot be a reason to object to the proposal.

The risk is rather for First Nation and the people who support the model and the faith that they put in it as a mechanism for transformation. I have a lot of confidence however, that with the right degree of political pragmatism and leadership that has been shown to date, the body will not run that risk.

So, to put it more plainly, if it were the case that in the early years of the body's operation it gave advice that was seen by both sides of politics to be impracticable, it might lose its relevance, but I think that that is a risk that could be readily overcome through good choices and leadership of the kind that we have seen to date. And to underscore it's a risk that is largely a risk on the side of First Nation people and therefore cannot be a reason to object to it on the non-Indigenous side of politics. The risk that it will prove too strong could readily be dealt with by some language making clear that the input of such a body is not a hard veto on the ability to pass Commonwealth legislation.

The second point I want to suggest is that we need to be clear about what the baseline for comparison is when we talk about risk. There are two risks in the status quo or in the proposals previously considered in the process of reform. The risk in the status quo is a whole generation of Aboriginal and Torres Strait Islander peoples will entirely lose faith in the process of legal and constitutional reform. I say that as someone who has the great privilege of teaching some people who are the leaders of that generation and I can say to you from what they have said to me, there is a real sense that this is the last chance in this documentary, right the last clip that we get for a generation to fix this and so that the small risk that one runs of changing things with you know downstream uncertainty, has to be weighed against the absolutely certain risk of disillusioning and disappointing a whole generation of leaders and fellow members of our community.

The other risk I would say is that when we debated prior versions of constitutional change that involved a stronger role for litigation in the courts, a sort of 1, 16A or non-discrimination model, that too was not without risk of two kinds. The obvious risk kindly pointed out by many political leaders was that it would give too much power to the judiciary. But the risk that I point out in my own work from a comparative perspective is that a stand-alone race guarantee without any of the modern accoutrements of other rights and other guarantees of non-discrimination that one would normally see in a modern constitutional democracy, might

Associate Professor Gabrielle Appleby

not be a guarantee that the High Court felt particularly empowered to enforce robustly.

So, no reform that we can come up with is without some degree of risk or uncertainty and that this model in my view has far less risk associated with any other plausible alternative, whether it be the status quo or a judiciable model of change.

And the last thing I want to emphasise before turning over to Gabrielle is that the two-part structure that the Referendum Council endorses and envisages which is core decisions put in the constitution and detail left to legislation, clearly lends itself to correction and flexibility. If it were the case that an initial body was created and not seen to be performing its function either on the side of the community or the Commonwealth Parliament, there would clearly be scope for revising the legislation to better refine and create a model that fulfilled the aspirations of the Uluru statement and the dialogue and I think that that is the huge advantage of a two part model, putting in the Constitution a mandate to create a voice and leaving to legislation the detail, it creates considerable flexibility downstream to correct any difficulties that might arise. I think that means that debates about risk really are misplaced. Of course, there's always as we understand there's always change and uncertainty that goes with that, but that it's very minimal compared to all other relevant alternatives and given the flexibility that's envisaged. Obviously we'll be happy to take questions and debate some of those questions in detail and questions.

Associate Professor Gabrielle Appleby

I'd also join in acknowledging and paying my respects to the Gadigal people of the Eora nation and their elders past and present, the traditional custodians of the land on which we are meeting tonight.

I've been asked by Megan to quickly explain and reflect a little on the truth telling dimension of the Uluru Statement from the Heart. Just a quick reminder, the Statement calls for Makarrata to achieve a fair and truthful relationship with the people of Australia. The statement seeks a Makarrata Commission to be established, not only to supervise a process of agreement making, but also for 'truth telling about our history'. So first I wanted to say something about how this call emerged from the dialogues and into the Uluru Statement.

The need for a truth telling was not a formal option that was incorporated into the dialogue's agenda as Megan has just explained, around for example which a break out group was established or a working group was established for the second day. And this was because it was not a reform option that had emerged from those previous reports on which those break out options have been created.

However, the importance of history became very obvious in every dialogue that we went to. Its emergence highlighted the importance of the process being a dialogue and not simply being a rigid consultation on predetermined options. So at every dialogue the delegates used the first session of the first day, when they were asked to imagine what meaningful reform would mean in their community, they used that session to talk about their history, to talk about the importance of their law, to talk about the impact of invasion on their community, to talk about the resistance that was mounted and the resulting massacres, the disease and the death, to talk about the period following invasion, a period of government control and discrimination. So, it became very clear to those attending the dialogues that before the communities could or were willing to speak of reform, the past needed to be properly acknowledged.

The dialogues thus emphasise that a process was needed to create space for First Nation's people to tell the truth about history in their own voices and from their own point of view and equally, an importance was placed on the need for mainstream Australians to hear those voices and to reconsider what they know and understand about their own nation's history.

Here I just wanted to pause and reflect on a few quotes that were taken from the records of the dialogues that were endorsed at the end of each meeting. This is a quote from the Darwin dialogue. 'Australia must acknowledge its history, its true history. Not Captain Cook. What happened all across Australia. The massacres and the wars. If that were taught in schools, we might have one nation where we are all together'. And a quote from the Brisbane record of meeting, 'In order for meaningful change to happen, Australian society generally needs to work on itself and to know the truth of its own history'. And finally, from the Melbourne dialogue, 'Government needs to be told the truth of how people got to here. They need to admit to that and to sort it out'.

This call for the true telling of history that came out from the dialogue was reflected I those 10 guiding principles that Megan referred to, that were adopted at the Uluru Convention and that guided the Convention to its final settlement in the form of the statement. So these guiding principles included in principle number five, 'Any final resolution must tell the truth of history'.

Calls for truth as well as redress have been reflected in previous declaration and calls for reform by First Nation's people. For instance the Eva Valley statement of 1993 called for a lasting settlement between Aboriginal and Torres Strait Islander people in the Commonwealth and it said that that settlement process must recognise and address the historical truth.

So it's not unsurprising that the need for a form of truth telling to be part of a package for reform emerged. Indeed, it reflects the term of many international instruments and in these instruments, it's recognised that truth telling opens the way for justice, healing, the restoration of dignity and on those bases, reconciliation.

For instance, the United Nations Declaration on the Rights of Indigenous People enshrines the importance of truth telling in a number of its preambular statements and throughout its article. In 2013, the UN General Assembly passed the Resolution on the Right to the Truth, and Article 4 specifically encourages states to, 'consider establishing specific judicial mechanism and where appropriate, truth and reconciliation commissions to complement the justice system, to investigate and address gross violations of human rights and serious violations of international humanitarian law'.

Now other countries have led the way in establishing truth telling mechanisms to deal with the violence and injustice of a colonial past. Examples of truth telling commissions and tribunals from other foreign jurisdictions include the South African Truth and Reconciliation Commission which operated between 1995 and 2002. The South African commission was established to help that country come to terms with the legacy of Apartheid in a morally acceptable way. Its mandate included violations by the government and by non-government actors and it held special hearings into specific sectors, into specific institutions and in some cases, specific individuals. The commission's final report covered the structural and historical background to the violence, it set out individual cases, regional trends and the broader institutional and social environment of the apartheid system. The report made detailed recommendations for a series of financial, symbolic and community reparation.

Another example is the Truth and Reconciliation Commission of Canada which operated between 2009 and 2015. The Canadian commission was established with a very specific mandate, to investigate the abuse and assimilation that occurred in Indian residential schools across Canada over a period of more than 100 years. The commission was allocated 60 million dollars and spent six years travelling across Canada hearing testimony from more than 6,000 witnesses including survivors and families, former provincial government and church officials, and all of those affected by residential schools. The final report recommended action across a broad front, including improvement to Aboriginal education, reducing the number of Aboriginal children in care, closing gaps in outcomes and funding Aboriginal language initiatives. It also said that a national centre for truth and reconciliation should be established and should receive $10 million so that government and community archives would be able to provide records relevant to the history and legacy of the residential school system to the national centre. It recommended additional funding for communities to research and produce histories of their own residential school's experience, so a localised truth telling to continue.

Truth telling opens the way for justice, healing, the restoration of dignity and on those bases, reconciliation.

And finally, in New Zealand there's the Waitangi Truth Tribunal. The Waitangi Tribunal is an ongoing mechanism, which was established as a permanent commission of inquiry that investigates claims that are brought by Maoris relating to Crown action which breaches the promises of the Treaty of Waitangi where Maoris have suffered prejudice as a result. Once a claim is registered in the tribunal, the tribunal conducts research and hearings with evidence given by the claimant and from the Crown. The tribunal panel writes a report that sets out its findings and importantly to make recommendations on the actions the Crown needs to take to remedy the damage suffered, including entering into future treaty negotiation.

So, these fine examples certainly provide some ideas as to what a truth telling process in Australia might look like, and as does the Human Rights and Equal Opportunities Commission investigation into the separation of Aboriginal and Torres Strait Islander children from their families which led to the 1997 report, Bringing Them Home. In the course of the commission's inquiry it heard the stories of survivors in their own voices, some for the first time. The final report of the commission documented these stories extensively and made 54 recommendations to redress the impact of removal and the ongoing trauma it was causing.

So what might then truth telling in Australia look like as called for in the Uluru Statement? Well it's not detailed in the Uluru Statement what form truth telling might take, other than it needs to be supervised by the Makarrata Commission that's called for. It's not my intention to make recommendations as to what it might look like, but rather I'm going to conclude by raising some important questions.

Truth telling in Australia might, under the Makarrata Commission be a nationally led but locally run operation so that regional groups and communities can design and run their own localised truth telling processes in a way that responds to their own needs. In fact, it may be that such local processes can start before the national process is established, perhaps providing the political momentum to get up to that national process.

It might be designed around significant issues or events or policies that have affected Aboriginal and Torres Strait Islander people, it might focus on specific sectors, institutions or actors, or it might be a general process for all stories to be shared. What we'll also have to be given to have a truth telling work of the Makarrata Commission will inform the negotiation of the treaty by the commission and also how it will inform the work of the structural reform that was called for in the Uluru Statement. That is, how it will inform the work of the voice.

The design of the truth telling process should be led by Aboriginal and Torres Strait Islander people. And I say this both for its own legitimacy and to make sure it's designed to respond to their requirements for the process and their call that was heard in those dialogues.

Much thought's going to be need to be given to answer many questions, including how we ensure it's given adequate funding and resources to conduct the necessary hearings across communities in Australia, and to also ensure that people who attend and give evidence are properly supported in what's going to be, what will often be traumatic testimony. Resources I would say will also be needed to ensure the stories are properly documented and properly archived so that

they can provide a publicly accessible record for future generations.

So, a very brief word in conclusion. As a non-Indigenous Australian I am genuinely excited by the call for truth telling that came out of the Uluru Convention, as we read in the statement. And I say this first because it's a call that emerged strongly and organically from the delegate and the communities themselves and so it truly represents what they wanted and needed in terms of meaningful reform. And secondly, because it represents a process through which all Australians might be able to grow and ensure that the whole nation emerges richer and strong for that process. Thank you.

Noel Pearson

Thank you very much Arthur and to the Bar Association, Law Society and the Judicial Commission for your invitation to present this evening. I want to pay tribute to the First Nations of this city and this region. I want to pay in front of her fellow lawyers here, tribute to Megan's leadership of our dialogue process over that torrid six month period. It really was led by her and Pat Anderson, a team from the University of New South Wales, Gabrielle and the other lawyers that helped Megan through that process really did a, an astounding job. I really think that the result defied all of my expectations about what could be achieved if we go through a proper process of consideration and discussion about the law and discussion about the politics and I'm certainly very proud of the Uluru Statement from the Heart. I really think it represents our best chance to do something great for the country.

I think it is a modest but profound way forward. It will make a huge change in my view. All of my life is devoted to trying to build things from the ground, but even as we build things up from the ground, we have to attend to the structural conditions that make life so parlous for people on the ground.

The strongest argument is captured in the statement itself, which is the statement about our extraordinary incarceration in this country. No people on the planet earth are incarcerated at our rates, we all know that – you all know that. And it begs the question, our egregious incarceration rate begs the question as to whether we are a particularly criminal people inclined towards criminality in some kind of innate way. Well, I don't think we accept that. There's a structural dimension to our parlous situation and my submission is that the structure at our highest level is part of our disempowerment and if we want to turn those things around, we have to turn that thing around. And the advocacy of the last 100 years or more in relation to this question of can we have a say about our own destiny in our own country?

When I consider the time period that our people have been on this continent it is like considering the origins of the universe. It is so unimaginable. Who can imagine a people who have been here for sixty millennia? It is out of our imagination to think of the idea that a people could be in possession of a continent for more than sixty millennia and yet in little more than 200 we have to beg, we have to beg for a rightful place in our own country and what I urge upon those who have come here, the idea that there might be some recognition of that past and our continuing presence.

So, this is an opportunity to do that. I really believe that if the nation doesn't take advantage of the opportunity of the Uluru Statement, this is a question that will never go away. I fear for the state of the Australian heart in relation to Indigenous issues. It may well prove that there be greater love for our equivalent human rights strugglers in same-sex marriage; that there will be more sympathy for that cause then there will be for ours. I think it's a real question. We've been gazumped by that debate. We should have moved on from Uluru to a proper consideration by the government and the parliament of the proposition put forward there. But as the politics played out, we have been gazumped and put on the backburner. We hope that as soon as the same-sex marriage plebiscite is concluded, that there might be a way to put this agenda back on the front.

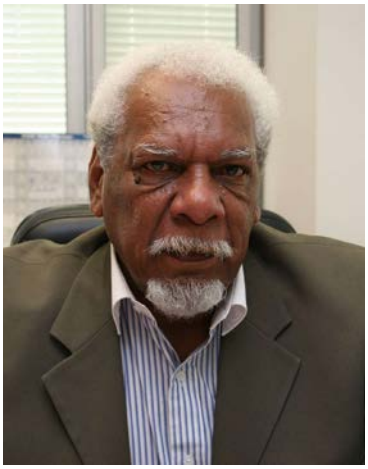
Now one of my concerns about all of this is that no great human rights achievement has been done without national political leadership. The equivalent achievement with civil rights in the United States required a president who had made this a project in his mind decades before it was achieved. LBJ was thinking about civil rights, decades before he brought it to pass with Martin Luther King. He was thinking about the Gordian challenge involved long before he became president. He had the brains to think through the problems and untie the knot and see a pathway through, how it is that he would convince the South and particularly the Texas South to eventually allow civil rights to come about. The great plotter of social justice.

We have no equivalent calculators of political solutions in Australia, not in the leadership of the country, not in the parliament. So, the challenge we have is how do we plot our way forward from the outside if nobody on the inside is thinking it through? LBJ showed that every political knot can be untied, you've just got to work out how to do it.

Noel Pearson signs the canvas where the Uluru Statement from the Heart will be painted on, during the closing ceremony in the Mutitjulu community of the First Nations National Convention held in Uluru, on Friday 26 May 2017. Photo: Alex Ellinghausen / Fairfax Photos

A tribute to Sol Bellear

Memories of the Redfern Speech



Sol Bellear AM, the long-serving chairperson of the Aboriginal Medical Service in Redfern, a staunch advocate for land rights and a Bundjalung man from Mullumbimby, died on 30 November 2017. In a media statement, President Arthur Moses SC said:

'We, as a nation, are diminished by the unexpected loss of this inspirational Australian. Sol dedicated his life to the betterment of Indigenous people. He fought tirelessly against injustice and inequality, which, sadly, continues to be a stain on our nation's character. Sol Bellear enjoyed the respect and admiration of lawyers across New South Wales, young and old … In more recent times, he supported the Uluru Statement from the Heart.'

Sol had accepted an invitation to address a function in the Bar Common Room on 11 December 2017 to mark the 25th Anniversary of Paul Keating's Redfern Park Speech. As a mark of respect to Sol's family and friends, that function was held over until March 2018.

Sol's friends at the NSW Aboriginal Land Council said he was looking forward to the Bar Association function and carefully prepared what he proposed to say. Sol agreed to be interviewed on site at Redfern Park, about Paul Keating's speech. The following is a transcript of the last interview Sol ever did. His family has agreed to share it with *Bar News*. On behalf of our readers, we thank them.

ALC Sol Bellear, most people above a certain age know where they were when Paul Keating gave his Redfern speech. But you were actually right here. What do you remember of the day?

Sol Well, thwat's it. People say that they remember where they were at the time. I was right there on stage with him, and along with Stan Grant. Stan Grant of course was the MC. The day itself was just something unbelievable. It was just like a gathering, a prime minister giving a speech. Yes, it was in Redfern; yes, it was about Aboriginal people. But then into the speech, it just erupted. I mean that speech would have to be one of the most brilliant speeches ever, ever in Australia, if not the southern hemisphere.

ALC You were given a look at the speech before Paul Keating delivered it. What did you think when you read it? Did you think it would have the same impact as it did when you were looking at it on the page?

Sol No. I went through it and I had a look at a lot of different speeches that prime ministers or ministers were going to make. Being with ATSIC at the time, they just sent them across as a matter of courtesy. I thought this is just another speech, another prime minister, another speech, another Aboriginal issue, another promise, another feel-good situation and that's it. But Paul Keating, he's an orator, one of the best Australia has ever seen. The way that he delivered that on the day, it just broadened my whole horizon again about the Australian parliament and about non-Aboriginal people living in Australia.

ALC How did you come to be standing next to him on that day?

Sol Well, I gave a speech, the introductory speech before him. I was the deputy chair of ATSIC. It was the Year of the World's Indigenous Peoples speech. That's why I thought yes, feel-good, make us feel good for the day, if not a couple of days and that's it. But I gave an introductory speech beforehand as the deputy chair of ATSIC and it just went from there.

ALC You spent some time with the prime minister before he gave this speech. How would you describe his mood on the day in the lead-up to that speech?

Sol It was funny, because we'd met up about half an hour or an hour beforehand and like you said, I'd read the speech a couple of weeks beforehand and a week again later on. But we caught up and he was in a very good mood. He was saying it was so important to him. He'd had quite a few wins with the Reconciliation Council. See, this was 1992. So in 1990, we had the National Aboriginal Health Strategy was launched and then we got into Reconciliation, and then we had the Mabo deci-

sion. So on Indigenous issues, particularly here in Australia, Paul Keating was buoyed. I mean he was getting ticks all over the place and he just really, really carried out what Aboriginal people wanted. He was so buoyant about the day; he really was. He thought this is another contribution I can make and hopefully have the rest of Australia come along with him.

ALC When you listen to the audio of the speech all these years later, there's a point in the speech where it seems the crowd's mood shifts from jeering to cheering. Is that actually what happened when you were there?

Sol In the beginning, probably two paragraphs into Paul's speech, the crowd probably had the same feelings I had – oh yes, here is just another prime minister welcoming the International Year of the World's Indigenous Peoples. But then he started getting into some things, saying things, and he was very passionate, emotional perhaps. I just want to quote some of the things that got us going and the way the emotion that he put into this, where he said: 'And, as I say, the starting point might be to recognise the problem starts with us, non-Aboriginal Australians. It begins, I think, with an act of recognition, recognition that it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the diseases, the alcohol. We committed the murders. We took the children from their mothers. We practised discrimination and exclusion. It was our ignorance and our prejudice and our failure to imagine these things being done to us. With some noble exceptions, we failed to make the most basic human response and enter into their hearts and minds. We failed to ask, how would I feel if this was done to us?' When he got to the part where he said 'we took the children from their mothers', that's when the crowd erupted. Aboriginal people, non-Aboriginal people, they just knew that this man is very, very genuine; this man as the prime minister and this man's government had made a very, very fair dinkum commitment. The rest of the speech when he talked about the treatment that British people have got, the Irish people that resettled here, the Greeks, the Italians, the Yugoslavs, all the migrants that had come to Australia, he said that we still haven't got that justice for the Aboriginal people that have been here for over 50,000 years. It was genuine, very, very genuine. I think today, 25 years later, he still has that genuine commitment and feeling for Aboriginal people. I think we've just got to look at Barangaroo. He was an architect behind all that, to make sure that it was named after Barangaroo.

When he got to the part where he said 'we took the children from their mothers', that's when the crowd erupted.

Aboriginal people, non-Aboriginal people, they just knew that this man is very, very genuine; this man as the prime minister and this man's government had made a very, very fair dinkum commitment.

I'm going to get a rock done, I'm going to have the speech printed on it and even in the dead of night, if I have to, I'll come and plant it here, right in the heart of Redfern Park.

ALC How was he after he gave the speech? Did he know that he'd made a real impact? Or did he just see it as another speech, move onto the next thing?

Sol I think Paul Keating, prime minister, or Paul Keating, citizen, he knows when he's given a great speech. He knows when he's got the public there along with him. All through that, he had to pause about ten times for the rest of the speech for the applause that he got. He was buoyed. We went down to the Town Hall for a reception there after the speech and he was just on cloud nine. Normally, he'd come up and say how did it go, like everybody else, or what did you think? He knew that he was on a winner and he knew. He was just on cloud nine for the rest of the day, and deservedly so.

ALC Obviously they were very powerful and unflinching words that you just read out. But on the day, he stopped short of making an apology to Aboriginal people. Why do you think that was?

Sol I think that was the only disappointing thing for me in that speech. Right at the end, I was thinking now here comes an apology to Aboriginal people. I actually said to Stan Grant after everything had finished, 'I'm still waiting for that apology'. I think that he had to have cabinet approval. I think that there was a whole issue of things would have had to go through the Attorney-General, they would've been thinking about the compensation and all that sort of stuff. As we know, when Kevin Rudd gave the apology to the Stolen Generations, the so-called millions of dollars in compensation and lawsuits, it's just not going to happen. The people of the Stolen Generation, they just wanted that apology. We've seen the emotion at that, the tears and the hugs and the cheers that, yes, we were wrongly done by and we have received an apology.

ALC Some people might say when they look back on that speech that they were just words, that they weren't really followed by any actions and that nothing has changed. What do you think? Can words change a country, and did they change them in this case?

Sol Absolutely. We look around the world and see some of the top speeches that world leaders have given – they've changed countries, they've changed wars, they've changed the ideology of everything. These were not just words that Paul Keating spoke. This was putting the country on notice that we need to educate ourselves about Aboriginal people, about our history and about our past, all that sort of stuff. No, they weren't just words. Unfortunately, John Howard came in at the next election and a lot of those things, the Reconciliation movement and all that, Howard refused to let his ministers march across the Harbour Bridge and all that sort of stuff. So what Howard and even prime ministers after him, including the current prime minister, have taken those words that Paul Keating gave to Australia and put Australia on notice for, and threw them out. That's the pity. 25 years ago this happened, this speech and those beautiful words; now, we've gone backwards. Our infant mortality rate has gone through the roof. Our health, the gap has widened. We've got

more people incarcerated, particularly our young people and women, more are incarcerated. Land Rights issues have just about come to a halt. Just recently, we have a situation where people met at Uluru and put a clear message through that they wanted a voice in parliament. Without even sitting down and going through the thing properly, the current prime minister has just rejected it completely. That's really, really disgusting and I think Australian people know that they really want to get back in behind those words that Paul Keating brought up. The refugees in Australia are certainly behind us. We need to have our voice listened to. We need to revisit Paul Keating's words and his speech and say there's nothing bad going to happen here about this, let's embrace what Paul Keating said 25 years ago and let's march forward.

ALC Sol, we're just sitting close to the site of what was one of the most famous speeches, if not the most famous speech in Australian history. But you'd never know that if you're actually here at Redfern Park. Why do you think that is? Why isn't there any marker for the speech?

Sol No. Redfern is the place where modern Aboriginal ideology from the '60s and the '70s, our first Aboriginal legal services, first Aboriginal medical services, children's services, and so it goes, this was the civil rights movement and the human rights movement that happened for Aboriginal people, all begin here in Redfern on the follow-on from the 1967 Referendum. So we were then counted as citizens in 1967. A group of young people came into Redfern and said we're taking this forward to the next level. It was the end of the human rights in South Africa, the anti-Apartheid movement, the anti-Vietnam War, civil rights movement was coming to an end over in the US. More Australian people looked at what was happening overseas and marched for people overseas, and yet things that were happening to Aboriginal people here in Australia were worse than what was happening in some of the countries overseas. So we had to take up the fight, and we did. Keating then came in with this and put the words into action, or put our action into words. Now, come '96 onwards, everything just stopped.

It begins, I think, with that act of recognition.

Recognition that it was we who did the dispossessing.

We took the traditional lands and smashed the traditional way of life.

We brought the diseases. The alcohol.

We committed the murders.

We took the children from their mothers.

We practised discrimination and exclusion.

It was our ignorance and our prejudice. And our failure to imagine these things being done to us.

With some noble exceptions, we failed to make the most basic human response and enter into their hearts and minds.

We failed to ask - how would I feel if this were done to me?

As a consequence, we failed to see that what we were doing degraded all of us.

ALC But there's no plaque, there's no memorial, there's nothing to actually signify that this speech was given at this place. Do you think that's a bit strange?

Sol No. I've been fighting for last 25 years now. I've written to Sydney City Council on the 10th anniversary, the 15th anniversary and the 20th anniversary – didn't even get any recognition of my correspondence to them. And yes, I'm going to get a rock done, I'm going to have the speech printed on it and even in the dead of night, if I have to, I'll come and plant it here, right in the heart of Redfern Park.

ALC So there should be a memorial to the speech here in Redfern?

Sol There has got to be a memorial to this area. People have got to know, particularly now the gentrification is happening in Redfern, that this is an Aboriginal stronghold, not just for people of New South Wales, but for Aboriginal people right throughout Australia. All of Aboriginal Australia recognises the contribution that the Aboriginal people of Redfern have made for human rights for Aboriginal people.

ALC So finally, Sol, how would you summarise the impact of Paul Keating's Redfern speech?

Sol Paul Keating's speech was the most significant speech, prime minister or not, has ever made to Aboriginal people in Australia, and not just to Aboriginal people, but to all of Australia. There was no guilt in it. There were no words there to make people guilty. I think on the day, the non-Aboriginal people in the audience applauded and knew that. We need to have that plaque. We've got plaques, we've got statues for people that invaded our country, for people that shot up other people's countries and all that. Yet one of the most important speeches in Australia's history, there is not one bit of recognition by plaque or anything else to recognise that.

ALC Do you think there should be some recognition given to what happened on that day in this place? And if so, how?

Sol When we look around this park, we look around all parks all over Australia, we look at cenotaphs all around. We've got statues for people that invaded this country, we've got statues and we've got all these other things for people that invaded this country, invaded other countries, memorials and everything. Yet one of the most significant speeches ever made to all of Australia by a prime minister on behalf of Aboriginal people, there is nothing to recognise it, nothing to bring forward. Here we are, 25 years on from that magnificent speech, and there is not one plaque, not one bit of recognition that could again change this country's thinking towards the world's oldest living people.

ALC Thanks very much.

Sol Thank you.

Native title compensation claims

by Vance Hughston SC and Tina Jowett

Vance Hughston SC

Tina Jowett

Introduction

In the 24 years since the enactment of the *Native Title Act 1993* (Cth) (NTA), there has been just one fully litigated and successful native title compensation claim: *Griffiths v Northern Territory (No.3)* [2016] FCA 900; (2016) 337 ALR 362 (Mansfield J) *(Griffiths No.3)* and, on appeal, *Northern Territory v Griffiths* [2017] FCAFC 106 (*Griffiths FFC*). On 18 February 2018 the High Court granted leave to the Northern Territory and Commonwealth to appeal *Griffiths FFC*. In this article we discuss the approach that the Federal Court took at first instance and on appeal to this truly novel area of Australian law.

Background and the Native Title Act

The enactment of the NTA was the Commonwealth's response to the High Court's landmark recognition of native title in Australia in *Mabo v Queensland (No.2)* (1992) 175 CLR 1.

The main objects of the NTA are set out in s 3 of the NTA and they are:

> to provide for the recognition and protection of native title; and
>
> to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
>
> to establish a mechanism for determining claims to native title; and
>
> to provide for, or permit, the validation of past acts invalidated because of the existence of native title.

Claims for the recognition of native title

As part of the statutory recognition and protection of native title, the NTA made provision for Aboriginal people and Torres Strait Islanders to apply to the Federal Court to obtain a determination that would recognise their native title rights and interests. There have been many such applications determined by the Federal Court since the commencement of the NTA on 1 January 1994. Most contested native title claims have gone on appeal to the Full Federal Court and a significant number to the High Court. As a result, a considerable body of jurisprudence has developed relative to the making and the determination of claims for the recognition of native title.

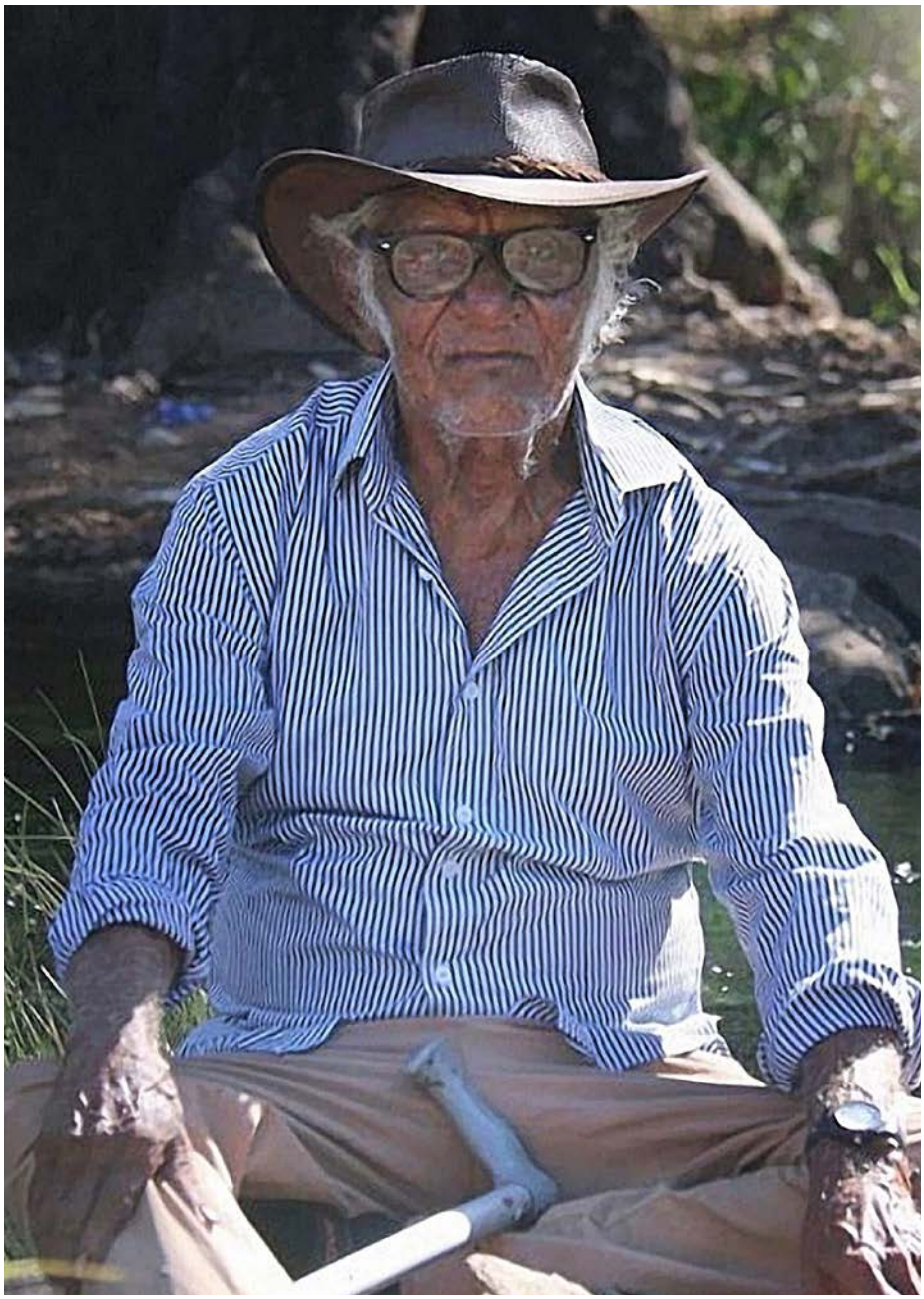
Native title rights and interests are not common law rights and interests; they are rights and interests possessed under traditional laws and customs and are 'recognised' by the common law. Those rights and interests may not, and often will not, correspond with rights and interests in land familiar to the Anglo-Australian property lawyer. Native title rights and interests will often reflect a different conception of 'property' or 'belonging': *Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2002) 214 CLR 422 (*Yorta Yorta*) at [40]. In *Commonwealth v Yarmirr* (2001) 208 CLR 1 *(Yarmirr)* at [12], the High Court cautioned that neither the use of the word 'title' nor the fact that the rights and interests be 'in relation to' land and waters should be seen as requiring identification of the rights and interests as items of 'real property'.

The following passage from the majority judgment in *Western Australia v Ward* (2002) 213 CLR 1 *(Ward)* at [14] aptly describes both the nature of native title and the difficulty of translating what is essentially a spiritual or religious connection with land into what the law will recognise as rights and interests:

> As is now well recognised, the connection which Aboriginal peoples have with 'country' is essentially spiritual. In *Milirrpum v Nabalco Pty Ltd*, Blackburn J said that:[1]
>
> > 'the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship. … There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole.'
>
> It is a relationship which sometimes is spoken of as having to care for, and being able to 'speak for', country. 'Speaking for' country is bound up with the idea that, at least in some circumstances, others should ask for permission to enter upon country or use it or enjoy its resources, but to focus only on the requirement that others seek permission for some activities would oversimplify the nature of the connection that the phrase seeks to capture. The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them. The difficulties are not reduced by the inevitable tendency to think of rights and interests in relation to the land only in terms familiar to the common lawyer. Nor are they reduced by the requirement of the NTA, now found in par (e) of s 225, for a determination by the Federal Court to state, with respect to land or waters in the determination area not covered by a 'non-exclusive agricultural lease' or a 'non-exclusive pastoral lease', whether the native title rights and interests 'confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others'.'

Native title compensation claims

The NTA's *quid pro quo* for enabling the Commonwealth, state and territory governments to validate past acts which may have



Alan Griffiths. Photo: ABC

been invalidated by reason of the existence of native title and to engage in future dealings that may affect native title was to make provision for the native title holders to receive compensation on just terms for the effect that such acts would have upon their native title rights and interests. In relation to some state regimes liability for compensation is transferred. For example, the State of Western Australia is liable under the NTA to compensate native title holders for the grant of mining tenements over native title land, yet under s 125A of it's *Mining Act 1978* (WA), the state has transferred that liability to the holder of mining tenements.

The pivotal section of the NTA when it comes to determining the quantum of compensation payable is s 51(1) which relevantly provides that the entitlement to compensation for past or future acts: 'is an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests'.

Griffiths v Northern Territory (No.3) (2016) 337 ALR 362

Background

The Ngaliwurry and Nungali People (Griffiths Applicants) filed applications for a native title determination in 1999 and 2000 over areas of vacant Crown land within the small township of Timber Creek in the Northern Territory.[2] At first instance, Weinberg J determined that the Griffiths Applicants held only non-exclusive native title rights and interests. His Honour ruled that, with a few exceptions, any prior extinguishment as a result of the grant of pastoral leases must be disregarded under s 47B of the NTA.[3] The Griffiths Applicants successfully appealed that decision. The Full Court determined that the Griffiths Applicants held native title rights to exclusive possession, use and occupation in relation to those parts of the claim area to which s 47B applied.[4]

The Griffiths Applicants commenced a claim for compensation under s 61 of the NTA for the past extinguishment of their native title rights and interests in respect of various lots of land within Timber Creek. Because s 47B had no application to a claim for compensation, the court could not disregard the prior extinguishment of the right to control access and use brought about by the earlier grant of historic pastoral leases.

Issues in Griffiths (No.3)

It was common ground that most of the Griffiths Applicants' entitlement to compensation arose under s 23J of the NTA for the extinguishment of their native title rights and interests by various previous exclusive possession acts attributable to the Northern Territory and validated by operation of the NTA.[5] It was also common ground that the rights and interests which were extinguished by those previous exclusive possession acts were non-exclusive rights and interests by virtue of the fact that earlier pastoral leases had already extinguished the Griffiths Applicants' exclusive native title rights.[6]

The compensation application claimed compensation under two heads. One head of claim was the economic loss caused by the acts that extinguished the native title rights and interests. The other head of claim was the non-economic effect of those acts on the Griffiths Applicants. The Northern Territory and the Commonwealth did not take issue with that general framework and accordingly Mansfield J adopted that framework for his assessment of the amount of compensation.

The primary judge awarded $512,400 compensation for the economic value of the extinguished native title rights (80% of the freehold value) and simple interest on that sum of $1,488,261. He also awarded $1,300,000 for solatium for the loss or impairment of those rights and interests.

Mansfield J's approach to the calculation of compensation queried in the Full Court

In *Griffiths* FFC, the Full Court referred to the passage in the majority judgment in *Ward* (at [14]), set out earlier above at [5], in which their Honours adopted the observation of Blackburn J in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, that the relationship of Aboriginal people to land is, whatever else, a spiritual relationship in which ancestors, the people and all else are organic parts of one indissoluble whole (at [140]). The Full Court said that s 51(1) of the NTA should

be construed in a manner which reflects the (special) nature of the subject matter with which it deals and when that is done, 'it is by no means clear that Parliament intended there to be the kind of binary approach to compensation adopted by the parties in this proceeding' (at [142]).

The Full Court said that the use of the phrase, 'loss, diminution, impairment or other effect', in s 51(1) suggests that Parliament contemplates that there may be more than one effect, and that the effects may vary in nature, quality and significance (at [142]). They said that native title rights have a unique indissoluble character and it is in relation to those rights and interests that the terms of the compensation must, as s 51(1) states, be 'just' (ibid):

> The statute does not ask in terms what is the 'effect' on the land in relation to which rights and interests are held; nor on its value. Nor does the statute confine the effect to the use or exercise in any particular way of the bundle of rights constituting native title. Properly construed, s 51(1) contemplates compensation to native title holders of a more holistic nature. (at [142])

Their Honours went on to say that once it is seen that Aboriginal rights and interests in land had dimensions remote from the notions enshrined in Australian land law, the question arises as to whether any real assistance can be found in applying the principles to be found in state or territory land compensation statutes to the task of assessing compensation for the loss of native title rights and interests (at [144]). Their Honours said that it may well be appropriate to 'loose the assessment from the shackles of Australia land law and approach the compensation exercise without dividing value into economic and non-economic components. It might rather be more appropriate to seek to place a money value as best as can be done on the one indissoluble whole.' (at [144]).

Timber Creek, NT. Photo: ABC

The Full Court's decision

Despite those criticisms, the Full Court went on to determine the appeal in the way that it had been argued before it and in the way that the case had been conducted before the primary judge. That is, the Full Court considered whether the primary judge had erred in his calculation of either or both, economic loss and non-economic loss.

Economic loss

The starting point of Mansfield J's analysis of the Griffiths Applicants' economic loss was that exclusive native title is equivalent in value to freehold title.[7] It was reasoned that a discount must be applied to the Griffiths Applicants' rights and interests on the basis that there is a difference in value between exclusive and non-exclusive native title rights.[8] Justice Mansfield ultimately held that the Griffiths Applicants' non-exclusive rights and interests were worth 80% of the freehold value. His Honour noted that this was not 'a matter of careful calculation' and that, rather:

> It is an intuitive decision, focussing on the nature of the rights held by the claim group which had been either extinguished or impaired by reason of the determination acts in the particular circumstances. It reflects a focus on the entitlement to just compensation for the impairment of those particular native title rights and interests which existed immediately prior to the determination acts. [9]

The Full Court agreed that the calculation of compensation was an 'intuitive' decision but said that the primary judge had erred in not giving a sufficient discount to reflect the fact that the native title holders' rights and interests were non-exclusive, that is, they did not have a right to control access onto their land and the inalienable nature of native title. The Full Court said that the discount factor should have been 65%, rather than 80% of the freehold value of the land.

Justice Mansfield calculated the interest on the economic loss using the simple interest method. His Honour noted that the NTA does not prescribe a particular method and held that the appropriate method will depend on the evidence in a particular case.[10] In the case before him, Mansfield J considered it probable that the funds would have been distributed to individuals rather than invested commercially, and this justified the payment of simple, rather than compound, interest by the Northern Territory.[11]

Before the Full Court, the Commonwealth's contention was that the economic value of the non-exclusive native title should be assessed at 50% of the freehold value. The Northern Territory's contention was that the economic value should be assessed as the aggregate of a 'usage value' of the parcels of land (derived from the market value of undeveloped range land) and a 'negotiation value' equal to the excess of 50% of the freehold value over the 'usage value'. In its cross-appeal, the native title holders' contention was that the economic value should be assessed at 100% of the freehold value.

Non-economic loss

Compensation for non-economic loss was the largest component of the damages awarded to the Griffiths Applicants.[12] As noted by Mansfield J, the issue confronting the court was 'how to quantify the essentially spiritual relationship which Aboriginal people, and particularly the Ngarliwurru-Nungali People, have with country and to translate the spiritual or religious hurt into compensation'.[13]

His Honour held that non-economic loss or solatium, is to be calculated with reference to the collective and communal nature of native title, and the extent to which rights and interests are non-exclusive.[14] It was particularly emphasised that not all claim groups will have an identical relationship to country, and so the court must undertake an evaluation of the relevant compensable intangible disadvantages, which in turn requires an appreciation of the effects of that loss on the specific native title holders.[15] As in his consideration of economic loss, Mansfield J suggested the process of calculating non-economic loss is an intuitive one.[16]

Justice Mansfield identified three particular considerations that were significant to his assessment of non-economic loss. First, the construction of a water tank on a site of

spiritual significance, which caused readily identifiable distress. Second, the impact of certain acts on the capacity of the native title holders to conduct ceremonial and spiritual activities on that area and adjacent areas. Third, the reduction of the geographical area over which native title is held, which has affected the spiritual connection of the claim group to their country.[17]

At [382]-[384], his Honour concluded:

> Those three elements have now been experienced by the Claim Group for some three decades. The evidence given by the members of the Claim Group shows that the effect of the acts has not dissipated over time. I have referred to that evidence above. The compensation, therefore, should be assessed on the basis of the past three decades or so of the loss of cultural and spiritual relationship with the lots affected by the compensable acts in the manner I have identified, and for an extensive time into the future.
>
> …
>
> As that compensation is made as at the date of this judgment, there is no question of interest to be calculated in relation to it.

By taking into account the intangible disadvantages principle in the Land Acquisition Act (NT), (see NTA s 51(4)), Mansfield J assessed compensation for non-economic loss in an amount of $1,300,000, which was more than twice the aggregate freehold value of the land. Before the Full Court, the Commonwealth maintained that the non-economic value should be assessed at $5,000 per parcel of land whilst the territory's position was that the non-economic value should be assessed at 10% of the economic loss based on the 'usage value' and 'negotiation value' as discussed earlier above at [21].

The Full Court declined to interfere with the non-economic loss component of the compensation. In this respect, the Full Court said that the non-economic loss claim was to compensate for the effects of the loss or diminution in the claim group's native title rights and interests in land and as such it was for the anguish and distress caused by the extinguishment of those rights (at [375]). Their Honours said that losses of that nature cannot be measured in terms of money and that the basis on which such assessments are made has been explored in the assessment of loss of amenities of life in cases of personal injury (at [375]).

The Full Court considered that a 'homely touchstone' for the exercise of discretion in fixing general damages for personal injuries was captured in Lord Devlin's speech in *West v Shepherd* (1964) AC 326 at 357 where his Lordship said that the award should be such that the defendant 'can hold up his head among his neighbours and say with their approval that he has done the fair thing' (at [389]). Although their Honours noted that the unusual challenge presented by the *Griffiths* case to the application of the principles relevant to the exercise of discretion on an intuitive basis is that there is no history in Australia of analogous awards of compensation for non-economic loss for the extinguishment of native title rights and interests (at [393]).

Conclusion

Justice Mansfield's reasoning at first instance and that of the Full Court on appeal points, firstly, to the added significance that will attach to the extinguishment of exclusive, as opposed to non-exclusive, native title rights and interests. Secondly, although each case will depend upon its own facts and on the degree of traditional connection to the land, compensation for the native title holding community must include compensation for such intangibles as loss of amenities, pain and suffering and reputational damage.

Claims for compensation for the loss of native title have potential to become bitterly fought disputes. For example, in *Warrie (on behalf of the Yindjibarndi People) v State of Western Australia* [2017] FCA 803 *(Warrie)* the Fortescue Metals Group's (FMG) predominant concern during the trial of the Yindjibarndi People's application for a determination of native title was to avoid a finding that the native title rights and interests which the Yindjibarndi admittedly possessed did not confer on them a right of exclusive possession. In *Warrie*, Rares J rejected FMG's arguments to the contrary and found that the Yindjibarndi People did possess exclusive possession native title. Any future compensation application by the Yindjibarndi People will result in a liability for FMG, which is as yet unquantified, to compensate the Yindjibarndi People for the affect that the grant of FMG's Solomon Hub mining tenements have had and will continue to have, on the Yindjibarndi People's native title rights and interests.

In February 2018 the applicant, the Northern Territory and the Commonwealth sought, and were granted, special leave to appeal to the High Court. It is hoped that the High Court will provide a much greater degree of certainty in what is currently a very uncertain area of the law.

END NOTES

1 (1971) 17 FLR 141 at 167.
2 *Griffiths v Northern Territory of Australia* [2006] FCA 903]; (2006) 165 FCR 300 (*Griffiths*) at [8]-[10].
3 *Griffiths* at [705].
4 *Griffiths v Northern Territory of Australia* [2006] FCAFC 178; (2007) 165 FCR 391 (*Griffiths FFC*).
5 *Griffiths* (No.3) at [73]-[81]. Compensation under the general law was also claimed in respect of three invalid 'future acts' consisting of freehold grants, each of which were invalid under s 24OA of the NTA.
6 *Griffiths* (No.3) at [71].
7 *Griffiths* (No.3) at [213].
8 *Griffiths* (No.3) at [227].
9 *Griffiths* (No.3) at [233].
10 *Griffiths* (No.3) at [252].
11 *Griffiths* (No.3) at [277]-[279].
12 *Griffiths* (No.3) at [466].
13 *Griffiths* (No.3) at [291].
14 *Griffiths* (No.3) at [301].
15 *Griffiths* (No.3) at [318].
16 *Griffiths* (No.3) at [302].
17 *Griffiths* (No.3) at [378]-[381].

A different seat in the courtroom

by Steven Berveling

Two major but very different parts of my life (as barrister and as endurance cyclist) coincided after a B-double truck caused me to have a major accident during a Perth-Albany- Perth cycling event: 1200km in less than 4 days. This article gives an insight in how I found being a plaintiff so very different, scary and exhausting in contrast to the role in court which we barristers usually undertake.

In summary, the truck's speed and proximity to me was such that its passing forced me into the road shoulder where I crashed, suffering numerous fractures. I was in three different hospitals for a month and off work for nearly six months. I am left with a lot of metal in various parts of my body but: I can breathe and stand upright!

After a prod and recommendation from a barrister neighbour, I wrote to Perth solicitors and due to the geographical separation between us, a face-to-face meeting took some time. However, about six months later Big Day No. 1 arrives: for me to visit my solicitors.

After a very pleasant civilised but long meeting I was taken to the lift lobby and I descended alone to the ground floor. Once there, rather than exit the building I quickly found a bathroom and bawled my eyes out; the emotion of the process got too much so quickly.

Then just medical and legal process action: lots of visits to numerous medical specialists and commencement of proceedings – until the Particulars of Damage was drafted and filed. Suddenly, a court document (something with which we all are familiar, regardless of its actual content) became deeply personal as it set out my injuries in a blunt tabulated form together with a dollar value. This contrasted enormously with my fantasy about my injuries, seen through my rose coloured glasses.

A pre-trial conference was scheduled – hence my second trip to Perth. The settlement negotiations therein gave a new perspective, with live tension between my sense of self-worth relating to the extent of injury, and on the other hand the numbers alongside the injuries being so much more than mere numbers to a plaintiff (ultimately my self-worth won out more).

We were able to settle only on quantum and not liability. We nevertheless continued with offers to settle, and my emotional involvement made this settlement negotiation all very surreal, despite my being a plaintiff who works as a barrister. Emotional reasons played a huge part in the process, in contrast to how we as barristers are so adept at removing our selves from such reasons.

In any event, all offers to settle were rejected. Hearing dates were appointed, and my third trip to Perth was scheduled into my diary. Suddenly I had to decide on what to wear when usually that decision is made for barristers. A grey suit seemed too lawyerly, I opted for a jacket and tie instead (Lycra was definitely out of the question!)

After the opening, I was Witness No. 1. In my career I have seen thousands of witnesses take the oath, predominantly in NSW where the witness agrees (by saying 'so help me God' or 'I do') to the statement read out by the Court officer that the witness will say the truth, the whole truth and nothing but the truth. Instead, in Western Australia the witness actually reads out the statement.

I got to the 'I, Steven Mark Berveling, swear to Almighty God that…', and completely froze, unable to move and unable to say anything more. I could see the two barristers looking at each other, and the judge similarly wondering what to do now whilst my brain was saying 'Steven: you are really at the pointy end, and how dare anybody suggest that you might not say the truth!?' I regained composure but the episode confirmed the heavy toll that giving evidence takes on a witness, especially as a plaintiff.

The evidence (from me, from an expert engineer specialising in the aerodynamics surrounding trucks, and from two eye-witnesses) took nearly 2½ days and finished late Friday morning. The matter was then adjourned for submissions the following Monday, but I needed to return to Sydney.

The energy that the hearing drained from me could be seen as soon as I left the courthouse. I slept in the taxi between Perth City in the airport (not a great distance); at the airport waiting for departure, as well as during the entire flight to Sydney. We landed in the evening and I then slept for 11 hours at home. Further, three days later I got the flu, and I cannot recall having ever had the flu with such severity: I was in bed for 1½ weeks, so ill that I wasn't bored whilst capable only of staring at the ceiling.

My solicitor learnt four days early that judgment would be delivered on the Thursday before Christmas. One could hope that such timing augured well, but I was unable to take any comfort from that and hardly slept on the Monday, Tuesday and Wednesday nights. My solicitor's call on judgment day removed the suspense: we had won! Both my partner and I fell asleep at 7PM that evening.

The judgment comprised 74 pages, essentially dealing with six seconds of my life surrounding my accident. In clinical detail the judge set out the facts of the case, the proximity of the truck to me, and ultimately how incredibly lucky I was. Those cold hard facts as set out by a totally independent unbiased person have an impact beyond the immediate result. The judge took away my rose coloured glasses about my injuries, leaving as one ramification a serious question in my mind as to my willingness to continue ultra-endurance cycling events.

I hope that through this discourse I have been able to humanise some of the litigation processes which we as barristers so easily take for granted as part of our work. I fully agree that as barristers we must remain separate from the emotion of litigation, but at the same time the toll that it can take on our clients cannot be underestimated. Litigation might be founded on documents but ultimately deals with human beings.

Practising at the London Bar

by Christopher Parkin of 5 Wentworth chambers

Reflections from a Sydney barrister

After several years practising at the NSW Bar I recently relocated to practise in London. In October 2017, I started my path to qualification at 11 Kings Bench Walk, a set of chambers specialising in commercial, employment, media and public law.

This is article is a short note of some of my observation about the differences between life at the Bar in NSW and in London.

Qualifying in England

In England, the decision to become a barrister is frequently made immediately after university. It is not unusual to be 5+ years' call by the age of 30 in London, while in Sydney you may just be starting out.

Qualification in England starts with a three year law degree (or a one year law conversion course) followed by a one year bar course and a year of pupillage.

Obtaining pupillage can be a substantial hurdle, with approximately 485 pupillage places offered in 2016/17 and 2-3 times that many seeking to be called to the Bar. Applications are made through a centralised online portal reminiscent of NSW clerkship applications. The process typically involves a first round interview, 2-5 days in chambers and the completion an assessed piece of work, followed by a final interview which could involve an advocacy exercise.

The pupillage model is very different to readership. Pupils do not take on their own work for the first 6-9 months and are wholly or partly remunerated by their chambers. They typically spend their year sitting with, and shadowing, three or four pupil supervisors in court and conferences, assisting with their supervisors' work and receiving regular constructive feedback on their skills development.

Written work completed by a pupil is often marked and taken into account in determining whether the pupil is ultimately offered membership of chambers.

Lincoln's Inn

The 'feel' of the London Bar

While the day-to-day work of a barrister in London does not differ significantly from NSW, the 'feel' is very different.

The venue for my call to the Bar was not a court, but the Temple Church – a round church constructed by the Military Order of the Knights Templar in the 12th Century. The blaring organ music accompanying the procession of masters of the bench was a startling reminder that I wasn't in Queens Square anymore.

11 Kings Bench Walk is housed in a row of 17th Century terraces in the Inner Temple. The rooms are sizeable and many have large windows overlooking private gardens. The frantic feeling of Phillip St is not replicated in the Temple, which conveys a sense of quiet serenity that seems completely at odds with the lifestyles lived by its inhabitants.

The Royal Courts of Justice, home to the Queen's Bench Division of the High Court and

Ian Goodrick / Alamy Stock Photo

Temple Church

the Court of Appeal, is a sprawling Victorian Gothic building with a labyrinthine layout. The building is a marvel to look at, but a trap for the directionally challenged. These older courts are structured so that junior counsel sit in the row behind queen's counsel unless invited to join them. I suspect my leaders in Sydney may have preferred such an arrangement when I was their junior.

On the social side, chambers tea takes place every Thursday afternoon. Lunch (three courses or something lighter) can be taken at the halls of the Inns of Court each day. For those so inclined, the surrounding laneways are crammed full of pubs and wine bars.

Practising in England and Wales

Clerks (or clerking teams) are an ever-present part of every barrister's practice. The clerks are the conduit for work, take care of all fee negotiations, undertake billing and administration and chase aged debt. All major practice decisions taken by the barrister will involve strategising with one or more of their clerks.

Advocacy opportunities are more plentiful in England (at least at the junior end). Solicitors seem to take on less appearance work and most do not have rights of audience in the higher courts. There is also a substantial amount of tribunal litigation providing good opportunities for juniors to cut their teeth.

However, publicly-funded areas of practice are struggling. The published rates for government work at the junior end is around £25-45/hour (AUD$45-80/hour). Legally-aided work (most criminal work) can be so poorly paid that juniors can spend more on their train ticket to court than they received for the appearance.

Transferring for Australian lawyers

As a qualified foreign lawyer educated in a Commonwealth jurisdiction (but nonetheless a junior practitioner) I was exempted from completing an English law degree. I was also able to sit exams in ethics, procedure and advocacy in lieu of completing the bar course.

More experienced practitioners may be able to obtain more substantial exemptions including exemptions from all or part of pupillage. For more information see the Qualified Foreign Lawyers Guidelines at www.barstandardsboard.org.uk

Reflections from a London barrister

Barristers are a strange lot. It takes a particular type of person to want to stand up in court and 'sing for their supper'. It also takes a particular type of person to want the independence and precariousness of self-em-

Chris Winslow / New South Wales Bar Association

New Square

ployed existence. We are a rare breed. It is therefore always great fun to meet other barristers, particularly from other jurisdictions. There is a great deal that we have in common.

However, although there is inevitably much which barristers all over the world have in common (a well-developed diva complex perhaps?), each jurisdiction also has its unique differences and quirks. This was something I learnt when I visited Sydney for the recent International Bar Association Conference, and had a chance to meet members of the NSW New Barristers' Committee. So, what are differences?

Well, first, your 'New Barristers' would not seem that new to us. All those that I met had already completed some years as a solicitor before qualifying for the Bar. Although more barristers in England and Wales are coming to the career later, perhaps after having spent some years as a solicitor or doing something totally different, for most English barristers the Bar is their first and only career. In my chambers of 70, I can think of only four people who had another career before joining the Bar (solicitor, finance, academic, spy). Come to think of it, the last of those cannot have been very good at his previous job, given that I know about it. This inevitably means that you need more help from chambers in getting your practice started, as to which more below. It also means that you have to take on a great deal of responsibility from a comparatively young age. This makes it all the more important that you have access to sufficient cases where you are led by more senior barristers (often but not always a QC) so that you can learn from the best.

This earlier start is facilitated by the funding of training. It is a regulatory requirement that all pupils (our equivalent of readers) must be paid. The minimum amount set by our independent regulator is £12,000 (not exactly generous, although this can be topped up by earnings in the second six months of pupillage when pupils can start taking their own cases). However, many sets (particularly in the commercial field) pay very much more than this, after all they have to compete for the best talent with each other and the large solicitors' firms. The highest pupillage award currently offered is £72,500. It is generally accepted that some form of payment of pupils is necessary if there is to be any level of social mobility or diversity in the profession. However, it has had the inevitable impact that there are fewer pupillages available, particularly in the publicly funded sphere.

Once pupillage is over, new tenants in chambers do not need to 'buy' their room, as I understand is the practice in NSW. They will normally simply start paying chambers expenses like everyone else. How each chambers structures their expenses is different. In my chambers, you pay a flat percentage of your earnings. In others, barristers pay a fixed amount per square metre of their room and then a percentage of earnings on top. Other chambers require a fixed payment regardless of earnings and then a percentage top-up based on earnings. In your

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Royal Courts of Justice

first year of tenancy, many chambers require you to start paying chambers expenses on the same basis as everyone else, others do not require a new tenant to pay any expenses in their first year. Some chambers also offer their first year tenants guaranteed earnings.

A significant proportion of chambers expenses are spent on chambers clerks. Gone are the days where senior clerks would earn a percentage of chambers turnover and then use that to pay themselves and their team as they saw fit, almost all clerks are now on a fixed salary with bonuses for good performance, but clerks are still a vital part of the chambers structure. Most importantly, it is our clerks who will negotiate our fees. As a general rule, they do not fix what a barrister charges, that is up to the individual barrister. I could, if I wanted, charge myself out at £1,000 an hour, but it is safe to say I would not get any work. It is the clerks' job to advise what a reasonable amount to charge for a particular piece of work would be, and then to negotiate the fee with the instructing solicitor. As far as I am concerned, this is absolutely invaluable. Having someone else negotiate fees for me means that I can concentrate on doing the work and maintaining a good relationship with the client. Clerks also generally take responsibility for chambers marketing and business development, although some chambers now also have dedicated marketing staff.

In terms of how fees are structured, this is largely driven by the client. Some prefer an hourly rate, others prefer fixed fees for set pieces of work or hearings. Many hearings are still paid for via a fixed 'brief fee', which covers all preparation and the first day of the hearing, and 'refreshers' which are a fixed daily charge for each day thereafter. How much is charged for the brief fee and refreshers will depend on the likely time required, the popularity of the barrister concerned and the complexity and value of the dispute.

That said, the work undertaken by barristers in England and Wales, particularly the Young Bar, is becoming a great deal more flexible. For example, most young barristers will now spend some time on secondment with a client, whether that be a lay client or a firm of solicitors. For those in criminal practice, this may be time spent at the Serious Fraud Office, for those in civil it could be at a bank or insurer. Some secondments can be spent abroad. About 15% of all barristers are now employed on a permanent basis in various public and private institutions.

However, despite all this, the Bar of England and Wales remains, for the most part, remarkably similar to what it has always been. A cohort of self-employed, independent court advocates. The similarities between us and the NSW Bar will therefore always be more numerous than the differences.

If you are interested in cross-qualifying into the English Bar, there is more information on the Bar Standards Board's website: https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/current-requirements/transferring-lawyers/qualified-foreign-lawyers/.

Genderfluidity and the law

by Alexandra Rose for the Human Rights Committee

Two-spirited, genderqueer, genderfluid, non-binary, gender neutral, gender expansive. These are some of the terms you may have heard people using in recent years to describe themselves, or others. But you may not know what it means.

The following is a brief introduction to the non-binary world and how the law is slowly catching up.

In 2009, Norrie May-Welby applied to the Registrar of Births, Deaths and Marriages of the State of New South Wales seeking a Change of Sex and Change of Name. Norrie did not want to be identified as 'male' or 'female' on documents, but rather as 'not specified'. The Registrar informed Norrie that he did not have the power to issues certificates with no gender specified. However, Norrie thought it would be a false statement to select either of the 'male' or 'female' options because Norrie self-identifies as neuter. A four-year legal battle ensued but in 2014, the High Court held that the *Births, Deaths and Marriages Registration Act 1995* (NSW) 'does not require that people who, having undergone a sex affirmation procedure, remain of indeterminate sex – that is, neither male nor female – must be registered, inaccurately, as one or the other. The Act itself recognises that a person may be other than male or female and therefore may be taken to permit the registration sought, as "non-specific."'[1]

The decision in *Registrar v Norrie* carries on from a series of cases in which Australian courts have had to consider the issue of self-perception and social perception regarding gender. For example, in *AB v Western Australia*[2] the High Court held that the question of what gender a person exhibits to other members of society is 'reached by reference to the person's appearance and behaviour, amongst other things. It does not require detailed knowledge of their bodily state'[3]. The Court said the recognition of someone as a particular gender 'does not require knowledge of a person's remnant sexual organs'.[4]

Registrar v Norrie directly challenged the underlying assumption that sex is a binary system of categorisation. Recognising that there are more than two genders, the Australian Government introduced *Guidelines on the Recognition of Sex and Gender* in 2013

(Guidelines), which apply to all Commonwealth Government departments and agencies.[5] The introduction to the Guidelines states that '[t]he Australian Government recognises that individuals may identify and be recognised within the community as a gender other than the sex they were assigned at birth or during infancy, or as a gender which is not exclusively male or female. This should be recognised and reflected in their personal records held by Commonwealth Government departments and agencies.'[6] Accordingly, '[w]here sex and/or gender information is collected and recorded in a personal record, individuals should be given the option to select M (male), F (female) or X (Indeterminate/Intersex/Unspecified).'[7]

Australia was the first country to introduce laws to protect non-binary persons from discrimination

You may have already noticed this change in the 2016 Census or if you have recently applied for a passport. Barristers will also be asked whether they identify as M, F or X in our upcoming practicing certificate renewal applications.

So, what does 'X' mean? Well, the starting point is to distinguish between 'sex' and 'gender'. The Guidelines state that 'sex' refers to 'chromosomal, gonadal and anatomical characteristics associated with biological sex'[8] while 'gender' 'is part of a person's personal and social identity'.[9]

The website itspronouncedmetrosexual.com has created The Genderbread Person to help distinguish between gender identity, gender expression, biological sex and sexual attraction (see Figure 1). Gender identity is depicted on a sliding scale and described as '[h]ow you, in your head, define your gender, based on how much you align (or don't align) to what you understand to be the options for gender'.

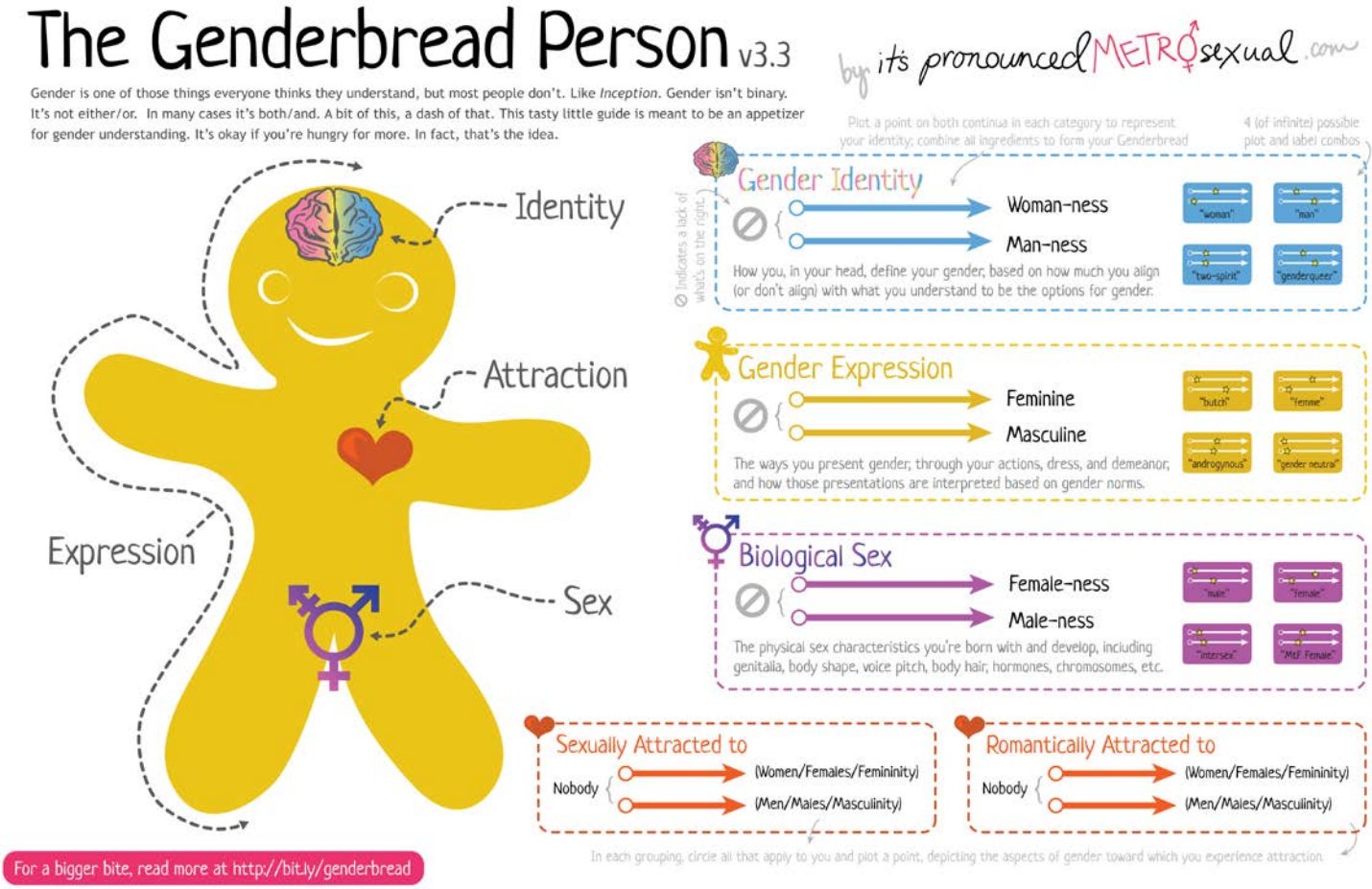
The options for genderfluidity are numerous and includes anything that falls outside the male/female binary and cisnormativity (cisgender or cis being the term for people whose gender identity matches the sex that they were assigned at birth). Someone may feel that they are male and female at the same time. They may feel like they are male or female at various different times. They may feel neither male nor female.

In an interview with Elle magazine in 2015, Ruby Rose, who plays Stella on *Orange is the New Black* said that '[g]ender fluidity is not really feeling like you're at one end of the spectrum or the other. For the most part, I definitely don't identify as any gender. I'm not a guy; I don't really feel like a woman, but obviously I was born one. So, I'm somewhere in the middle, which – in my perfect imagination – is like having the best of both sexes. I have a lot of characteristics that would normally be present in a guy and then less that would be present in a woman.'[10] Other celebrities who have identified as genderfluid include Miley Cyrus and Tilda Swinton. There is also a non-binary person, Asia Kate Dillon, playing a non-binary character on the US show *Billions*.

Being two-spirited or genderfluid is not the same as being intersex. Intersex persons have a diversity of bodies and gender identities and may identify as male, female, both or neither. Organisation Intersex International Australia Limited (OII Australia), a national body by and for people with intersex variations, states that approximately 1.7% of people are intersex, which is 'about as common as having red hair'.[11]

There is no accurate data on the number of people in Australia who identify as genderfluid although the Australian Bureau of Statistics (ABS) counted 1,260 sex and/or gender diverse people in Australia following the 2016 Census. However, the ABS acknowledges that '[t]his count is not considered to be an accurate count, due to limitations around the special procedures and willingness or opportunity to report as sex and/or gender diverse' acknowledging that '[p]eople who have been treated with disrespect, abuse and discrimination because of their sex or gender may be unwilling to reveal their sex in an official document'.[12]

Australia was the first country to introduce laws to protect non-binary persons from discrimination when it introduced the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth). This Act amended the *Sex Discrimination Act 1984* (Cth) to specifically prohibit discrimination on the basis of 'gender identity' and 'intersex status'. Under these amendments, 'intersex status' is defined as 'the status of having physical, hormonal or genetic features that are (a) neither wholly female nor wholly male; or (b) a combination of female and male; or (c) neither female nor male'.[13] You will note that this definition is squarely focused on a person's sex organs and not their identify. 'Gender identity' is defined broadly to mean 'the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth'.[14] The Explanatory Memorandum to the Bill states that 'gender' is a different concept to 'sex' 'understood to be part of a person's social identity (rather than biological characteristics). Gender refers to the way a person presents and is recognised within the community. A person's gender might include outward social



markers, including their name, outward appearance, mannerisms and dress. It also recognises that a person's sex and gender may not necessarily be the same. Some people may identify as a different gender to their birth sex and some people may identify as neither male nor female.'[15]

This means it is now unlawful to discriminate against persons who are intersex or gender fluid in employment, education, the provision of goods and services and a number of other areas of life. However, when Mark Dreyfus, the then Attorney-General for the Commonwealth, gave the second reading speech for the Bill, he stressed that while the proposed Act was intended to 'acknowledge [the] reality' of sex and gender diversity in Australia it does 'not create a third sex in any sense'.[16]

Other countries are now following Australia's lead. Fiji has amended its Constitution to prohibit discrimination based on sexual orientation, gender identity and gender expression. Malta has similarly added gender identity to the list of prohibited grounds of discrimination in its Constitution.[17] Nepal and Bangladesh created a legal "third gender" category and the Supreme Court of India affirmed the right of transgender persons to determine their own gender. Malta became the first State to prohibit sex-assignment surgery or treatment on intersex minors without their informed consent.[18] In addition to Australia, there are now nine other countries that offer its citizens gender-neutral passports including Canada, Denmark, Germany, Malta, New Zealand, Pakistan, India, Ireland and Nepal. X passports are also approved by the ICAO, the UN agency that regulates international air travel.

The concept of multiple genders is acknowledged in other cultures too (if not the law), including the Buginese people of Sulawesi in Indonesia who recognise five genders including a 'metagender' known as the Bissu who are seen as a combination of the other four genders. Native Americans recognise that there are 'two-spirited people', while in Hawaii there are the *mahu* who fall somewhere between 'male' and 'female' and are respected as healers, teachers, and caretakers.

There is, however, continued resistance to the recognition and protection of gender diverse people in other areas of the world. In many States it is a crime to 'cross-dress' or 'imitate the opposite sex' – such as in Kuwait.[19] Even in Germany, trans and intersex people are often characterised as mentally ill and have had their sexual and reproductive health rights violated.[20]

So how might these changes affect your practice? Well, you may have colleagues, solicitors, or clients that identify as genderfluid or you might have cases in which you have to consider the rights of non-binary parties.

One tip to show respect for someone's non-binary status is to use the correct pronouns. If you aren't sure what someone prefers, then ask. They/them pronouns are commonly used but people also use pronouns such as he/him, she/her or xe/xem. Other pronouns include ze/hir and fae/faer. You can also use the gender-neutral title Mx instead of Mr or Ms and gender-neutral terms such as friends or colleagues instead of ladies and gentleman; students instead of boys and girls; partner instead of husband/wife.

In *Registrar v Norrie*, the High Court recognised that '[f]or the most part, the sex of the individuals concerned is irrelevant to legal relations', and that '[t]he chief, perhaps the only, case where the sex of the parties to the relationship is legally significant is marriage'.[21] This is no longer the case after the definition of marriage in the *Marriage Act 1961* (Cth) was famously changed in 2017 from being 'the union of a man and a woman' to 'the union of 2 people' to the exclusion of all others, voluntarily entered into for life.[22] There remain, of course, other areas of life where gender still matters. For example, admittance to many schools is gender based, so is inclusion in certain sports teams. The issue of which bathrooms or change-rooms a genderfluid person can, or chooses, to use and what insurance or health care they can obtain is also likely to raise concerns. But similar concerns were raised, discussed and worked through when society was made to confront and ultimately accommodate the needs of women and LGBTQI++ persons. No doubt Australian society, and the law, is robust enough to do it again.

END NOTES

1 *New South Wales Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490 at [46].
2 (2011) 244 CLR 390
3 Ibid. at [34].
4 Ibid. at [35].
5 https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf
6 Ibid. at [1].
7 Ibid. at [19].
8 Ibid. at [11].
9 Ibid. at [13].
10 http://www.elle.com/culture/movies-tv/a28865/ruby-rose-oitnb/
11 https://oii.org.au/allies/
12 http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Sex%20and%20Gender%20Diversity%20in%20the%202016%20Census~100
13 Section 4.
14 Ibid.
15 Explanatory Memorandum, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* (Cth) at [13].
16 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, 2894 (Mark Dreyfus).
17 UN Human Rights Council report A/HRC/29/23 dated 4 May 2015 on *Discrimination and violence against individuals based on their sexual orientation and gender identity* at [72].
18 Ibid. at [73].
19 Ibid. at [44]. Concluding observations of the Human Rights Committee on Kuwait (CCPR/C/KWT/CO/2), at para. 30.
20 Concluding observations of the Committee on Economic, Social and Cultural Rights on Germany (E/C.12/ DEU/CO/5), at [26].
21 [2014] HCA 11; (2014) 250 CLR 490, 500 [42] (The Court).
22 By the introduction of the *Marriage Amendment (Definition and Religious Freedoms)* Act 2017 (Cth).

Paperless trials

by David Robertson

A revolution is quietly underway in the nondescript Windeyer Chambers building on Macquarie Street. There, the Land and Environment Court of New South Wales is running a pilot program to conduct 'paperless trials' in certain document-intensive proceedings.

So far the court has conducted six paperless trials, all compensation claims for the compulsory acquisition of land in the court's Class 3 jurisdiction. A further eight paperless trials are set down for hearing this year, again all Class 3 compensation claims.

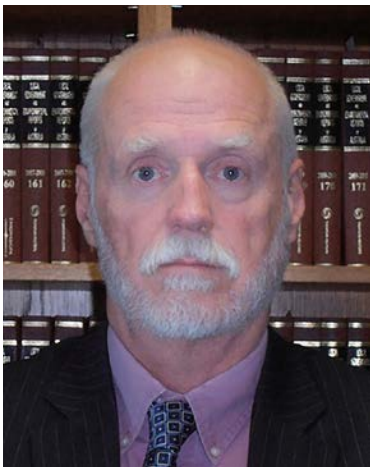
The paperless trial pilot program has been implemented without much formality or technological infrastructure. There is not yet any practice note or practice direction for the conduct of paperless trials. Nor have any courtrooms been transformed into 'e-courts' with rows of computer monitors like some courtrooms in the Federal Court used for large class actions. All that has been required to conduct paperless trials in the Land and Environment Court is a projector, a laptop computer, a few laser pointers, and the willingness of judges, practitioners and parties to participate in the process.

Justice Tim Moore has been responsible for overseeing the paperless trial pilot program in the court. He explains the procedure as follows:

- At the first or second directions hearing, the Class 3 list judge notifies the parties that, in the judge's view, the proceeding may benefit from being run as a paperless trial. Proceedings identified as suitable to be run as a paperless trial are those likely to run for five or more hearing days, with multiple expert witnesses and a large volume of documents. The judge invites the parties to consider whether to run the proceeding as a paperless trial and to notify the court accordingly. If the practitioners are unfamiliar with the procedures for a paperless trial, the list judge invites the parties' counsel to a conference to explain the procedures and to conduct a courtroom demonstration.

- If the parties elect to conduct a paperless

trial, the list judge makes a set of standard directions for the preparation of the matter for trial. The most important of these directions is for the preparation of an electronic court book and tender bundle. The electronic court book and tender bundle must contain all pleadings, affidavits and expert reports, documentary evidence, and the parties' written submissions, all in searchable PDF format. The electronic court book



Justice Tim Moore

and tender bundle must be delivered to the court and by the parties on a USB stick about two weeks prior to the commencement of the hearing.

- At the hearing, the case is run using electronic documents rather than paper documents. The USB with the electronic court book and tender bundle is tendered and becomes 'Exhibit A'. In the courtroom, the judge's tipstaff operates a laptop that projects the documents in Exhibit A onto a screen or the wall of the courtroom (only some courtrooms have screens). The judge and counsel direct the tipstaff to the relevant documents in the electronic court book or tender bundle, which are projected onto the screen or wall in the courtroom and can be seen by all in court (judge, practitioners, witnesses and parties). Plans, expert reports, legislative provisions and extracts from cases are projected in court as and when required. When two documents, plans or air photos are being dealt with, for comparative purposes, both can be shown using a split screen. Counsels' submissions and the witnesses' evidence, including crossexamination, proceed by reference to the electronic documents projected in court, rather than by reference to documents in lever-arch folders, paper copies of plans, etc. The judge and counsel each have a different coloured laser pointer which can be used when necessary to identify a particular part of a plan, expert report, case extract, etc that is being projected on the screen. The tipstaff's computer is connected to the court's network so that the NSW Legislation; Caselaw and other relevant external websites can also be accessed and relevant material displayed.

- Paper documents can still be tendered in court during the trial if required – for example, a document shown to a witness in cross-examination which is not in the electronic tender bundle. However, if that occurs, the document must also be provided to the court and the parties in electronic form (either on a USB or by e-mail), so that the document can be added to Exhibit A.

- Counsel and solicitors usually bring their own laptop or tablet computer to the hearing to access the documents in the electronic court book and tender bundle during the hearing. However, practitioners

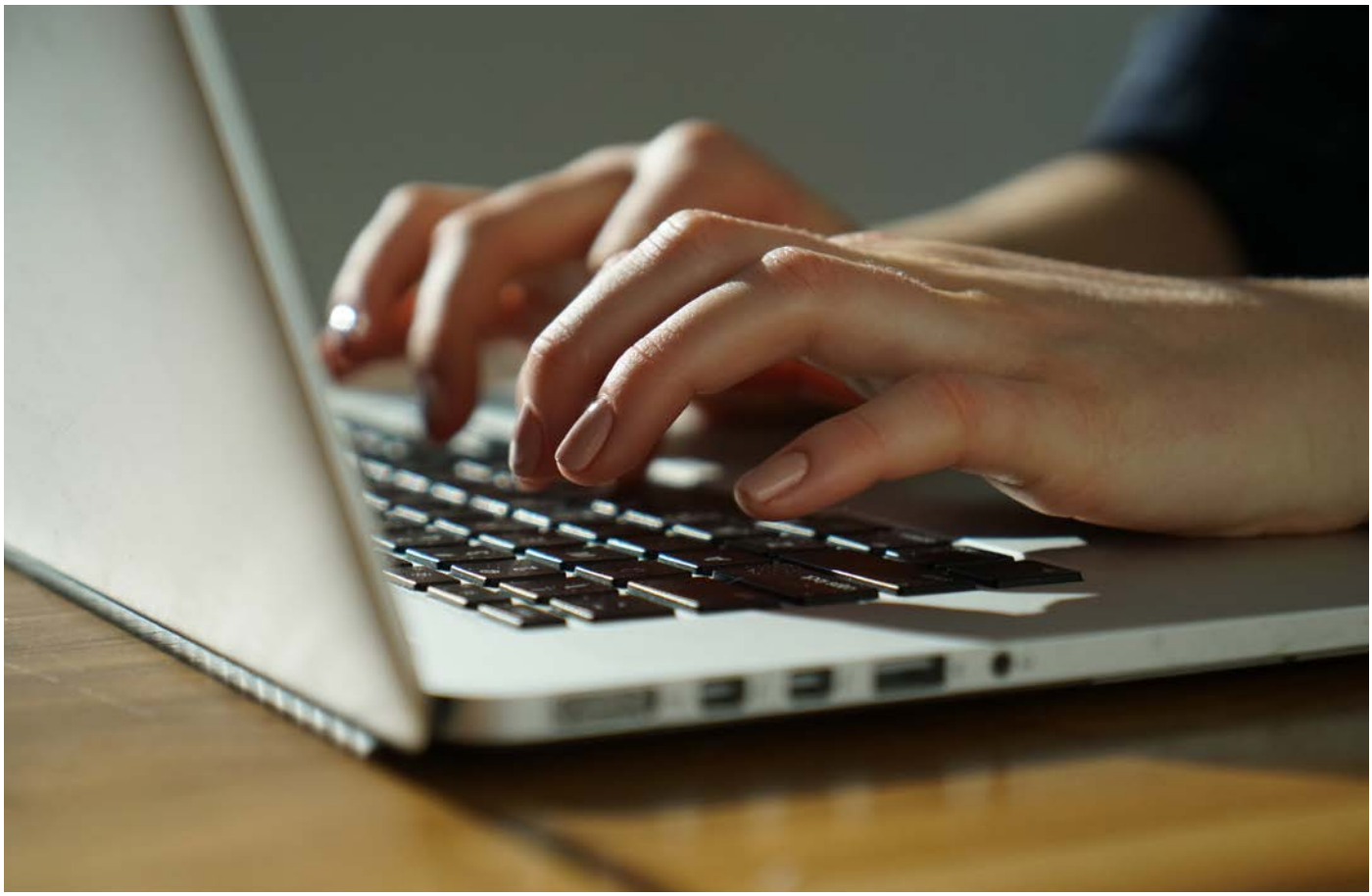
may bring into court a paper copy of the court book and tender bundle if they wish to have access to the paper documents in court. The electronic court book and tender bundle must be tabbed and paginated like a paper court book and tender bundle, in which case paper versions of the court book and tender bundle can be easily produced if necessary.

Having now presided over two paperless trials, Justice Moore is enthusiastic about the benefits to the court, practitioners and the parties. 'The project was originally proposed by the Australian Legal Sector Alliance as an environmental initiative to save paper. While there has certainly been much paper saved, probably 50,000 or 60,000 pages per case, there have also been a number of other benefits. Cases proceed more efficiently in the courtroom. There are significant time savings having a document projected on the courtroom wall rather than having to direct the court and witnesses to a particular document in a lever-arch folder. There are significant costs savings to parties. We estimate that parties have saved approximately $1 million in photocopying costs for the trials run so far. Perhaps most interestingly, I have found that paperless trials promote and enhance the principle of open justice. With the relevant documents, legislation and case law projected onto the courtroom wall, all persons in court, including the parties, can follow the proceedings, whereas with a traditional paper trial, usually the only persons who can follow proceedings are those with their own copy of the court book and tender bundle, which is usually only the judge and the practitioners.'

Practitioners are also generally positive about paperless trials. Ian Hemmings SC has appeared in three paperless trials so far and is presently in the middle of a 10-week paperless trial. Hemmings SC has fully embraced the paperless concept; he does not take a single piece of paper to court. Instead, he takes a 27-inch tablet computer to conduct hearings, which is so large that it has its own stand/cradle and doubles as his lectern in court. He has found the process so beneficial that he intends to conduct all future trials as paperless, whether or not the court and other parties do so as well. 'For me, the main benefit is portability. In a paperless trial, I have my brief with me wherever I go – court, chambers or home. I can access it on my computer, tablet and phone. I use a program to mark up the electronic court book and tender bundle to prepare for the hearing, so I have the marked-up documents in court for cross-examination and submissions as I would if I prepared for hearing with a paper brief. All the documents in the electronic court book and tender bundle are searchable, which makes it much easier to find relevant passages that I am looking for out of thousands of documents, which is useful both in court and in preparing written submissions.' Are there any downsides of paperless? 'It took me a while to get used to preparing for a hearing without paper documents. I think we work visually with paper, so we recall documents from their location in our brief and our bundles of documents prepared for cross-examination and submissions. Working with electronic documents is different, but with time I have developed my own system of organising the material in electronic form which I now find easier and more effective than paper.'

Given the positive feedback from judges, practitioners and parties, the Land and Environment Court intends to continue conducting paperless trials in compensation claims in its Class 3 jurisdiction, and is considering expanding the paperless trial pilot to some other proceedings, such as lengthy, document-intensive judicial review proceedings in the court's Class 4 jurisdiction and merits appeal proceedings in the court's Class 1 jurisdiction. The court will also soon publish a practice note which sets out the procedures for preparing and conducting a paperless trial.

Furthermore, in light of this positive feedback, and the simple and inexpensive way in which paperless trials have been introduced in the Land and Environment Court, there seems to be no reason why paperless trials cannot be introduced in other courts in the State, at least on a trial basis. Lengthy, document-intensive commercial matters in the Supreme Court and District Court appear to be ideal proceedings to go paperless.



Implied terms of fact: counsel's last resort

By David Ash

Author, advocate and judge Robert Megarry said of implied terms that they are 'so often the last desperate resort of counsel in distress'.[1] Perhaps. But and while there is no difficulty in stating the Law, there remains the wretched Fact. This note reviews three primary cases on implied terms of fact, *The Moorcock, Codelfa and BP Refinery (Westernport)*.

Only in the first were all judges of one mind. In the ocean of litigation which was the second, the tide flowed to the plaintiff first from the arbitrator, then from the primary judge, then from the NSW Court of Appeal, only to ebb in the High Court, leaving it marooned on the isle of frustration. BP (Westernport) is disturbing: after two courts had found one term so obvious it went without saying, the final court not only unfound it but found another, also so obvious it went without saying, to the wholly opposite effect. Little wonder, pace Sir Robert, that counsel look on with pensive amazement.

Obvious obviousness

In the galaxy of contract, implied terms are comets, dark matter or stellar remnants. Some, like those implied by usage, recur regularly but never in the same form. Some are unformed, awaiting cataclysmic revelation, like implied terms of good faith. Some, like the subject of this note, are remnants, mere grab bags. The very fact that implied terms of fact are a grab bag explains why both eminent judges and desperate counsel… grab at them. The point of difference with terms implied by law is explained by Gageler J, 32 years after *Codelfa* and by my guesstimate 33 years after he was Sir Anthony Mason's associate:[2]

> Contractual terms implied in fact are 'individualised gap fillers, depending on the terms and circumstances of a particular contract'. Contractual terms implied in law, of the kind in issue in the present case, are 'in reality incidents attached to standardised contractual relationships' operating as 'standardised default rules'. The former are founded on what is 'necessary' to give 'efficacy' to the particular contract. The latter are founded on 'more general considerations', which take into account 'the inherent nature of [the] contract and of the relationship thereby established'.

Despite its celestial mechanics, the implied term of fact needs no rocket science to support it. Something happens to which the contracting parties never turned their mind; unsurprisingly, the beneficiary of the accident says to the other 'Let the loss lie where it falls'; unsurprisingly, the other says to the court 'What the parties really had in mind was…'; and, unsurprisingly, the court is left to arrive at a conclusion which has a legal dignity beyond palm tree justice.

The test for legal dignity here draws its mettle from a familiar source, the idea of freedom of contract: the court looks at what would have been said, had the parties turned their mind to the situation, not what should have been said, now hindsight is the guide. As Mason J explained it in *Codelfa*:[3]

> For obvious reasons the courts are slow to imply a term. In many cases, what the parties have actually agreed upon represents the totality of their willingness to agree; each may be prepared to take his chance in relation to an eventuality for which no provision is made. The more detailed and comprehensive the contract the less ground there is for supposing that the parties have failed to address their minds to the question at issue. And then there is the difficulty of identifying with any degree of certainty the term which the parties would have settled upon had they considered the question.

The litigation is not in the obviousness but in the paradox of obviousness. The 'universally accepted' test (to use Sir Anthony's own words) is that of MacKinnon LJ:[4]

> Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying. . .

This idea of obviousness really gets an outing in this area, doesn't it? The paradox (obviously?) is that nobody would be in court if anyone had said it in the first place.

Forensic truth

In 1927, Werner Heisenberg restated the uncertainty principle in relation to subatomic particles: the position and the velocity of an object cannot both be measured exactly, at the same time, even in theory.

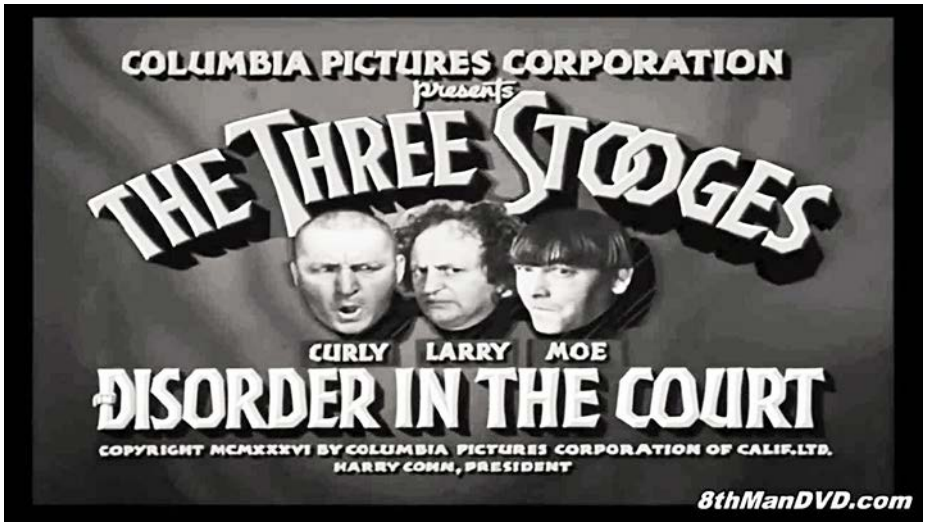
A half century before, experienced commercial judges of England's Court of Appeal had already developed the proposition in relation to contracting parties, namely that the intention of each party to a written contract cannot be determined exactly, even after re-reading the contract and even after spending a lot of money on legal advice, and its true meaning can only be determined with the objectivity of hindsight. Like all forensic truth, it is never complete, it is merely the product of a majority of the last appellate court to which the document is exposed.

The mathematical relationship is:

$$\Delta x \Delta p \geq \frac{\hbar}{2}$$

In other words, the sum of the versions of a written contract (x) multiplied by the sum of the interpretations advanced by lawyers (p) must always exceed or at least be equal to half the number of appellate judges, where h is Banc's constant.

The rapid postwar growth of uncertainty both in law and in science may have been different had an episode in 1943 unwound another way. Professor Heisenberg was giving a lecture in Zurich, and the OSS sent in their man with orders. If it appeared that the Germans were too close to developing the bomb, the man was to kill him. The man it chose was Moe Berg. Berg graduated from



Columbia really was a law school, wasn't it?

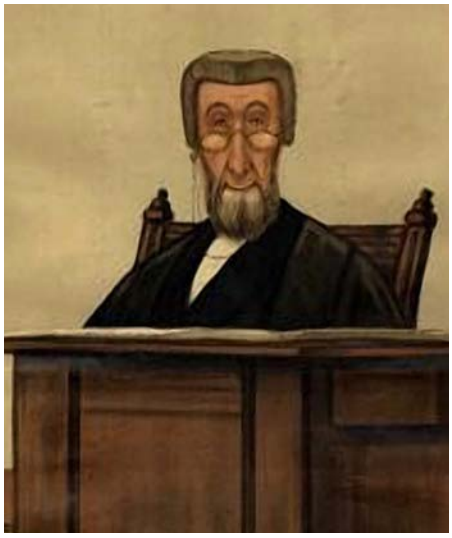
Columbia Law School but chose baseball instead ('I'd rather be a ballplayer than a justice on the U.S. Supreme Court.'[5]) A would-be assassin entering a lecture theatre to shoot the lecturer is possible in anyone's theory, even a law student's; it is a rare thing indeed to have the assassin's lecture notes:[6]

> As I listen, I am uncertain—see: Heisenberg's uncertainty principle—what to do to H… Discussing math while Rome burns – if they knew what I'm thinking.

Berg would decline the Medal of Merit for wartime service. He stopped work on his memoirs after the assigned co-author confused him with Moe Howard of Three Stooges fame.[7]

Wills, wives & wrecks

The younger reader may be confused about court hierarchy. To recap, in England, they call the primary court the High Court, the middle court the Court of Appeal, and the final court the Supreme Court. Like Alice tumbling towards the Antipathies, we call our primary court the Supreme Court and the final court the High Court. Habeus fori appellationis, or is my Latin that bad?



Sir Charles Parker Butt – Caricature by Ape published in Vanity Fair in 1887

The Probate, Divorce and Admiralty Division of England's High Court was its own grab bag, born of Judicature Act reforms. Known to practitioners as the Court of Wills, Wives & Wrecks it was the smallest of the divisions. Hearings must have moved from collision to collusion and back. The headnote to the case but one before *The Moorcock* records:[8]

> In cross-petitions by the husband and wife for dissolution of marriage the jury found that the wife had committed adultery, and that the husband had committed adultery with the wife's sister and with another woman, and that the wife had condoned his adultery.

The Court in the circumstances refused to make any decree, dismissing both petitions. Sometimes the work would cross over. Who hearing a case called *The Erato*[9] could think they were in Admiralty?

In fact, the judge hearing both those matters, Sir Charles Parker Butt, also heard *The Moorcock*. As a gap year or two, Butt had practised in the consular courts at Constantinople while acting as correspondent for the Times. He picked up a lot of mercantile and maritime law which held him in good stead. The NDB records:

> Though by no means a consummate lawyer he was an eminently skilful advocate, and, on taking silk (8 Dec. 1868), succeeded to much of the practice which was liberated by the advancement of Sir William Baliol Brett (afterwards Viscount Esher) to the bench.

The Moorcock at hearing

Loitering, as the High Court reminds us,[10] all depends on context. People may linger either legally or illegally. Two years before *The Moorcock* suffered its accident, parliament had acted to protect England's major river, or at least the upriver Jerome K Jerome part of it:[11]

> … with the changing times, the Thames Preservation Act was passed in 1885 to enshrine the preservation of river for leisure. It prohibited shooting on the river, which had become a cause for concern. The act noted: 'It is lawful for all persons for pleasure or profit to travel or loiter upon any and every part of the river' (apart from private cuts).

As to how the *Moorcock* came to be grounded, history has left us no photo. The Wikipedia entry is of the London docks around 1909. Fittingly, a Thames tug built in 1959 called the *Moorcock* collected a solid following among shipspotters[12] and model builders.[13] We do know, however, that this part of the river was a very different and very busy place.

The West India Docks in 1900, St Bride's Wharf was nearby. © PLA collection Museum of London.

The vessel was in the business of bringing in cargo from Antwerp. The owner was looking for a new wharf to discharge goods and agreed with the owners of St Bride's, a wharf in the Wapping area. An agreement was entered into and the vessel duly arrived and moored. As the tide ebbed, she settled on the ground until a loud noise was heard. The centre had settled on a saddle of hard ground while the vessel's ends were not supported so that, in the words of the judge, she had broken her back.

The ground – that is, the river floor – was vested in the Conservators of the River Thames. Moreover, and so the wharfinger would argue, the river being navigable was a public highway free to all comers. There doesn't seem to be any dispute that the owner of the vessel knew that grounding could occur. Indeed, Butt J downed the owner on his express representation case:

> I think so far as the express representation went, it came pretty much to this, 'Is the place a good one?' perhaps the word 'suitable' was used, 'Well there is a vessel of the same size as yours, or thereabouts, lying there now, come and see,' and they went and they saw a vessel of very nearly the same size, fully the same length, although not quite the same dimensions in other respects. Then the Moorcock was taken there. In the result, not only on the warranty, but on the allegation that an express representation was made of the suitability and safety of this place, I think the plaintiff fails.

However, the judge came in for the plaintiff on the implication. Once it was established that the unloading could not be had without mooring and without taking the ground, the wharfinger had to be taken as saying that they had taken reasonable care to ascertain the safety of that ground.

The Moorcock on appeal

For an advocate's view of appeal benches much depends on how their client has fared. An informal poll indicates two ideals. The first is a strong president, a brilliant and polite number two, and a solid number three. The second is a good manager in the middle with a luminary on each side.

This appeal was more the first. In the middle was Lord Esher, formerly William Brett and the son of the Reverend Joseph G Brett. The 1911 *Britannica* records:

> Lord Esher suffered, perhaps, as master of the rolls from succeeding a lawyer of such eminence as Jessel. He had a caustic tongue, but also a fund of shrewd common sense, and one of his favourite considerations was whether a certain course was 'business' or not. He retired from the bench at the close of 1897, and a viscounty was conferred upon him on his retirement, a dignity never given to any judge, lord chancellors excepted, 'for mere legal conduct since the time of Lord Coke.' He died in London on the 24th of May 1899.

The 1911 *Britannica* is 'considered to represent a summary of human knowledge in the early 20th Century'.[14] It was edited by, and Esher's entry was authored by, Hugh Chisholm sometime barrister. Chisholm was known for his attention to detail, unsurprising for a son of the Warden of the Standards at the Board of Trade.

But I wonder at the when and the where of the elevation of Sir Edward Coke, never King James I's best mate. Oddly Sir Nathaniel Lindley, the great appellate judge at the time of but not on the bench of *The Moorcock* was, according to Wikipedia but not the 1911 Britannica, descended from Coke on his mother's side.

For those that revel in these things Coke was a Serjeant-at-Law; Coke and his contemporary Francis Bacon had a bit of a career clash in the 1590s; in 1596, the Queen appointed Bacon 'Queen's Counsel Extraordinary', the first QC; in 1604, King James formalized it by giving Bacon a patent and SJs began their long decline; but Coke gets the last laugh, for when Lindley died in 1921 he died as the last English SJ. Meanwhile and so debates over dignities don't appear to lay readers as the province of the bar, I note that businessmen were elevating themselves well before Mr Lloyd George put out his hat: five years after creating QCs, James introduced baronetcies – the Gong Lite which is neither knight nor lord – as a means of raising money.

Back to *The Moorcock*. On Lord Esher's left was Sir Charles Fry. Appointed initially as a puisne judge, The Spectator recorded:

> The new Chancery Judge is Mr. Edward Fry, Q.C.—now Sir Edward Fry,—and no better appointment could have been made. Mr. Fry is a very accomplished lawyer in the literary and theoretical sense, as well as a barrister of very large experience and skill in equity cases, and it is only fair to say that his appointment is not in any sense due to party sympathies. He is, we believe, a Liberal in politics, and chosen, therefore, for no other reason than the great additional strength he will bring to the ranks of Conveyancing and Equity lawyers in the High Court of Justice.

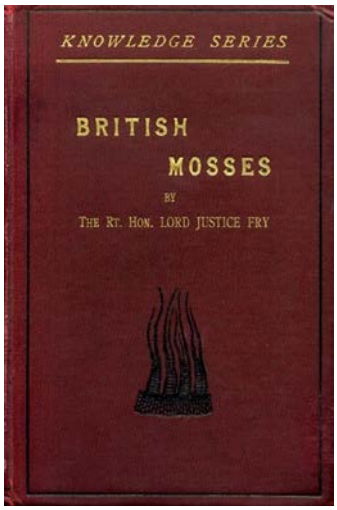
The issue was 5 May 1877, the government a Conservative one. Indeed, 1877 is probably the zenith of imperial conservatism. Not only was Disraeli half way through his second premiership, on 1 January his effort to have the Queen formally Empress of India came to fruition. Fry's view on such matters was a little different. In his foreword to the 1884 report to the Houses of Parliament titled *The Indo-Chinese opium trade considered in relation to its history, morality, and expediency, and its influence on Christian missions*, he wrote:

As Tom Waits says, 'The large print giveth and the small print taketh away'.

> We English, by the policy we have pursued, are morally responsible for every acre of land in China which is withdrawn from the cultivation of grain and devoted to that of the poppy; so that the fact of the growth of the drug [opium] in China ought only to increase our sense of responsibility.

The Fry, Rowntree and Cadbury families are as famous to the history of chocolate as they are to Quakerdom. Fry's reputation as a judge would have been enough for most; he was also a pre-eminent international arbitrator and zoologist. A member of the Royal Society, he penned two books on bryophytes, one with his daughter.

Fry's children largely embraced the Quaker tradition of service. Son Roger was a warm member of Bloomsbury, while daughter Margery was principal of the Oxford women's college Somerville. Interestingly, Sir James Fitzjames Stephen, a cousin of a NSW chief justice and who had served as a puisne judge alongside Fry, was uncle to Virginia Woolf and father to Katharine Stephen, principal of Cambridge women's college Newnham.



"No, the book is not about my colleagues."

Charles Synge Christopher Bowen

We move now to the man on Esher's right, the highly admired Charles Bowen. Bowen was, like Esher, son of a clergyman and, with a brother, a first-class cricketer. He knew a thing or two about contracts and wrote the most enduring of the reasons in *Carlill v Carbolic Smoke Ball Co*. Law students will be familiar with the first advertisement, the

cause of the litigation:

But the second should not go unnoticed:

The rogue has his day. As for Mrs Carlill, she lived to 96. Her certificate noted 'influenza'. A time bar cannot be outlived.

Bowen was a polite and polished judge. His ease with his colleagues was supreme. Megarry tells the tale:[15]

Lots of puff in the first ad

> The opening of the Royal Courts of Justice in 1882 by Queen Victoria was the occasion of a celebrated display of judicial comity. Lord Selborne LC called a meeting of the judges, at which the draft of an address to the Queen was considered. It contained the phrase 'Your Majesty's Judges are deeply sensible of their own many shortcomings…,' whereat Jessel MR strongly objected, saying 'I am not conscious of 'many shortcomings', and if I were I should not be fit to sit on the bench,' a view in keeping with his remark 'I may be wrong, I sometimes am, but I never doubt,' or, as it is sometimes put, 'I may be wrong but I have no doubts.' After some wrangling as to the terms of the address, Bowen LJ suggested a characteristic compromise: 'Instead of saying that we are 'deeply sensible of our own many shortcomings', why not say that we are 'deeply sensible of the many shortcomings of each other'?'

Funnily enough, the one person to come to Jessel's defence is an Australian judge who possessed a similar albeit gruffer self-confidence. When Jessel's remark about doubt was repeated to Sir Samuel Griffith, he immediately replied 'Well, he could hardly have meant that. He must have meant that he never expressed any doubts, for every judge must always feel some doubts at least until the conclusion of the argument.'[16]

Sir Charles Bowen left an impressive grab bag of expressions for anyone interested in language, lay or legal.

In a 1903 decision concerning fair comment, Collins MR referred to 'the ordinary reasonable man, 'the man on the Clapham omnibus', as Lord Bowen phrased it'.[17] Collins himself had a more than passing knowledge of defamation; he was judge on the first and fateful Wilde trial. And following a theme of ordinary reason, in 1885 Bowen observed that 'the state of a man's mind is as much a fact as the state of his digestion'.[18]

Enough of the reasonableness of Bowen's common law. What of the conscience of his equity? It is displayed in his poem:

> The rain it raineth on the just
> And also on the unjust fella;
> But chiefly on the just, because
> The unjust hath the just's umbrella.

The most curious expression of Bowen's involves the cat that wasn't there. A number of sources give Bowen the credit. For example, the *Pall Mall Gazette* for April 1894 stated:

> 'I often hear,' Bowen said once, 'eminent counsel talk of an equity in the case. It always reminds me of the story that Confucius once called his followers together and asked them what was the greatest impossibility conceivable? None could answer. Then he said that it was when a blind man is searching in a dark room for a black hat which is not there.'

In 1911, the distinguished US philosopher William James wrote:

> With his obscure and uncertain speculations as to the intimate nature and causes of things, the philosopher is likened to a 'blind man in a dark room looking for a black cat that is not there.'

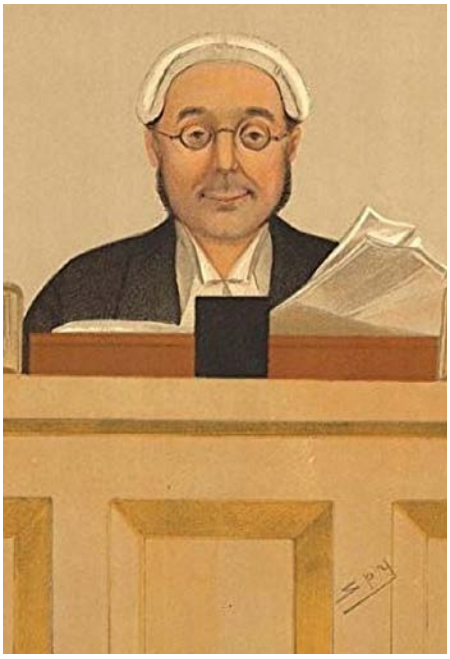
Leading a correspondent to the *Chicago Tribune* in 1926 to write:

> It was not William James but an Englishman, the witty Lord Bowen, who said 'a metaphysician is a man who goes into a dark cellar at midnight without a light looking for a black cat that is not there.'

For the record and whatever the Confucianism of these Chinese whispers, the award goes neither to James nor to Bowen but to an American writing in 1850.[19]

Delay and ducks…

As an appeal judge, Bowen was necessarily a generalist. For example, he was able to bring the common law of reason to the inequity of delay. When a Mr Hall was enjoined, he had the benefit of the usual undertaking by the applicant. Unfortunately, he took four years



"Judicial Politeness" – Bowen as caricatured by Spy (Leslie Ward) in Vanity Fair, March 1892

to get around to doing something about it. The chief judge in bankruptcy didn't call on the opposition and nor did the appeal bench. For Bowen, the matter was clear:[20]

> It is a reasonable presumption that a man who sleeps upon his rights has not got much right.

By the way, the chief judge (Sir James Bacon) was something of an expert on delay. As vice-chancellor he once said:[21]

> This case bristles with simplicity. The facts are admitted; the law is plain; and yet it has taken seven days to try – one day longer than God Almighty required to make the world.

John de Morgan wrote in his book *In Lighter Vein*:[22]

> The English court of Chancery is not, as a rule, a very amusing resort, but the late Vice-Chancellor Malins was always able to command a fairly 'good house' whenever he had the opportunity…
>
> [A cranky litigant] presented himself in court, and taking aim from amid the bystanders hurled a rather ancient egg at the head of the judge. Vice-Chancellor

> Malins, by adroitly ducking, managed to avoid the missile, which malodorously discharged itself at a safe distance from its target… 'I think [the judge said] that egg must have been intended for my brother Bacon.'

De Morgan's writing is 19th century, but don't let that hide a fascinating fellow. He was a professional agitator who among his many projects established the Tichborne Propaganda Release Union, organizing a march on the House of Commons on behalf of the Claimant.[23]

As for *The Moorcock*, Bowen's words were:

> In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men …

There is no need to set out the appeal court's reasons at length, because later words are better known, the reasons of MacKinnon LJ referred to by Mason J in *Codelfa*. The words reek of common sense and are worth setting out:

> I recognize that the right or duty of a Court to find the existence of an implied term or implied terms in a written contract is a matter to be exercised with care; and a Court is too often invited to do so upon vague and uncertain grounds. Too often also such an invitation is backed by the citation of a sentence or two from the judgment of Bowen LJ in The Moorcock. They are sentences from an extempore judgment as sound and sensible as all the utterances of that great judge; but I fancy that he would have been rather surprised if he could have foreseen that these general remarks of his would come to be a favourite citation of a supposed principle of law, and I even think that he might sympathize with the occasional impatience of his successors when The Moorcock is so often flushed for them in that guise.
>
> For my part, I think that there is a test that may be at least as useful as such generalities. If I may quote from an essay which I wrote some years ago, I then said: 'Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!''

At least it is true, I think, that, if a term were never implied by a judge unless it could pass that test, he could not be held to be wrong.

Of duckings and eggs obiter benedicta

The Moorcock is 'flushed'? Well, it is the red grouse and I suppose this must be so.

If avian analogy is the metewand, Bowen has the last word, not as to the value of ex tempore judgments but their misfit cousin the obiter dictum:[24]

> … like my Brothers who sit with me, I am extremely reluctant to decide anything except what is necessary for the special case, because I believe by long experience that judgments come with far more weight and gravity when they come upon points which the Judges are bound to decide, and I believe that obiter dicta, like the proverbial chickens of destiny come home to roost sooner or later in a very uncomfortable way to the Judges who have uttered them, and are a great source of embarrassment in future cases.

Bowen can't – and admits he can't – lay claim to such chickens. The earliest reference I can find is the frontispiece of Robert Southey's 1810 opus *The Curse of Kehama*. Under the author's name there is some Greek which is translated as 'Curses are like young chicken, they always come home to roost'. Yes, chicken was then an acceptable plural. Incidentally and as defamation has been mentioned, it is worth recalling that the poet laureate named his school magazine *The Flagellant* and compounded his problems by using an early number to apply the title to Westminster School's headmaster:[25]

> Vincent was moved to uncontrolled wrath and an action for libel against the publisher. Southey at once admitted himself the author of the paper and was promptly expelled.

From river to rail

The author's earlier reliance on cosmology was not singular. In 2015, Justice Martin of the Western Australian Supreme Court gave a paper headed 'Surrounding circumstances evidence: construing contracts and submissions about proper construction: the return of the Jedi (sic) Judii':[26]

> Invoking a Star Wars unfolding saga theme, this episode's point of departure assumes a preceding familiarity with what feels like an almost timeless galactic story about contractual interpretation, ambiguity and the 1982 'true rule' stated in Codelfa Construction Pty Ltd.

Justice Martin, like Gageler J although a couple of years earlier, was an associate to one of the judges in *Codelfa*, Sir Ronald Wilson. For his part, Sir Anthony Mason preferred Joseph Conrad over HG Wells; it was he who used the expression 'this ocean of litigious controversy'.[27] Mind you, there is the liquid nexus as galaxy comes from the Greek *galaxias*, meaning 'milky'.

The background to *Codelfa* is the history of major city infrastructure, in this case Sydney's Eastern Suburbs Railway: an original plan, decades where vision collides with revision, tensions between the public body charged with overseeing construction and the foreign company charged with that construction, local residents' action groups, political shifts, and supervening social change.

The initial plan is set out in the Second Schedule to the *City and Suburban Electric Railways (Amendment) Act 1967*.

"Hello, I've just docked from Antwerp. Pass the whisky."

> … From the Domain the railway will be constructed above ground across Woolloomooloo, in tunnels under Kings Cross and again above ground across Rushcutters Bay to enter tunnels again near Edgecliff. The railway then proceeds in a south-easterly direction through Woollahra and Bondi Junction, thence southerly and south-westerly through Waverley and Randwick to terminate at an underground station at Kingsford, the whole section from Edgecliff to Kingsford being in tunnels except for a small section where Woollahra station is to be provided in an open cutting. Railway stations will be provided at Chalmers Street, Town Hall, Martin Place, Kings Cross, Rushcutters Bay, Edgecliff, Woollahra, Bondi Junction, Charing Cross, Frenchman's Road, Randwick, University of New South Wales and Kingsford with special bus-to-rail interchange facilities being provided at Edgecliff, Bondi Junction, Randwick and Kingsford. Train storage sidings will also be provided in tunnels beyond Kingsford Station.

Shades of the light rail! What made the

Eastern Suburbs Railway saga a particularly Sydney episode was two factors. First, anachronistic social ambition. When Dr Bradfield's plan was in its infancy, growth was anticipated in the southeast, down where the airport now is. By the time Mr Wran's Labor government was elected in 1976, it was the greater west which was and would increasingly remain under-resourced. This factor in the context of huge cost blowouts made truncation of the railway inevitable.

Secondly, that evergreen litigant the Woollahra Resident. Cost-cutting meant that the rail was now to stop at Bondi Junction, but there was still hope that there would be a Woollahra railway station along the way. It would have been bucolic.

In this case it was the Italian construction group *Codelfa* which signed up with the State Rail Authority. These days, *Codelfa*'s parent has on its homepage the ambitious 'Ready to face all new challenges'.[28] Perhaps, but is anyone ever really ready for development work in Sydney?

The facts in *Codelfa* were straightforward enough. *Codelfa* promised the SRA that the railway could be done pronto. With some statutory comfort and a she'll-be-right-mate attitude embracing both Australian and Italian stereotypes, the promise was made on a common assumption that pronto-ness could be achieved as no-one was going to enjoin anyone.

Enjoin them the good burghers of Woollahra most certainly did, with the result that *Codelfa*'s work schedule had to be shredded and the costs exploded. I suggested at the outset that the concern of the court is to look at what would have been said, had the parties turned their mind to the situation, not what should have been said, now hindsight is the guide. In the analysis of Brennan J:[29]

> The contract reveals no lacuna which must be filled to make it work. It works perfectly well. It is a case of a contractor who promised to complete work within a time which was too short having regard to the hours during which it was lawful to work and the speed at which the construction team was capable of working. It was not an express term of the contract that Codelfa would work three shifts a day and, having regard to the environment in which the works were to be performed, Codelfa could not lawfully have promised that it would do so. Codelfa's promise to complete the works was a promise to do so lawfully. It was not an express term of the contract that Codelfa would not be restrained by injunction if it committed an actionable nuisance. The Commissioner could not have promised that the courts would not intervene if Codelfa committed an actionable nuisance. No doubt the Commissioner and Codelfa shared a mistaken belief that Codelfa would be able to work three shifts a day lawfully, or at least without liability to restraint by injunction, because they mistakenly believed that s. 11 of the City and Suburban Electric Railways Act conferred an immunity upon Codelfa. That mistake could not give rise to an implied term. If, at the time when the parties were signing the contract, the officious bystander had asked what did they intend in the event of the issue of an injunction restraining work during the night shift, they would have replied: 'We have thought of that. It cannot happen.' They cannot be presumed to have agreed upon a term inconsistent with their common belief.

Rush hour at Woollahra Station. © Sean Clark, 1992.

The outcome was a loss for *Codelfa*, or at most a draw. The mistaken assumption was not sufficient to imply a term (and thus let *Codelfa* make some money for keeping going) but was sufficient to found frustration (and thus to relieve *Codelfa* of the price of keeping going).

Codelfa has two morals. The first is in Lord Bowen's bones: a requirement of an implied term that 'it must be necessary to give business efficacy to the contract' is not to be Spoonerised by primary judges into 'it must be necessary to give business contracts efficacy'. The second is more general and stated by Mason J as follows:[30]

> The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning.

One day a legal historian may write 'Relationships between the High Court and the NSW Court of Appeal in the early 21st century'. It will be a slim volume. Other cases will be at the fore, but *Codelfa* contributed. Let the summary of the aforementioned Western Australian judge suffice:

> For those needing a quick refresher, by the Jireh reasons Gummow, Heydon and Bell JJ, whilst dismissing that application for special leave, admonished the Courts of Appeal of New South Wales and Victoria - for taking it upon themselves to presume that the 'true rule' of contractual construction as articulated by Sir Anthony Mason in Codelfa at 352, had been abrogated in Australia.

The summary is spot on. However, as a loyal oriental may I admonish the occidental? The High Court's news for the eastern appellate courts was not universally grim. The bench – with two of its three members alumni of the NSW Court of Appeal – also praised another member of that court, someone who had been a junior in *Codelfa* three decades earlier.

And so to Western Port

Western Port is a tidal bay. Its mouth is dominated by Phillip Island and opens onto Bass Strait. Its body is dominated by French Island. The peninsula on the western side of Westernport is Mornington Peninsula, which makes Melbourne's Port Phillip Bay to the west of Western Port. Anyway, the eastern side of the peninsula used to comprise the Shire of Hastings. Today, the environment is a primary concern.

But BP Refinery's visit to the courts, unlike that of *Codelfa*'s, did not have its roots in either a generalized environmental dispute or even a localized nimbyism. To the contrary, locals wanted it. In the early '60s, just like before and since, local councils and state governments liked to lure big corporations. The refinery at Westernport was the paradigm example and the lure provided by the shire was a rating preference.

But first, the unions

However, it should not be thought that that the refinery was welcomed by everyone. It was not. And it was this hostility that led to the refinery's first piece of litigation, one unrelated to the implied terms litigation almost a decade later.

A major feature of the refinery was a mechanisation 'leaving little room for the employment of manual labour in connexion with the delivery of crude oil to it, the processes of refining and extraction of marketable products from it, or the delivery of the output of the refinery at the first stage of distribution.'[31]

As white collar workers are finding out in the 21st century, why employ people if you don't have to? One way the blue collar Storemen & Packers' Union sought to get inside the refinery – this product of international capitalism and regional government – was

to invoke the federal industrial jurisdiction. The union sought to invoke this jurisdiction by serving its log of claims not only on BP Refinery but also on five other interstate employers. Setting up a paper dispute to get something interstate and therefore justiciable was a practice already sanctioned by the High Court, but this time round big business won. The majority confirmed that while a paper dispute was kosher, there still had to be some nexus with the interstate employers and there simply wasn't one here.

Sir Edward McTiernan, the Labor politician appointed with HV Evatt over three decades before, dissented. It is an unashamedly centralist piece, summarised in a 1967 casenote by T J Higgins, I assume the later Higgins CJ of the ACT Supreme Court:[32]

> The majority view, on the other hand, while imprecise and unspecified does appear, from the result in this case, to have the effect of gravely circumscribing the jurisdiction of the Commonwealth Conciliation and Arbitration Commission. The local economic or industrial policies of the States will, at least potentially, be elevated above the national interest, and many awards already made may well find they lack jurisdictional basis for either continuance or renewal. It is to be hoped that the High Court will, in future, regard this instant case as a decision only as to whether, on its particular facts, any dispute really existed with the refinery company and the distributors and rebut any inferences that may be drawn from the majority judgment concerning the degree of association of interest between employers in an industry necessary to join them as parties to a single industrial dispute.

Back to implied terms

It is important to get the uncontroversial and unremarkable out of the way, and I intend to use this and the next paragraph for that purpose. The first uncontroversial proposition is that in the case, Lord Simon said:

> [F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that hino term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

The second uncontroversial proposition is that Lord Simon's statement in that case is the current law in Australia. The most recent statement by a majority of the High Court is:[33]

> Such implications are made when the conditions set out in BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266 at 283 per Lord Simon of Glaisdale, Viscount Dilhorne and Lord Keith of Kinkel are satisfied. These were conditions adopted by this Court in Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd [1979] HCA 51; (1979) 144 CLR 596 at 605–606 per Mason J, Gibbs and Stephen JJ agreeing at 599, Aickin J agreeing at 615; [1979] HCA 51; see also Codelfa Construction Pty Ltd v State Rail Authority of NSW [1982] HCA 24; (1982) 149 CLR 337 at 347 per Mason J, Stephen J agreeing at 344, Wilson J agreeing at 392, 404 per Brennan J; [1982] HCA 24.

Now to the more controversial

The background to the implied terms litigation can doubtless be put in a number of ways. I've chosen Wikipedia's narrative not from laziness but because the author states the facts with an impish nod to what was to come in the Privy Council:

> In 1963 BP Refinery (Westernport) Pty Ltd reached an agreement with Henry Bolte, the then Premier of Victoria for the establishment of an oil refinery and construction of port facilities at Crib Point, in Western Port, Victoria('the Refinery Agreement'). The Parliament of Victoria, on the same day it ratified the Refinery Agreement, amended the Local Government Act 1958 to allow local councils to agree on the rates payable for industrial land. In 1964 the Shire of Hastings and BP Refinery entered into a Rating Agreement, which set out the rates payable for the following 40 years, and was approved by the Governor ('the Rating Agreement').
>
> BP decided to restructure its Australian operations and on 15 December 1969 wrote to the Shire of Hastings stating 'I hope I may assume that there will be no difficulty over transferring' the rights and privileges including the Rating Agreement to BP Australia Ltd. That the Rating Agreement would transfer was apparently so obvious to BP that it did not wait to hear the position of the Shire of Hastings before transferring the assets to BP Australia Ltd. Under the Rating Agreement the rates would have been $50,000 however the Shire of Hastings said the Rating Agreement no longer applied and assessed the rates in excess of $150,000.
>
> What was obvious to BP was not obvious to the County Court or to the Full Court. [For those courts it] was an implied condition of the rating agreement that it should continue in operation only so long as BP Refinery should be the occupier of the refinery site and rateable as such; so that on BP Refinery going out of occupation on the 1 January 1970, the rating agreement came to an end.

The other thing to note was that there was earlier and separate litigation between the shire and the corporation which ended, to use the words of the County Court, in the Supreme Court deciding that the Rating Agreement was 'a personal contract'.

What was BP to do with these upstart colonial courts? An appeal to the Privy Council was advised and what jolly good advice it turned out to be. The outcome is first hinted at by a question from Viscount Dilhorne to the appellant's counsel about two-thirds the way through his address:

> Why should not a term be implied in the Rating Agreement that if the appellant's rights were assigned to another company in the BP group, the word 'company' in the agreement meant the assignee?

Counsel for the appellant properly and promptly got the message:

> We would seek to adopt such a formulation of a term to be implied in the rating agreement as an alternative submission.

Things for the shire only got worse. In their reasons, the majority were at a loss to understand how BP was acting other than as it had to:

> Their Lordships would draw attention to [a number of matters including the following] which must be borne in mind when it comes to the implication of any term in the rating agreement. First, both parties secured substantial benefits over a long period. For the appellant company it was the preferential rating. For the respondents there were the recited advantages of industrial development within their area; there were the large rates (albeit preferential) on the refinery; and there would be full rates on hereditaments ancillary to the refinery (e.g., housing for the workers, and shops to serve them). Secondly, the expenditure of a very large sum of money on an important industrial installation in a particular place may well be irrevocable. If the incentive to the siting within the respondents' district should be withdrawn, the installation could

> not by the mere passing of a corporate resolution be removed elsewhere, as if it were a unit in a cottage industry. Once tempted to a particular site it is there for good - or ill.
>
> A group of companies such as the B.P. group may from time to time for good reasons wish to make changes in its corporate structure - particularly when a period of as long as forty years is envisaged. This possibility was, as has been said, recognized in the refinery agreement, and the identity of the member of the B.P. group occupying the refinery site cannot have been of the least importance to the respondents.

So the attitude is clear enough. Big British Business was going to suffer. How to get around this? Fortunately for the majority - Lord Simon of Glaisdale, Viscount Dilhorne and Lord Keith of Kinkel – Lord Wilberforce had – apparently – provided the path five years earlier:

> In order for the agreement ... to be understood, it must be placed in its context. The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations.

The context, in case the ratepayers of Hastings were under any misapprehension, was British Petroleum. And so Viscount Dilhorne's implied term came to be.

The majority bench

Lord Simon of Glaisdale only died in 2006, the last surviving Englishman to have received an appointment as King's Counsel. Lord Keith of Kinkel was himself the son of a law lord.[34] Both had been mentioned in dispatches. Lord Keith tended to a small-c conservative outlook, and it was said that his judgments in damages cases were 'No'. Lord Simon had been a Tory politician although this did not define him. His specialty had been family law. His other 'last' was as the last President of Wills, Wives and Wrecks. One family lawyer recalled in 2011:[35]

> Simon was an avowed feminist who thought that many divorced women, particularly those no longer young, had a rough deal from husbands who wished to move on to 'newer models'. On one occasion he asked: 'Is it consonant with our ideas of justice that a husband who has enjoyed the services of his wife during her springtime and summer, should be able to cast her away in the autumn?' On another occasion he observed: 'The cock can feather the nest because he does not have to spend most of his time sitting on it.'

Lord Simon had suffered from an operation to remove a tumour, which left him with facial paralysis, a speech impediment, and a dud eye which gave him a good piratical air.

Importantly, Simon was Solicitor-General while Sir Reginald Manningham-Buller was the Attorney. The latter's career was controversial, to say the least. The later Lord Devlin, before whom he appeared, later wrote a scathing piece about him. He became widely known, via Bernard Levin's pen, as 'Sir Reginald Bullingham-Manner'.[36] And, relevantly, he would be Lord Dilhorne.

Yet it is easy enough to lampoon Dilhorne and one must be cautious of over-simplification. Witness the turning knife in this marvelous piece for *The Spectator* by Alan Watkins, the writer who coined the phrases 'the men in grey suits' and 'young fogey':[37]

> Patrick Devlin was one of the outstanding lawyers of the second half of the century. He was also what lawyers, outstanding or otherwise, rarely are: an excellent writer of English… Having been made a High Court judge at 42, a Lord Justice of Appeal at 45 and a Law Lord a year later, he retired from his legal duties in the Upper House at the early age of 58, as soon as he had qualified for a pension. When asked on television what he intended to do with the rest of his life, he replied, 'Enjoy myself.'
>
> … He also made a lot of money out of being an arbitrator. And he wrote some good books.

It was one of these, Easing the Passing, that led to further tut-tutting in the Temple about Pat Devlin. This was an account of the acquittal of Dr John Bodkin Adams of Eastbourne. It is one of the best books ever written about a trial. This is not altogether surprising, because Devlin was the judge. I suspect, however, that what annoyed assorted silks and benchers was not so much that he had breached convention (if, indeed, he had) in writing about a trial over which he had presided as that he was, in the course of the work, rude about the prosecuting counsel, Sir Reginald Manningham-Buller, the Attorney-Gener al, later Lord Dilhorne, the Lord Chancel- lor. He referred to him disrespectfully throughout as 'Reggie' and cast persistent doubt on both his intelligence and his application. The latter charge, at least, was unfair. For Reggie was to do the reverse of what Devlin had done. Having served his brief term on the Woolsack and been succeeded by Labour's Gerald Gardiner, he put his head down, read a few books and some law reports, and turned himself into a thoroughly competent Lord of Appeal.

Nor were Pat's motives for being so scornful of Reggie of the purest. He admits as much in the book. Lord Goddard, one of his mentors, wanted

Lord Simon.

> Devlin to succeed him at some time as Lord Chief Justice. So, at one stage, did Devlin. Somewhere, some- how, Reggie got himself in the way of this plot. As Reggie never became LCJ anyway, and the notion that the Attorney has a reversion on the job is a constitutional myth, Devlin's account does not make complete sense. But there it is.

The minority bench

And what of Lord Wilberforce? After all, he was in the room, along with Lord Morris. The former was one of the most well-known of the 20th century law lords, and great-great-grandson of the abolitionist. Lord Morris fascinated many a law student, being Lord Morris of Borth-y-Gest.

Both, again, served with great distinction, although Morris being a generation older took his decoration (an MC) in World War I. (Dudley Williams of our High Court did too.)

Together they had a marvelous time:

> … this argument appears in the majority judgment and consists in saying that a term ought to be implied that if the rights of the appellant company were assigned or otherwise disposed of to a company in which the British Petroleum

Co of Australia held thirty per cent or more of the issued share capital, 'Company' should mean that assignee company.

Of this argument we would say:

1) It was not put forward in either court below, nor taken or hinted at in the appellant's printed case.

2) It is inconsistent with the decision of the Full Court in the earlier case concerned with B.P. Australia Ltd., and involves contending that that unappealed decision was wrong. In our respectful opinion it was right.

3) It is inconsistent with the appellant's own action in December 1969, when it requested that their rights and privileges vested in the appellants might be transferred to B.P. Australia Ltd.

4) It introduces a method of interpretation which is novel and unsound. We have referred above to the agreement of 7 May 1964, which contains its own definition of 'the Company' - that is, the appellant. Every reference in that agreement to the Company - we have mentioned the main references above - is beyond doubt a reference to the appellant company and to no other entity. To vary an expressed definition agreed between the parties by reference to a recital of another agreement of a different character between different parties involves a process alien to normal methods of construction.

5) The introduction of the new 'implied term' cannot be justified under the normal principles. It is not necessary in order to produce business efficacy, is inconsistent with the expressed terms of the rating agreement, and, in our opinion, is not authorized by s. 390A. In effect it would impose upon the Shire a contractual party to which the Shire has not assented.

It's either Borth-y-Gest *or* The Moorcock reprised.
http://www.snowdoniaguide.com/borth_y_gest.htm

Lord Wilberforce (in oil, ho ho).
© Suzi Malin; University of Hull Art Collection.

6) The extended definition does not produce the result aimed at. For one of two things: either the extended definition means 'any company in the B.P. Group' - but in that case it departs from the 'incorporated' definition; or, if the 'incorporated definition' is taken, it produces the wrong result, for the assignee company is B.P. Australia Ltd. to which alone the benefit of the State agreement has been transferred and which has not re-transferred it to the appellant. It cannot produce the appellant company which has parted with the State agreement and now has merely a three year lease of the site.

Ouch. Think that we might never have known of the dissent had it not been for Sir Garfield Barwick, who only agreed to sit on the council if there were published dissents.

The High Court were alive to the oddity; as Brennan J diplomatically put it:

> In B.P. Refinery (Westernport) Pty. Ltd. v. Hastings Shire Council [1977] HCA 40; (1977) 52 ALJR 20 there are some passages in the majority judgment which suggests that their Lordships went further and sought to derive from the matrix of facts in which the contract was made the implication of a contractual term. If their Lordships went further than Prenn v. Simmonds (1971) 1 WLR 1381; (1971) 3 All ER 237 would permit - and it is by no means clear that their Lordships intended to do so, for Prenn v. Simmonds was cited - then I should not think that the majority judgment would accord with sound principle. Clearly the minority judgment looked to the contract itself as the source of the term to be implied. B.P. Refinery should not be regarded as authorizing an extension of the role of extrinsic evidence, nor as permitting the implication of a term other than what is necessary 'to make the written contract work or, conversely, in order to avoid an unworkable situation', to quote a phrase from the minority judgment in that case. If it appears from the written contract that a term is to be implied, there are conditions which any proposed term must satisfy. They were stated by the majority judgment in B.P. Refinery (1977) 52 ALJR, at p 26 and adopted by Mason J. with the concurrence of the other members of this Court in Secured Income Real Estate v. St. Martin's Investments Pty. Ltd. [1979] HCA 51; (1979) 144 CLR 596, at p 606 .

An epitaph in the books

The Privy Council case was never reported in the official reports, the Appeal Cases. Its only outing in its first round was the Australian Law Journal Reports.

The second peculiarity flows directly. In 1994, well after the Bicentenary and the Australia Acts, the publisher of the High Court's own official reports, the Commonwealth Law Reports, put out Volume 180. For those readers unable to sell their libraries in our post-typographical age, look up to the spine and you will see '1942-91'. In the foreword, Sir Anthony Mason said:

> The thirty cases in this volume are spread over a fifty year period and, like Georges Bizet's opera Carmen, their significance was not initially appreciated by their audience.
>
> … The third group of [these] cases deals with principles of general contract and equity law. The cases range from the Privy Council decision in BP Refinery… to the High Court decision in Bloch v Bloch, which relates to the 'purchase money' resulting trust and the presumption of advancement. The former case has proved most influential, being applied in a number of Australian cases, including the High Court decisions in Codelfa… and Hawkins v Clayton.[38]

It is no surprise that a Privy Council decision appears in the CLRs. For some decades, its law was Commonwealth law. But I think I am correct in saying that, accusations of anachronicism aside, BP Refinery is the last such case to be reported in the CLRs. Incidentally, Sir Anthony was our first chief not to be appointed to the Privy Council, a tradition which is likely to continue!

The environment outs

The majority reasons in BP Refinery are remarkable. As to the law of when a term is implied into a contract, the reasons form the basis of modern Anglo-Australian law. We have seen recent reference by the High Court. So it is with the Supreme Court, albeit and sadly with reference only to the ALJR citation. As to the application of that law and the permissible involvement of facts beyond the contract itself, the reasons are wrong. The judge on whose previous dicta the reasoning was based – Lord Wilberforce – makes clear why.

It is not to the point to criticize the judges themselves. Each in his own way served his country and his office with distinction. The moral, I think, is that the case is a firm reminder that judges who go beyond the case in front of them do so at peril. Usually, this is a criticism levelled by black-letter lawyers on more liberal colleagues; certainty, it is said (and, it must be added, often with great force) is vital to the rule of law. The great irony of BP Refinery is that the majority in wanting certainty for BP came adrift from that certainty upon which the rule of law is often found. As their Lordships said, 'Once tempted to a particular site it is there for good - or ill.' In the 1980s, the refinery was largely abandoned. The only photographs I can locate are on a UK urban exploration site called 28 Days Later. I assume it drew its name from the well-known UK post-apocalyptic horror film made in 2002.

END NOTES

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4 ***Shirlaw v Southern Foundries*** (1926) Ltd (1939) 2 KB 206, 227.
5 web.archive.org/web/20080213152947/http://www.baseballlibrary.com/ballplayers .
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9 ***The Erato*** (1888) 13 PD 163.
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13 riverthames.sosugary.com/displayimage.php?pid=380 .
14 en.wikisource.org/wiki/Wikisource:WikiProject_1911_Encyclopædia_Britannica .
15 Megarry, work cited above, pp 8-9.
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17 ***McQuire v Western Morning News Company*** [1903] 2 KB 100, 109.
18 Edgington v Fitzmaurice (1885) 29 Ch D 459, 483. According to Wikipedia, this has been quoted in at least four US Federal Court securities judgments, *Aruve v. Creech*, 507 U.S. 463, 473 (1993), *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716-717 (1983), *Blue Chip Stamps v. Manor Drug Stores* 421 U.S. 723, 744 (1975), ***Comm'r v. Culbertson***, 337 U.S. 733, 743 n.12 (1949) (same).
19 quoteinvestigator.com/2015/02/15/hidden-cat/#return-note-10617-8 .
20 *Ex parte Hall*; In re Wood (1883) LR 23 CD 644, 653.
21 Megarry, work cited above, p 244.
22 1907, Paul Elder & Co, pp 99-100.
23 victorianfootnotes.net/2011/05/08/foundation-footnote-john-de-morgan/.
24 38 Ch D 71
25 Sargeaunt, ***Annals of Westminster School***, p 209.
26 supremecourt.wa.gov.au/_files/Surrounding%20Circumstances%20Evidence%20Construing%20Contracts%20and%20Submissions%20About%20Proper%20Construction%20The%20Return%20of%20the%20Jedi%20(sic)%20Judii%20Justice%20Kenneth%20Martin%2017%20Mar%202015.pdf .
27 ***Codelfa***, 345.
28 http://www.itinera-spa.it/en/ .
29 ***Codelfa***, 405.
30 ***Codelfa***, 352.
31 ***The Queen v Gough; ex p BP Refinery (Westernport) Pty Ltd*** (1966) 114 CLR 384, 392, McTiernan J.
32 Higgins, T J --- 'The Queen v Gough and Another; Ex parte BP Refinery Pty Ltd' [1967] FedLawRw 22; (1966-1967) 2(2) ***Federal Law Review*** 282
33 ***Commonwealth Bank v Barker*** [2014] 253 CLR 169, fn 89, French CJ, Bell and Keane JJ, Keifel J and Gageler J in separate judgments agreeing in the result. Whether this is in fact something said by a majority or something said by a 'plurality' must await a further *Bar News*.
34 Lord Keith's ***Daily Telegraph*** obituary is at https://www.telegraph.co.uk/news/obituaries/1398494/Lord-Keith-of-Kinkel.html.
35 www.familylore.co.uk/2011/10/lord-simon-of-glaisdale.html .
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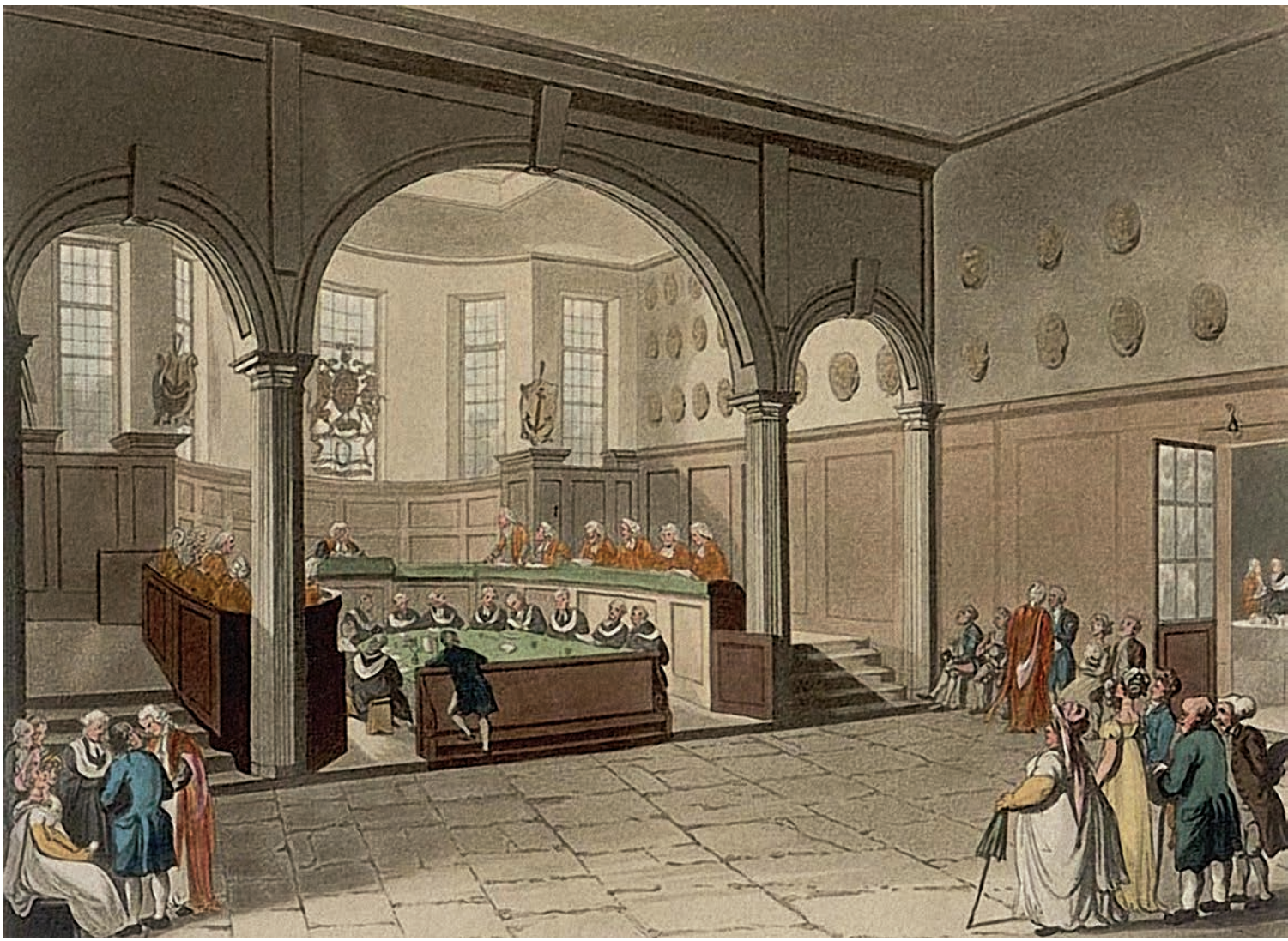


Doctor's Commons

By Kevin Tang

For half a millennium the separation between the spiritual law and the temporal law assured the livelihood and existence of a band of practitioners known as the Doctors' Commons in London. The jurisdiction grew out of the early episcopal courts recognised by William I in 1072. It was a bastion of Canon and Ecclesiastical Law. A distinct strain of Canon Law developed in England after the Reformation. This was the quintessential spiritual jurisdiction as distinct from the temporal courts and its profession. In a blaze of glory, Doctors' Commons came and went.

Origins - α

The institution 'Doctors' Commons' arose out of a seminary or sacerdotal college known as Jesus Commons which operated in St Paul's Cathedral churchyard in the City of London before 1400. Doctors 'Commons refers to the learned specialists in Canon and Ecclesiastical law trained in the Roman law (civilian law) tradition and procedures. Doctors' Commons, as a title, was in use by 1532. It was conceived as a voluntary society for practitioners and scholars to live and practice amongst one another and to keep a 'common table' and as scholars they '*commoned*' on site. In this respect, it was similar to the Inns of Court but Doctors' Commons was exclusively for those who practised in the Ecclesiastical and the Civil law courts in London. It was never a teaching institution. This was the age when Civil law, Canon law and theology were pre-eminent university subjects. The common law was an orderless science the apprenticeship of which was lengthy.

Before 1850, most lawyers, especially in Western Europe were men who had taken Holy Orders. The main centres of theological and civil law learning since before the Dark Ages included Bologna in Italy, The Sorbonne in Paris and Oxford and Cambridge in England amongst others. Most of the canon law at the time arose externally to England and England developed its own system in time. Almost all of the members of Doctors' Commons held the degrees of DCL from Oxford or LLD from Cambridge.

Scenario

Originally Doctors Commons was located in chambers in Paternoster Row by St Paul's Cathedral in the 1490s. By 1568 the Doctors' Commons became a much larger institution and there were many more advocates and visiting scholars from all over Christendom from the centres of theological scholarship Church Law and Civilian law e.g. The Sorbonne in Paris, Montpellier and Poitiers in France, Coimbra in Portugal and Valladolid in Spain.

Ammonius, Henry VIII Latin secretary, responded to a letter from Erasmus of Rotterdam (1466-1536) dated 18 November 1511, enquiring about the possibility of lodgings in London. Ammonius suggested to Erasmus that lodgings were available in the Doctors' Commons. Ammonius expressed the view that the venue was, however, no better than a privy (*cloaca*).

Erasmus was one itinerant scholar distinguished in the field of theology who visited Doctors' Commons but he does not appear to have ever been a member of the society or college known as Doctors' Commons. Other sojourners included Francois Rabelais (1494-1553), Michel de Montaigne (1533-1592) and Jean Calvin (1509 – 1564). There were vast records on membership and signed subscription books for each year of its existence. In any event, it was more likely that Erasmus and his theological status entitled him to stay with his friend Lord Mountjoy in Mountjoy House which became the second and most significant location of Doctors' Commons. Doctors Commons acquired the land when the lease over the previous, modest premises became difficult to maintain. The old building was destroyed in 1666 in the Great Fire of London. Dr Henry Harvey, the Dean of Arches and Master of Trinity Hall Cambridge in 1559, facilitated the purchase. Dr Harvey knew that venues for the sittings of the Court of Arches were itinerant. Earlier the court sat mostly under the arches in the St Mary-le-Bow Church, hence its name.

Cardinal Wolsey (1515-1529 Chancellor) had proposed a more salubrious college to be built for the Doctors. In 1568, when Doctors' Commons moved to Knightrider Street, the accommodation was known as a colony or an *appanage* of Trinity Hall Cambridge. A large stone house with a garden was constructed. Doctors' Commons was granted a Royal Charter by King George III on 22 June 1768 where the Charter specified that the college was for Doctors of Law, '*exercent in the Ecclesiastical and Admiralty Courts*'.

At Mountjoy House convenience was supreme. It had two quadrangles. When the society moved in 1568, the premises comprised of a large hall where the Court of Arches sat and a new court room was built for sittings of the High Court of Admiralty and also the prerogative Court of Canterbury and the Bishop of London's Consistory Court. There was a dining hall and above which was a grand room, where the most valuable asset of the Society was stored. By this time, the Doctors' Commons had amassed a library of books which was unique throughout Christendom – there were early manuscripts by Gratian *The Decretum*, countless medieval illuminated manuscripts, folios in vellum, rare theological works and eg. the original Rolls of Oleron. It

Falkenstein foto / Alamy Stock Photo

was an Aladdin's cave of knowledge through the ages of ecclesiastical, theological and Church literature.

Dickens observed the following in *David Copperfield* of this rather curious jurisdiction of wives, wills and wrecks:

> 'You shall go to Doctors' Commons one day, and find them blundering through half the nautical terms in Young's Dictionary, apropos of the 'Nancy' having run down the 'Sarah Jane,' or Mr Pegotty and the Yarmouth boatmen having put off in a gale of wind with an anchor and cable to the 'Nelson' Indiamen in distress; and you shall go there another day, and find them deep in the evidence, pro and con, respecting a clergyman who has misbehaved himself; and you shall find the judge in the nautical case, the advocate in the clergyman's case, or contrariwise. They are like actors: now a man's a judge, and now he is not a judge; now he's one thing, now he's another! Now he's something else, change and change about; but it's always a very pleasant, profitable little affair of private theatricals, presented to an uncommonly select audience.'

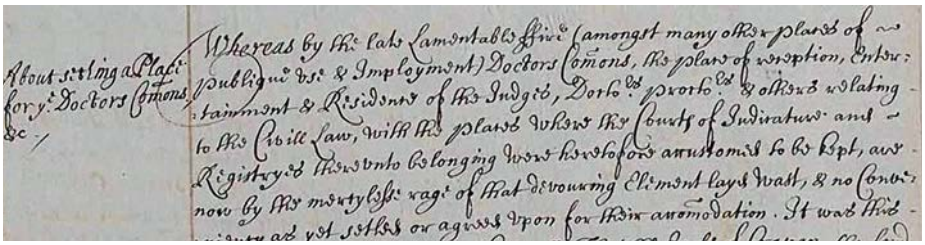
Causas

The practitioners of Doctors' Commons had to its name at least four monopolies. The cases that the advocates appeared in were of a certain type.

First was Ecclesiastical Law and Church Law and part from dealing with the more delicate questions of excommunications (requiring a bell, a book and candles), cases were centred on misbehaving clergy - *criminous clerks*, faculties and dispensations, heresy, tithes, pew rights, church smiting and it was also an appellate jurisdiction (referrals came from a bewildering array of first instance courts eg. archiepiscopal, episcopal, decanal, prebendal etc…).

Second, the Doctors practised in mercantile law (Admiralty and Maritime), in salvage and carriage cases, the law of prize and shipwreck, not to mention the cases of piracy on the high seas, were common. The advocates of the Doctors' Commons regularly argued commercial causes as merchant ships sailed into London from every corner of the Earth. This was the age of the *lex mercatoria* (the law merchant), the origins of the commercial lists in England, Australia and other common law jurisdictions. It commenced with self-regulating merchants from the Renaissance onwards in and around Continental Europe. A great part of the success of Doctors' Commons is directly attributable to the critical mass of professionals with international contracts of sale and carriage and which expertise had direct and practical application. It was the most lucrative aspect of the monopolies of Doctors' Commons.

Thirdly, the Prerogative Wills office was an annexe of the Doctors' Commons. Members of the public could inspect a will, if they wished, for a fee. The Bank of England did not accept probate from elsewhere except the


About setting a Platt for y^e Doctors Comons &c /

Whereas by the late Lamentable fire (amongst many other places of ~ publique use & Imployment) Doctors Comons, the place of reception, Entertainment & Residence of the Judges, Doctors, proctors & officers relating to the Civill Law, with the places where the Courts of Judicature and Registry's thereunto belonging were heretofore accustomed to be Kept, are now by the mortyfying rage of that devouring Element layd Wast, & no Conveniency yet settled or agreed upon for their accomodation. It was thought

London based Doctors' Commons. The bank would not pay out. A will of any value or significance would need to be proved by a member of Doctors' Commons and a formula was used denoting it. One significant will which arrived for probate/letters of administration was that of Napoleon Bonaparte, who died on 5 May 1821 at St Helena.

Fourthly, the Doctors' Commons also practised in marital disputes.

It was a much fabled curial procedure and susceptible to Dickensian characterisation and theatrical description. Another rare jurisdiction peculiar to the Doctors' Commons was the High Court of Chivalry which had been in operation since the 14th Century. Its business was confined to disputes over armorial bearings, all decided according the law of Arms. The court has only sat once since 1737 and was the last English court to use the procedure of the Civil Law.

Dramatis Personae

Doctors' Commons was a whole jurisdiction. It comprised of two particular professions. The proctors were in essence the equivalent to Solicitors in the heathen courts. The advocates, however, appeared as Counsel, as barristers would before the judges in the Royal Courts. The Judges were appointed from the ranks of Counsel. It was often the case that in the jurisdiction, and any commission could be full time or part time and this had the effect of advocates straddling the Bar and Bench – advocate one day and judge the next and *vice versa*. There was also the equivalent to an attorney or law officer, a King's Advocate in the jurisdiction.

The advocates and judges wore scarlet robes trimmed in Ermine. The proctors wore black robes trimmed in Ermine.

The procedure for admission was usually to that of the Court of Arches as an Advocate and the candidate would petition the Archbishop of Canterbury to be admitted. If successful the Archbishop issued a fiat to the Vicar-General who would prepare a re-script to the Dean of Arches requiring him to admit the candidate as an Advocate of the court and the admission would occur at the next session of the Arches Court. One could be qualified in civil or canon law but not necessarily.

Mise-en-scene

There is one known colour plate entitled 'Doctors' Commons' which was published in 1808 Ackermann's microcosm of London showing the interior of the main court (Mountjoy House) with a court in session complete with proctors and advocates before a judge sitting. It is described in *Sketches by Boz* and brought to life in Dickens' *David Copperfield*, when David considers becoming a Proctor in Doctors' Commons:

> 'What is a proctor, Steerforth?' said [David].
> Why, he is a sort of monkish attorney,' replied Steerforth. 'He is, to some faded courts held in the Doctors' Commons — a lazy old nook near St. Paul's Churchyard — what solicitors are to the courts of law and equity. He is a functionary whose existence, in the natural course of things, would have terminated about two hundred years ago. I can tell you best what he is, by telling you what Doctors' Commons is. It's a little out-of-the-way place, where they administer what is called ecclesiastical law, and play all kinds of tricks with obsolete old monsters of acts of Parliament. . . . It's a place that has an ancient monopoly in suits about people's wills and people's marriages, and disputes among ships and boats.' [Charles Dickens, *David Copperfield*, Ch. 23, 'I Corroborate Mr. Dick, and Choose a Profession,' instalment 8, Dec. 1849]

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Res Extincta - Ω

The Doctors' Commons jurisdiction was dissolved in 1857 when its Royal Charter was surrendered under power conferred by statute establishing the new Probate Court. The demise had been gradual and insidious. The monopolies of the Doctors' Commons would not survive the Victorian era.

Three Royal Commissions were appointed in the 1830s into Ecclesiastical and Church Law and the Diocesan system. Moves had been made to undermine the Doctors' Commons.

Inevitably, all advocates admitted in any of the Ecclesiastical courts were given rights of audience in any court in England and eligibility for appointments as if they had been called to the Bar on their admission date as advocates. The college was empowered to dispose of its assets as it saw fit and to surrender the Charter to the Crown, whereby it would be dissolved and any residual property would belong to its members in equal shares. Within days of those statutory enactments, the Matrimonial Causes Act that the Court of Divorce and Matrimonial causes were to be henceforth secular. All practitioners had a right of audience. By 1858, the Court of Probate and the High Court of Admiralty granted rights of audience to all practitioners.

For close to one thousand years, the Ecclesiastical and Canon Law jurisdiction were exclusively the domain of the Doctors of Civil Law. The two most vociferous members of the college who raised objection to the dissolution of the college were Doctor John Lee and the college's newest fellow Doctor Thomas Tristram. Both fought valiantly but in vain.

One argument remains for the survival of Doctors' Commons. The dissolution of the Royal Charter was imperfect. Consistent with the words of the Charter, at all times Doctors' Commons always had one member in existence – the Dean of Arches who was not only the president of the college *ex officio* but also a member of the college. The Dean of Arches' successors included Lord Penzance and others until Sir Lewis Dibden who outlived the last elected fellow. Without the writ of *quo warranto* issued by the Crown, the college was arguably still extant. No positive act of dissolution was performed. Its governing body arguably endures to this day. An entity remains upon which *quo warranto* proceedings could act.

The Courts adjourned and the Doctors ceased to appear. The precious library fetched a large sum of money when sold to private collectors. The premises was sold in 1865. In 1867, the buildings were demolished and the jurisdiction vanished into thin air.

Relevantly, a few decisions in Whitehall ended the Doctors' prestigious monopolies. Their forebears were the Canonists of the Middle Ages and their learned inheritance ceased. They had been expunged from the record.

Sic transit gloria mundi….

Teela Reid

by Chris Ronalds SC

Teela Reid was admitted as a solicitor in December 2016 and started work with NSW Legal Aid in March 2017. As a proud Wiradjuri and Wailwan woman from Gilgandra, Teela initially trained and worked as a PE teacher. Her transition to the NSW legal profession began after she was selected as an Indigenous youth female delegate to the United Nations Permanent Forum on Indigenous Issues, where she met Professor Megan Davis from UNSW who encouraged her to study law as a mechanism for developing as an advocate for her people.

During her second year at UNSW, Teela found it challenging to keep up motivation for her legal studies due to the intensity and competitiveness whilst dealing with loss and grief in her own family. Through the recommendation of a friend, she joined the mentoring program run by the NSW Bar Association as part of their Reconciliation Action Plan. She was linked with Sophia Beckett, a criminal lawyer then at Forbes Chambers and now a Public Defender.

Sophia Beckett (Public Defender), Justice Lucy McCallum (NSW Supreme Court), Teela Reid (Legal Aid NSW) Chris Ronalds AO SC

Teela recalls:

> I remember first going to Forbes Chambers, my first time ever in Chambers and not even knowing my way around and literally I remember the elevator opening and Soph welcoming me with the biggest smile ever and I just knew from that moment that it was all going to be fine. We went for a coffee and had regular catch ups from that point. She was very persistent we meet and I felt she never gave up on me, despite my own self- doubt. She took me under her wing and now I feel part of her family which provides a sense of security in a big city where I have no immediate family. Most importantly our mentoring relationship was based on mutual respect, not tokenism, and for that reason it was a turning point in boosting my confidence and self-esteem as I navigated my way through law school and into the legal profession.

Sophia comments:

> I was delighted to be asked to participate in the mentoring program and was paired with Teela Reid who was in the final years of her law degree at UNSW. After a few scheduled meetings, we quickly moved from a mentoring relationship to a friendship. In no time, our respective families in Sydney and Gilgandra were intertwined. The program assists students by providing more than just guidance, but also a sense of security and support: a person that can talk through the obstacles and problems along the way; understand that feeling that the legal profession can appear daunting and foreign; and encourage engagement. Despite these feelings, Teela nonetheless showed a willingness to accept the opportunities that the mentoring program offered. She is now better connected within the profession than I am, but she humours me by still pretending she needs me.

Teela participated in the initial "Share a Judge's Day" in August 2014 where Indigenous law students were paired with a NSW Supreme Court Judge for the day to see first-hand what goes on behind the scenes and in the Court room. Teela described the day as being "a really pivotal point and a great experience". Through this program, she met Justice Lucy McCallum and in 2016 worked as her tipstaff.

Teela described her year working in the Courts as:

> My time as a tipstaff exposed me to a variety of areas of law that would have taken years of practice to acquire. Experiencing jury trials, appeals and the defamation list provided insight into different advocacy styles that have been invaluable to developing my own skills.

Justice McCallum comments:

> Teela is one of the strongest people I know. She has experienced grief and discrimination and instead of knocking her back it has filled her with courage and determination. I learned a great deal about my own fears from watching her conquer hers.

In September 2015, the Indigenous Barristers' Trust made an inaugural award at the UNSW Indigenous Students Awards to Teela, then "a final year Aboriginal law student, for her efforts in increasing advocacy by designing and implementing the UNSW Law Mooting Competition for Australia's First Peoples in 2014 and 2015" with an award of $500.

In June 2017, Teela was selected to attend the Emerging Leaders Program at Harvard University. The Indigenous Barristers' Trust provided some financial assistance to enable Teela to attend the Program in the USA in June 2017. The Trust also covered the costs associated with her admission.

Teela is currently a solicitor at Legal Aid NSW and is considering a career at the NSW Bar and says:

> Without the mentoring program and opportunities provided by the NSW Bar Association and particularly the Indigenous Barristers' Trust, my time navigating law school and entering the legal profession would have been significantly harder. It's not just the financial assistance - it's the connections made amongst law students, graduates and people in the profession such as judges, barristers and solicitors that are breaking down barriers. Young Aboriginal lawyers are now starting to believe that going to the Bar is possible – it is a realistic option. And rightly so, if we believe the benefits of justice should be available to all, the Bar should reflect the diversity within our community and not only be accessible to those from privileged backgrounds.

Leon Apostle

by Anthony Cheshire SC

Leon Apostle is a Darug man with a Greek surname. He has 'an interesting mix' of relatives scattered across Western Sydney, where he grew up: Apostles, Tangyes, Lockes and Everinghams.

> I was raised by my mum and she placed a great deal of importance on education. I have very fond memories of sitting in bed with her, eating lollies and listening to her read to me for hours.

He was not overly academic at school, but loved art and played a lot of tennis and rugby. After school, he enrolled in a Bachelor of Arts degree at the University of Western Sydney, majoring in sociology.

During his degree course, Leon attended a summer school lecture at Sydney University on the subject of 'Indigenous Australia':

> The lecturer was quite an activist and spoke about legal issues that affected First Nations people. He inspired me to want to study law and soon after that I was studying law at the University of New South Wales.

The Nura Gili Centre for Indigenous Programs provides support and information for First Nations potential and existing students at UNSW:

> It is a fantastic resource. The tutors were incredible and I still go back and teach at their Indigenous Pre Law Course. They asked me what I wanted to do with my degree and I realised that I couldn't just keep taking and that I needed to give back. That was why I went into criminal law – to give back and help people who don't have a voice.

He started work for Legal Aid NSW as a legal support officer whilst still at UNSW and then continued in a graduate solicitor position, before joining Broken Hill Aboriginal Family Violence Prevention Legal Service (also known as the Warra Warra Legal Service). There he assisted First Nations people in the region with issues including family law, family and child protection, child removal and victims compensation. He describes that work as "amazing" and "very rewarding".

Leon then worked for the Aboriginal Legal Service NSW/ACT in Redfern and Parramatta before starting out as a sole practitioner:

> Going out on my own was probably a bit of madness, but I wanted a challenge rather than the predictability of a 9 to 5 job. I wanted to build something up and give back to the community.

He had an office in the Sydney CBD, but maintained his connections across the State and in particular in the far west.

When he was doing his Practical Legal Training, he was struck by one defence counsel's opening address in a District Court criminal trial:

> She had an incredible ease and manner in front of the jury; and her recollection and grasp of the facts was really impressive. I said to myself: that's what I am going to do and to that standard.

After building up a healthy practice of Local Court summary matters whilst also instructing in trials, he was ready to take the next step; and so came to the Bar and now appears in jury trials He has found it a bit of an adjustment to the altered role of being counsel rather than the solicitor, but he is now carving out a successful practice in criminal and family law for a variety of clients across the State:

> I am especially passionate about criminal law. I love seeing people's rights being upheld, especially if they can't advocate for themselves. I get a buzz from seeing them walk out of court empowered.

When he came to the Bar, Leon was tutored by Tony Evers, Public Defender, and mentored through the Office of the Director of Public Prosecutions Indigenous Lawyers mentoring program by the late Jose Crespo, Crown Prosecutor, who sadly died late last year:

> I would call him at all hours and he'd often convey the most ingenious lines of cross-examination. We got on like a house on fire. It was a great loss and I was very sad when Jose passed away.

He is now mentored by Huw Baker SC (through the ODPP program) and Howard Packer (through the Bar Association mentoring program). Chris Ronalds SC has also been a great source of support and encouragement:

> She is a person who selflessly gives her time and shows great support to First Nations barristers, students and solicitors.

He continues:

> All of these people have been very supportive, approachable and generous with their time. There is a lot of goodwill at the Bar and I will be forever grateful to these and many others who have given me support and encouragement over the years. I think it's important to acknowledge that these people had no obligation to help me, but chose to do so out of the goodness of their heart.
>
> Their knowledge of the law and trial advocacy is phenomenal and to hear their thoughts on matters is invaluable.

Leon has also been assisted by the Indigenous Barristers' Trust – The Mum Shirl Fund, which has supported him and helped him get on his feet as a junior barrister.

As for the future:

> My hope for the future is to continue to build a strong trial practice. I thoroughly enjoy conducting them and I especially like getting out on circuit to country New South Wales. I'd like to continue to build lasting professional relationships with colleagues who bring the same work ethic as me and who I enjoy being around.
>
> My greatest hope is to see a solid cohort of First Nations persons at the Bar and importantly on the Bench. Diversity on the Bench is important because First Nations people considering a career in the law need to know that they have a voice and that they are entitled to use it. I also hope that at some stage I will be experienced and knowledgeable enough to lend the support to younger First Nations barristers that so many people have given to me.

Damian Beaufils

by Anthony Cheshire SC

Damian Beaufils' surname derives from his New Caledonian French ancestors. He attended a local Catholic school in the south of Sydney and before embarking on a career in law studied an environmental engineering degree at the University of Wollongong.

He only found out that he was a descendent of the Gundungurra people from the Pejar area after he had left school and sometime after his grandmother had passed away:

> Initially I found it hard to understand why I had not been told before and it was difficult to connect, or rather reconnect, with my First Nations ancestry. Gradually, however, I came to understand and I am now proud of the journey my family has taken.

He had gone to Wollongong at the suggestion of its engineering faculty and its rugby coach. Following a knee injury, he decided to move to Sydney to support his younger brother with his transition out of home and concentrate on life after rugby. He also became a supporter of the Lloyd McDermott Indigenous Rugby Development Team, participating in coaching camps when he could. He enrolled at the University of Sydney and completed his Bachelor of Laws degree. He received a scholarship from the Bruce Miles Foundation and was a Victoria Gollan Prize winner, awards which were set up to encourage, support and reward excellence in First Nations law students.

It was during that time that he realised that he wanted a legal career and to work in criminal law. In 2009 as a university student he was assisted by the Indigenous Barristers' Trust – The Mum Shirl Fund to attend the National Indigenous Lawyers Conference in Adelaide:

> There was only one other First Nations students studying law at Sydney University at the time, but there were many at the conference from all over Australia. I was exposed to different networks of students, many of whom subsequently became lawyers or academics. The talks were informative, but the main benefit was getting out there and meeting people. I was lucky that I met someone on the plane to Adelaide who was in a similar position to me: it made me feel a little less nervous and self-conscious about attending the conference on my own; and a little bit more comfortable about going. I have now been back to the conference several times in a number of different parts of Australia and I still have as friends many of the people that I met.

After graduating from the University of Sydney he then obtained a job with Legal Aid NSW:

> I was attracted by the social justice of the work and I wanted to work with people from all backgrounds, not just First Nations people.

Whilst working as a solicitor with Legal Aid NSW he also completed a Masters of Law in Criminal Prosecutions at the University of Wollongong.

He participated in the Bar Association mentoring programme, which he found helpful as part of his support network:

> A support network is vital. It is having people, not just from a First Nations background, but people you know will help you and upon whom you can rely. It is people who are not necessarily going to be sources of work or people you work with, but someone who you can go to at the end of a bad day, close the door and sit down and chat to. Even if people don't need to see their mentor very often, the fact that they are there, available and supportive is reassuring and helpful.

About four years ago, having decided that he wanted to explore the idea of going to the Bar, he made contact with Chris Ronalds AO SC:

> My biggest fear was that because I did not know many people at the Bar I would end up a bit lost and I wasn't really sure how I was going to make this happen. Chris helped me set up a pathway that would lead to the Bar. She has helped me get here and then survive, at least so far. It is not about feeding work, but about teaching and encouraging. If you give someone a fish, they will eat that night; but if you teach someone to fish, then they will eat every night.

Damian feels that he is now making his way as a barrister. He does criminal defence and prosecution work and is using his environmental engineering background to specialise in the area of environmental crime. He has also joined the Bar Association First Nations Committee. He is excited by the possibilities that being a member of the Bar presents, not only for himself, but also for the future of First Nations people.

> The goal is to get more First Nations people to the Bar. It is going to take a little bit of time to achieve that goal but that I know it is going to happen. If the Bar is to be a representation of the community there needs to be more First Nations barristers here. There are a number hurdles going through school and university even before getting to set up as a barrister and it is a long journey. I do get the feeling though that we are building up some momentum and I hope to continue to be a part of this journey. I want to build upon the great work that has already been done and I'm sure it won't be long before we add a few female First Nations barrister's to our ranks.

Tony McAvoy

by Anthony Cheshire SC

Tony McAvoy SC's great grandfather, Logan McAvoy, was a contract kangaroo shooter in central Queensland. He sought to be exempted from the Aborigines Protection Act and only worked for landholders who paid his full rate. It was possibly these actions that led to Logan and his family being arrested and transported to what became Cherbourg Aboriginal Reserve 250km north west of Brisbane. Their horses, rifles and other possessions including cash saving were seized and never returned.

The next two generations of Tony's family were raised in incarceration in Cherbourg and it was not until 1957 that they got out. By that time, Tony's father was 17, but he was only ever educated to Grade 4 standard because that was all that was offered at Cherbourg public school. Tony says that in spite of all this:

> From a young age he told me that there would be many people who would try to tell me that I wasn't good enough, and that I must ignore them, because I could do anything I wanted.

> I have represented lots of your family. They would be very proud of you if you studied law and became a lawyer.

Tony went to school in the Brisbane suburb of Inala. He enjoyed school and found study relatively easy. He did very well at a variety of sports, although he says that he was caned at least once each year by every principal he ever had. He says:

> The one piece of support that I suppose made the difference between staying at school and leaving before graduating school was the $12 per fortnight Aboriginal Secondary Education Grant cheque. It wasn't much, but it was just enough to give me a little bit of independence.

Nobody from his family had finished high school let alone gone to university and none of his mates went to university. He was offered a place on an arts degree course at Queensland Institute of Technology.

In an effort to raise funds for a motorbike to go between home and University, he asked the Aboriginal Student Welfare Officer if she knew where he could get a job for the holidays and she told him to contact the Aboriginal Legal Service. He attended an interview with the principal legal officer, who told him:

He offered Tony a job if he signed up to a term of five years as an articled law clerk and studied law at night. Although his school careers advisor told him that law is a really hard degree and takes lots of discipline and that perhaps he should just stick with an arts degree, Tony started work at the Aboriginal Legal Service in Brisbane and studying for a law degree at Queensland Institute of Technology.

Initially, the study of law was not a great success:

> There was only one other Aboriginal student in the whole institution and we didn't know each other then. I hated it and only had limited success in my first and second years. But all the while I was working the Aboriginal Legal Service gaining valuable experience. I remember my first suit was from St Vincent de Paul. At the end of my second year I was gross failed and placed on probation. If I didn't pass half of my subjects the following year I would be kicked out. It was then I stopped playing rugby league and starting taking my studies more seriously. I graduated in 1988 and was admitted as a solicitor the same year.

Apart from the support and understanding of the principal legal officer, Paul Richards, to whom he was indentured:

The other aspect that helped me through those years was that in about my third year other clerks were employed. There were Aboriginal people, Torres Strait Islanders, an African/Indian and a Vietnamese clerk over the years. We had our own safe space. It was an incubator from which fully fledged Aboriginal and Torres Strait Islander lawyers hatched. It would hardly be considered good practice these days but we spent years going to the local pubs near our office every Friday testing our wits against each other. Out of that little firm there has been produced two senior counsel, one of whom has gone on to become a Justice of the Federal Court, the first Torres Strait Islander Magistrate in Australia, the first Aboriginal Magistrate in Queensland, a senior junior Aboriginal Barrister who will take silk in the coming years, another is a boss of a major land council, and one who ran away to set up a legal practice in Dublin, Ireland. If there is another firm that has contributed more to the development of Aboriginal and Torres Strait Islander lawyers than Paul Richards and Associates, I am not aware of it.

It seems to me that for Aboriginal and Torres Strait Islander law students, articles of clerkship were a very useful means of getting a law degree, learning on the job how to be a lawyer and having an income.

It is my appreciation of the value of those years in the safety of people who were like me, and the reverse impact of a law school where there was no one like me that has driven my commitment to the annual National Indigenous Legal Conference. The need for safe spaces for Aboriginal and Torres Strait Islander law students is greater now than it has ever been.

The question that I often ask myself is what is the justification for extra effort being put into the development of Aboriginal and Torres Strait Islander lawyers. Clearly, there is a need for more Aboriginal people in all the professions

until we reach a point where the service providers largely match the clients in gender and culture.

Only when we have sufficient numbers of law graduates and practitioners, will we start to see the bench reflect the community. In that regard, the searing question in the Northern Territory is how it can be that, in a territory where 30 per cent of the population are Aboriginal people, no Aboriginal person has ever been appointed as a Judge of the Supreme Court or the Magistrates Court. Of course, the question is worthy of contemplation in isolation, but it should also be noted that there are no Aboriginal superior court judges in any jurisdiction, only Judge Myers of the Federal Circuit Court at the intermediate level, and very few magistrates.

Tony, who in 2015 was the first First Nations barrister in Australia appointed as Senior Counsel, offers three lessons from his experiences of which young First Nations law students and lawyers may make some use:

> The first I learned early on when I was nearly kicked out of law school and it has been a guide to life as well as the study and practice of law. It is this, concentrate on the task at hand. Do not worry too much about promotion or recognition, if you concentrate on the doing the best you can at each step those things will follow.
>
> The second lesson is to work in the area of law you are passionate about. Being of service to your people and to the whole community does not require you to be a treaty advocate or a children's court lawyer. There are Aboriginal and Torres Strait Islander lawyers who are passionate about international law, intellectual property, family law and many other areas and have contributed enormously to our advancement.
>
> The third lesson is not to be ashamed to ask for help and to make the most of your mentors. I have had and continue to have many mentors. One such informal mentor has been Justice Graham Hiley QC of the Northern Territory Supreme Court. After having been his junior in two important native title matters, and his opponent in another, his encouragement was one of the main reasons I applied for appointment as senior counsel.

Many of us have been deeply moved by Tony's stories of his family and the journey that has led him to the Inner Bar. His words should be an inspiration not only to First Nations students, lawyers and barristers, but to us all.

Anne Gibbons – 66 years, Ada Evans Chambers

Who is a barrister..?

As told by Ingmar Taylor

I was born in Tipperary in the Republic of Ireland. My parents were farmers.

As a child in rural Ireland I was steeped in property and tort law. As children we were conscious that flooding or disease that spreads from one property to another could amount to tortious acts. My father was keenly aware of the effects of adverse possession. If someone was on our property without permission my father would say, 'I sent him a solicitor's letter'. My father saw a solicitor's letter like a note from God. The ultimate step to take.

I came to Australia in 1975 when I was 24 years old. I had completed a Bachelor of Science and a Graduate Diploma in Education. I met my husband Geoff and we now have three children and five grandchildren. I taught maths and science in high schools while I completed a graduate Diploma in Science in parasite immunology at ANU in 1985.

In 1985 my husband and I moved to Boston for 5 years. During that time, I was awarded a Masters in Biology and Biotechnology from Tufts University. I subsequently worked at the University of Massachusetts as a research Scientist on the immune response to trauma at a molecular level. On my return to Sydney I worked as a research scientist at the Heart Research Institute. While I was working there I commenced my studies in Law through the LPAB.

In 2000 when our youngest child finished high school I commenced practice as a solicitor.

After two years I decided to come to the Bar at the age of 52. It came about because of my love of music. I walked into a restaurant in St Ives where the sound system was playing music I had not heard since my school days. 'That's *Panis Angelicus*!' I said loudly. Terry Healey, a Barrister at Ada Evans Chambers, overheard me and asked me how I knew that. That got us talking. He encouraged me to come to the Bar and I started at Ada Evans Chambers in March 2003. Terry was my tutor in criminal law.

In my first 6 months at the Bar I had the good fortune to appear as Junior Counsel to Peter Lowe in the High Court. He was arguing *Coleman v Power* (2004) 220 CLR 1, which was a case about the constitutional right to political free speech.

There are the luminaries at the Bar and then there are us – the everyday guys.

I have practised criminal law, particularly sentencing matters, throughout my years at the Bar. Criminal law and family law are, for many clients, bedfellows, and my practice soon included family law matters.

Since joining the Bar, I have completed a masters degree in Law at Sydney University. I am also a nationally accredited mediator. The skills acquired from the latter serve me well in the areas that I practise where negotiations and mediation are the way forward for many matters.

I do not have ambition to be one of the pillars of the Supreme Court. I do, however, love the challenge of appearing in the Supreme Court as I have done in family provisions matters, equity and common law. Generally, I enjoy the collegiality of the bar as I do the mentoring of members of the bench before whom I appear. I see no place for bullying or embarrassment as I know very few, if any, who do not give their best when appearing in matters.

To be happy at the Bar, I believe that you have to be prepared to be challenged and accept the good with the bad. Acknowledge mistakes and be brave enough to pursue the best outcome that can be had. My dad used to say 'the fella that never made a mistake never made anything'

If the judge asks me something that I do not know the answer to I will just say that I do not know and ask them to assist me or give me a short time to consider the issue raised. Bullying by judges is unnecessary. It is not collegiate. It is a good thing for judges to proceed on the basis that those before them should be brought up to standard but they do not have to be nasty or difficult when a barrister before them does not know the answer to a question.

Sometimes I feel like they are just bouncing me off the Bar table. You are just doing the best you can with what you have. Family law cases, in particular, can attract such difficulties. You do not want to say anything but you hope the judge does not seriously think that you settled that affidavit.

I have a particular interest in DNA evidence as provided particularly in criminal prosecutions as I have the good fortune to have an understanding of the science behind it from my science days. From time to time, Solicitors and other counsel approach me to assist them with the interpretation of DNA reports. I can usually tell them how powerful that DNA evidence will or will not be in the context of a particular prosecution.

I see advantages in having come to the Bar as older person. My experience as a teacher helps me identify that the cohort of students that find their way into the criminal justice system often mirror the students that were less gifted and appeared to have been neglected socially and emotionally. I believe that they often carry mental health difficulties that are undiagnosed and untreated. I believe that we have too much expectation that young adults can transition into resilient members of their community without good role models and or stable family circles. The rules that they fall foul of are often the very rules that they see broken every day in their school environment where it appears there are no consequences for behaviours such as bullying, assaults, robberies and the like. These crimes often set them on a path of relentless involvement with the police and security officers.

I am someone who is passionate about getting the right outcome for clients where I think that outcome will help them and is just. I don't just represent them in court. I assist to get them into rehabilitation and to obtain the other services they need to turn their life around.

Clients will call me and keep me up to date long after I have ceased acting for them to tell me where they are up to now with their lives. I ususlly hear from them again if they re-offend or need help for another family member.

Jose Crespo
1964 - 2017

Eulogy for Jose Crespo given by Lloyd Babb SC, the NSW Director of Public Prosecutions at the Mary Mother of Mercy Chapel, Rookwood on Monday 27 November 2017.

I have known Jose for twenty five years. I count him as a good friend. Today, I'm here to speak of his extraordinary contribution and service to the State New South Wales, and the grief his passing has brought to his colleagues and friends at the DPP and in the wider legal profession.

Jose started with the Office of The Director of Public Prosecutions in 1989, not long after he graduated from the University of Sydney. The Office opened in 1987, so Jose was there from the early days. He started as a legal officer in one of the trial groups, and in less than two years was promoted to a senior solicitor role.

In 1996, Jose was admitted to the Bar, and Jose left the office to work as a barrister first at the Trust Chambers, and later 3 Selbourne and then Ada Evans Chambers.

Jose came back to the DPP in 2001 when he was appointed a Crown Prosecutor.

Jose's professional achievements are impressive. Most recently he headed the Pre-trial unit of my Sydney Office. He was in that role because he was very careful and thorough and because he had impeccable judgment.

He was just reaching the zenith of his career, and there is no doubt in my mind that he would have continued further up the ranks of his chosen profession.

A great prosecutor has a mix of qualities – knowledge of the criminal law, experience, fairness, emotional intelligence, compassion and a commitment to justice. Jose had all of those qualities.

That is exemplified by the feedback received from prosecutors, defence lawyers and judges about the news of Jose's death:

> One solicitor told me this week about how Jose made his junior colleagues feel so valued and respected. When he was reviewing their work he would invariably put a note on it about how valuable he found their analysis of the case.

The solicitor responsible for briefing Crown Prosecutors in Sydney said of Jose:

> I have been briefing Jose with his matters over so many years and Jose was able to turn his hand to any type of matter, Robbery, Murder, CSA, Historical CSA and Drug prosecutions. He was dedicated and prepared all his matters carefully and dealt with them with a great deal of enthusiasm. Looking through the diaries he had a large number of long and short trials over these many years.

Barristers from the Public Defender's Chambers said the following things:

- Jose was a generous and genuine man, and a fine Crown Prosecutor …
- He was an incredibly nice and decent man and a very fair and competent Crown. …
- This is very sad for the legal profession and more so for his family …
- Jose was a good man and a fair crown …

A Supreme Court Judge said of Jose:

> I was upset to learn of Jose Crespo's sudden death.
>
> As you know, Jose had been appearing for the Crown in recent Arraignments Lists and he discharged that function in a highly efficient and effective way which always assisted the Court. He was, as well, always pleasant in his dealings with the Court and other members of the profession. Likewise, Jose was highly professional and courteous in his dealings with [my associate] which played an important part in the ongoing management of the Arraignments List.

Alister Henskens SC, NSW Legislative Assembly member for Kuringai gave a detailed and heartfelt speech last week in Parliament about Jose. It will forever be available on Hansards. He finished by saying:

> Jose was a consummate professional … Our state has lost a loyal and talented servant.

These professional achievements, however, don't stand alone. They mean so much more when you consider the kind of man Jose was.

Jose was a lovely man. There is no other way to describe him. He was lovely in the sense that he was much loved. He was a very positive force within the Office. He participated in the Office Yoga class. In yoga he displayed enthusiasm more than expertise and he always made us laugh. He was a great friend and a great listener when others needed his ear. Jose's kindness was legendary. He would reach out to people in strife without judgment, and help any way he could. He was cheerful and positive. He never had a harsh word to say about anyone and people who have known him decades – myself included – never heard anyone say anything bad about him.

Jose was polite and courteous at all times, to all people. He treated people with respect. He never forgot his humble beginnings.

Jose moved at a thousand miles a hour but he had a gentleness about him that is the trademark of kind people: he spoke softly and calmly. He loved dogs he talked still about the venerable Rumpole, his beloved dog who died a few years ago. He loved football and would have loved to have seen Australia qualify for another World Cup. He loved his friends and colleagues. Most of all he adored his two teenage sons, Liam and Zachary. Boys, he loved you very much and spoke about you all the time. He loved his family and was especially close to his father.

He was a great barrister, a respected Crown and a truly lovely man.

Jose, thank you for your service to this state, and to the people of NSW. Thank you for your contributions to the criminal justice system, which you honoured with skill and respect throughout your career.

Thank you for the gift of your time, which you gave freely and generously to your colleagues and friends.

Thank you for all those great times you made us laugh.

Robert Stephen Toner 1951 – 2018

Jim Poulos QC

Judge Bob Toner QC died on 3rd February 2018 from lung cancer which had only been diagnosed in late 2017. He was 66 years of age. A child of Fred and Helen Toner, he was brought up in Chatswood and was later educated at St Ignatius College Riverview, where he excelled in what he called 'Latin in Society' giving him a collection of stock phrases which he applied more or less correctly in the practice of law in later years. As a young man he was slim, bearded, loud and radical. He lost one of those descriptors in later years.

From the age of 15 he participated wholeheartedly in the causes of the day; such as the Vietnam War, anti-Apartheid, the push against development of Victoria Street, Kings Cross and in the pleasures and excesses of that time.

For a time, he was employed by the New South Wales Department of Government Transport as a bus conductor operating out of Willoughby Depot. In due course he came under notice as a staunch champion of workers' rights. However, an earnest discussion and the return of a shower of coins to a pompous passenger was his undoing – apparently the passenger really did know Minister Morton.

A stint as a process server created more opportunity for excitement and a realisation that it was time to progress to a higher plane.

He became a counter clerk in the frantically busy default registry of the District Court of the Metropolitan District. There he developed skills in dealing with a cross-section of those who peopled the lower reaches of the world of finance – those who owed and those who were owed. His affections were somewhat in favour of the former.

His studies in law were initially carried out through the Barrister's Admission Board until he was accepted into the University of New South Wales Law School.

As his work instilled deep knowledge of the law relating to common money courts, he came to be employed by John Chippendale, solicitor, in a large insolvency practice: a firm which Toner described as 'H N Chippendale & Co, threats made and received'.

At the Law School he impressed as a force to be reckoned with in the controversies of the day, whether political, social or legal in nature. The demos of the day were bread and butter to him. Among his mentors at that time were Terry Budden, the late Jim Staples and the late Merv Rutherford.

His interest in the plight of the indigenous community can be traced to this time. In later years he came to apply his experience in an effort to administer a fairer brand of justice to that community. In particular, his admiration for the late Bob Bellear DCJ was deep and he learnt much from him which he later applied in his judicial career.

Part of his political experience involved being secretary to the East Sydney Branch of the Labor Party, where he learned the workings of the political machine from the viewpoint of the left of the party.

In 1973 following a series of Machiavellian manoeuvres in the Chatswood Branch of the party, Toner was selected to run against the then attorney general, Kenneth McCaw in the electorate of Lane Cove. The final (losing) vote was a healthy one for Toner. He said, however, that the high point of the campaign was that his T-shirts were screen-printed by a rather dissolute looking individual who, observing that Toner's efforts were somewhat amateurish, took over the task. He often mused on what an original Brett Whiteley screen-printed T-shirt would now be worth.

In 1981, Bob was admitted as a barrister, his pupil master was Rod Madgwick (later of the District and Federal Court). He was fortunate to commence his career with the Grays Point Bush Fire Inquiry, which was to last almost three hundred hearing days.

Tom Kelly, his instructing solicitor, pointed out that the trees destroyed in the fire had largely regrown before the Inquiry findings were published.

Bob and Chris Birch (now Dr Chris Birch SC) were accepted as readers on 16 Wardell; where they were greeted by the floor leader, T E F Hughes QC who, on returning from court silently disrobed to the bare essentials before donning his street clothes and speaking words of welcome to them. Birch thinks this was the last time Hughes spoke to them during their readership.

In 1982 he met his life partner, Helen McCarthy, a forensic psychologist in the Corrective Services system. Her knowledge and insights were valuable and assisted Bob in the practice of criminal law. Helen shared Bob's political and social beliefs which they jointly promoted. They were married in 1985. Bob became father to Helen's children, Claudia and Joshua McCarthy, who he nurtured as his own, as he did their children, Isobel, Claudia's daughter and Amelia, the daughter of Joshua and Mai Mai.

Helen and Bob provided their family and friends with the fabled hospitality of their house in Darling Street, Balmain.

Toner progressed to 8th Floor Garfield Barwick in 1983 where eventually he became the leader of the Floor, developing a traditional common law practice in crime and personal injury litigation; there he came to work with his beloved clerk, Sarojini Ramsay, and his long-term secretary (later court associate) Elaine Prochaska. Elaine was with him for 30 years.

As an advocate he possessed some assets which should be emphasised. First, his appearance: there is no doubt he projected gravitas through his bulk, black beard and a direct gaze. Second, was his voice – a *basso profundo* rumble which could quickly swell to an alarming volume (see 'shouting not contempt' below). Third was a tactical sense honed by that great teacher 'copper cross examinations 101'. Fourth was a highly developed sense of humour coupled with a quick eye for the absurd in life and the law.

In 1989, he won his first murder trial instructed by Bob Thompson, solicitor in Grafton. That victory was to be the first of many; in fact, he had no losses in murder cases until the sensational *Serratore* case in 2001.

In civil cases he was a forthright advocate. In 1992 this quality led to a case which literally made his name: *In Re Toner* ex parte – a name known to all who seek to discover the boundaries beyond which a trial advocate should not go. Toner, then a junior counsel, was misheard by the late Lloyd-Jones DCJ; an argument ensued. The upshot was that Toner was convicted instanter for shouting being 'a contempt'. The Court of Appeal (President Kirby, Clarke and Hope JJA) upheld the appeal against conviction. The president, Kirby, delivered a somewhat tendentious homily about politeness before refusing an order for costs in favour of the successful team for the appellant, Poulos QC, Birch and L. McCallum.

In 1996 Toner took silk; by this time, he had amassed a phalanx of loyal attorneys. His transition from junior to senior was seamless and successful.

In his leisure hours a tight-knit guard of professional lunchers attended a series of restaurants most of which did not survive the abolition of entertainment as a tax deduction and the introduction of random breath testing. For most, the golden years were no more; a pall descended over the city but Toner and his troops fought on. A list of those now closed restaurants includes: Rumpoles, Edna's Table, the Atrium and Banc, known to Toner as the 'Rope and Bucket' (it was on the ground floor of Garfield Barwick).

His chambers were one of those outposts where its members kept the old traditions alive. But in addition to receiving his hospitality his floor gained much from Toner's mentoring in the practice of advocacy. In particular he was sought after

as a pupil master and as a support of the newly admitted.

He paid particular attention to the need to support the careers of women at the Bar, not only those who were members of his chambers. He believed strongly that the Bar Association should be proactive in the support of women.

Toner was proud of his achievements in the criminal law. With Ian Barker QC, instructed by the redoubtable Sam Macedone, he achieved much success. In later years he rued their loss in the case of John Serratore, who was ultimately convicted of murder following two trials, two appeals to the Court of Criminal Appeal and a refused special leave application. Toner was convinced Serratore was innocent.

In the civil field he led in the seminal tort cases *Makita v Sprowles* (2001, NSWCA), *Earthline (State Rail Authority (NSW) v Earthline Constructions Pty Ltd* (1999, HCA) and *Brodie v Singleton Shire Council* (2001 HCA).

Earthline was run before Barry O'Keefe, chief judge in the Commercial List. It had been the intention of Toner and his team to use the civil case brought by the SRA to get material for the defence of criminal proceedings which were in the offing against their client. Much to their surprise, after a destructive cross-examination by Toner of the plaintiff's chief witness they won. They won again in the Court of Appeal; however, the High Court gave them short shrift, ruling that the trial judge's advantages in seeing and hearing a witness could not trump a mountain of forged invoices. Ironically the Crown mislaid those invoices and the criminal proceedings never eventuated.

Makita gave no joy to him, although it has produced a wealth of material for the digestion of academics, students and judges alike. After the first instance win there followed a series of impassioned pleas to the plaintiff to settle her case for the large amount she had been offered lest she lose on appeal – she did. The unfortunate result for Mrs Sprowles' legal team was that they had to pay back the fees they had been paid, with interest.

In *Brodie* Toner and his team set out in 1996 to attack the centuries-old distinction between 'misfeasance' and 'non feasance' which had protected road authorities from liability. Years of work with a not inconsiderable risk of failure in a speculative enterprise culminated in a narrow 4/3 victory in the High Court of Australia. This was a result which caused much angst among insurers, councils and shires everywhere in Australia. The states all intervened and opposed the appeal.

In the High Court Toner and John Berwick were led by Jackson QC. Toner had nothing but praise for Jackson's appellate advocacy – he did say, however, that his own greatest achievement in *Brodie* was to convince his leader to accept the brief on a no win-no pay basis.

He served on the Bar Council between 1990 and 2007. For much of that time, he was a member of the Executive, first as secretary and then as treasurer.

These years were marked by serial conflicts with government, some arising out of the need to press for reform in the criminal law and at the same time to resist populist attacks on entrenched common law and statutory rights.

Barker QC and Toner represented the Bar in dealing with various humanitarian issues especially those which arose following the attacks on the World Trade Towers. The cases of David Hicks and Mamdou Habib were examples of how the rule of law had not been extended to protect individuals said to be complicit in terrorist-related activities. They conducted a campaign in the press in an effort to have Hicks freed and to draw attention to the use of torture.

Toner was, as always, a forceful person in debate on a number of issues. In dealing with politicians of various persuasion it was apparent that he was in his element. Sometimes he was more forceful than others, especially if he detected any falsehood in debate.

His counsel was often relied upon by presidents of the association; they included Barker QC, O'Keefe QC, Handley QC, Katzman SC, Harrison SC, Slattery SC, as they then were. Ruth McColl JA, a former president, spoke movingly at his memorial service.

He enjoyed the Bar's annual dinners and also those held annually between the Bar Councillors and members of the High Court Bench. He considered hearing Gaudron J singing 'I dreamt I saw Joe Hill last night' to be one of the highlights of the year.

In 2007 he turned away from the heavy pressures of life as a leader and as a representative of the Bar. He accepted a District Court appointment offered by the then Attorney General Bob Debus. He was appointed on 16 April 2007.

In his personal life Toner was much saddened by the long illness and eventual death on 14 September 2007 of his stepson, Joshua McCarthy. The effect on his normally ebullient personality was clearly evident.

On his appointment, some were concerned that he might carry his robust advocate persona onto the Bench. This did not occur, although from time to time he reacted to correct imprudent counsel or witnesses.

He naturally gravitated toward criminal cases where he quickly gained a reputation as a good and fair judge. His technical expertise in the law of evidence and procedure was of a high level.

The time he was happiest was when he went to his country circuits. There he was able to do justice, as they say, to all manner of men.

The Taree and Port Macquarie circuits saw him living at Bonny Hills where he and Helen had a coastal retreat half way between the two towns.

In Taree and 'Port' he quickly became respected by all players in both the civil and criminal milieu. He was recognised as having a deep understanding of the problems of the local communities. He introduced the smoking ceremony to the first day of sittings, sitting with elders from the area on the bench and inviting locals to perform a ceremonial dance of welcome in the courtroom.

He strove to avoid jail sentences wherever possible, using a 'talking remedy' and liberal usage of suspended sentences. However, he was as strict as any judge when it came to what he recognised as serious offences. For example, in April 2017 he sentenced an 83-year-old former school teacher to at least six years in prison for child sex offences. He was similarly firm with violent offenders.

His judgments and sentences were rarely criticised by the press. This was somewhat ironic as in his time on the Bar Council Toner had been critical of the poor standard of legal reporting in New South Wales.

Several cases were of public interest. One, which perhaps sums up Toner's skills and insights was that of *R v Jones* where the Police Memorial in the Domain had been vandalised. The sentence was one, his Honour said, of 'exquisite difficulty' as the act was condemned by all elements of the community. The accused was mentally impaired. In releasing Jones on a bond with stringent conditions, Judge Toner quoted from Winston Churchill's famous speech about the mark of a 'civilised society' being how it treated its weakest members.

In his private life Toner was a devotee of the game of golf, playing for the 'Amanza Mug' in the annual Bench and Bar competition with Sam Macedone. In later years, he came to love Australian Rules football. He had a keen interest in military history and could quote the dialogue in many a classic World War II movie.

He loved his garden and he could go on at length about the science of mulching and compost. For a time, his gardener at Darling Street was Kimmy McPherson a paroled transgender double murderer who had been the subject of several acrimonious hearings before the Serious Offenders Review Board before her release from Silverwater.

He will particularly be missed by his friends and acquaintances who laughed with him and who listened to his thunderous sallies against whoever he had selected as being representative of the force of darkness on any particular day.

He is survived by Helen, stepdaughter Claudia, granddaughters Isobel and Amelia and his sisters Carolyn, Barbara and Grette.

The Hon Justice Thomas Thawley

Tom Thawley SC was sworn in as a judge of the Federal Court of Australia in a private ceremony on 14 February 2018.

The Hon Justice Thomas Thawley comes from a family steeped in public service. His Honour's father, Michael, joined the Department of Foreign Affairs in 1972, the year Justice Thawley was born. Justice Thawley and his older brother, Sam, enjoyed an exciting, itinerant and eclectic upbringing in the various countries to which Michael and Debbie were posted including Italy, England and Russia. Justice Thawley's younger brother, Cosimo, was born just before his Honour turned 17. Michael and Debbie continued postings, with Cosimo, in Japan and the United States.

Justice Thawley's first school was the Montesorri school in Rome. He returned to Australia for a year, before attending St Hilary's Preparatory School in Godalming, England, then an all girls' school considering a change. Thereafter he went to many different schools including Wellesley House in Broadstairs and the École Francaise in Canberra. He was finally asked to leave school, in Geelong, in 1989. After school his Honour travelled to France where he studied briefly at the Institut de Touraine before commencing an apprenticeship in a French restaurant at Yzeures-sur-Creuse in the Loire Valley. He moved to Germany, for love, and worked variously as a builder's labourer, a steak chef and an antique furniture restorer.

Justice Thawley completed a Bachelor of Laws (Hons) and a Bachelor of Arts at the Australian National University in 1995 and a Master of Laws at the University of Sydney in 2015.

After completing university, his Honour moved to Sydney, to take up a position as tipstaff to the late Justice Roderick "Roddy" Pitt Meagher, then on the New South Wales Court of Appeal. A formidable friendship was forged that lasted until Justice Meagher's death in 2011.

He signed the Bar Roll in 1998. His Honour read and initially had his chambers on the 6th floor, before joining 7 Wentworth at 126 Phillip Street in 2006. He was a founding member and one of the driving forces that led to the establishment of New Chambers. His Honour took silk in 2012. Justice Thawley's colleagues at New Chambers will greatly miss him, not only for his expertise and skill, but for his generosity, warmth and hospitality.

His Honour was a leading commercial silk, specialising in revenue law, recognised for his skill and experience in cross-border taxation matters and for both his trial and appellate practice. In the recent *Chevron* transfer pricing litigation, his Honour appeared for the Commission of Taxation, who was successful at first instance and on appeal. The case was one of the lengthiest tax cases heard in Australia and involved multiple facets of tax law. His other clients included Microsoft, Google and BHP.

Across his practice, Justice Thawley was known to be persuasive, courteous, even-tempered, and highly efficient in court, as well as an adept cross-examiner.

On the announcement of Justice Thawley's appointment, Arthur Moses SC, President of the NSW Bar Association, noted that:

> He will make a significant contribution to the important work of the Federal Court in the administration of justice"

Justice Thawley is the devoted father of three children, Lucy, Harry and Freddy. His Honour is also an avid outdoorsman, an accomplished craftsman, both in woodwork and kintsugi, a violinist and a highly accomplished cook, having been the chef in the restaurant which he owned during his university years.

By Elizabeth Cheeseman SC

Magistrate Peter Thompson

On 5 February 2018, Peter Thompson was sworn in as a magistrate of the Local Court. Present on behalf of the New South Wales Bar was Sophie Callan while David Humphreys, pesident of the Law Society, spoke on behalf of the solicitors of NSW. Judge Henson presided over the proceedings.

His Honour started life in the Sydney suburb of Guildford and participated in Defence Force Cadets from an early age. Having commenced a degree at university, he chose a career in the Police Force. He attended the Policy Academy in Goulburn and graduated dux of in a group of more than 200 aspiring officers. After two years of general duties policing in Glebe and other places, he trained as a police prosecutor. His Honour studied law part-time at UTS and rose to the rank of acting inspector, reporting at one point directly to the commissioner.

His Honour's professional expertise is firmly in the domain of criminal law having spent 17 years in the NSW Police Service, 15 of those years as a Police Prosecutor. His focus in those years were complex jury trials and sentencing matters.

His Honour has for some years been a member of the RAAF in specialist reserves and currently holds the rank of squadron leader. Within the DPP his expertise was pre-committal advices and he was renowned for his ability to work through the caseload.

As an advocate, his Honour reflected on the qualities which make individuals who they are. He expressed gratitude to his close family members his wife Meredy and their children Keiran and Haydon. He remembered Kayla their daughter lovingly.

With such a mix of humanity, pragmatism, and a tendency for fairness and efficiency and high regard for principle, Magistrate Thompson's court will be the paradigm example of the jurisdiction.

By Kevin Tang

Jonathan Hyde

Lieutenant Colonel Jonathan James Hyde was sworn in as judge advocate and Defence Force magistrate by Rear Admiral the Honourable Justice M J Slattery RANR in a ceremony held on 6 February 2018 in the Supreme Court judges' consultation room in Queens Square in Sydney. In attendance, were Major General the Hon Justice P L Brereton, Lieutenant Colonel Humphreys President of the Law Society, uniformed representatives of the three services, close family members and Lieutenant Colonel Hyde's professional colleagues.

Mr Hyde commenced practice as a solicitor in 1991 in South Australia. He also worked in London in IP and commercial matters in the 1990s. He was called to the South Australian Bar in 1996 and in New South Wales in 2004. His career in the prosecution and defence of matters before courts martial commenced in 1997, when he was first commissioned in the ADF. Since then he has had extensive experience in ADF disciplinary proceedings, both appearing

for and prosecuting ADF members. His discipline and inquiry work in the ADF has examined the conduct of ADF members on operations during most of the conflicts in which Australia has been involved since 1997.

At the private bar in Sydney, Mr Hyde's experience has centred in general commercial law and commissions of inquiry. He has appeared in numerous coronial inquests, commissions of inquiry and royal commissions including before the ICAC and for such organisations as Cricket Australia, Tennis Australia and Queensland Cricket and most recently in the Royal Commission into Institutional Responses to Child Sexual Abuse.

Between 2013 and 2014, Mr Hyde was appointed a member of the Veterans' Review Board, where he heard applications by serving and former ADF members. In this quasi-judicial role, Mr Hyde's renowned courtesy in hearing vulnerable members of the community, our service veterans often decades after their active service, is a mark of exceptional distinction and of suitability for this appointment.

Mr Hyde is also a specialist in administrative law in the ADF and has appeared in many ADF commissions of inquiry as counsel assisting or counsel representing. Most notably he appeared in the 2006 inquiry into the death of Private Kovco in Iraq.

Judge advocates and Defence Force magistrates are appointed under the Defence Force Discipline Act 1982. They are senior military officers who are also experienced legal practitioners. A Defence Force magistrate is equivalent to a District Court judge sitting alone in a criminal trial. A judge advocate is equivalent to a District Court judge sitting with a jury in a criminal trial. Under the Defence Force Discipline Act, a jury trial is known as a court martial. Courts martial are presided over by a panel of 3-5 military officers who do not have legal qualifications. Judge advocates must ensure, among other things, that courts martial are conducted in accordance with the law and in a manner befitting a court of justice. Courts martial and Defence Force magistrate proceedings may be conducted throughout Australia, on a navy ship at sea or internationally wherever the Australian Defence Force is operating

The NSW Bar applauds Mr Hyde on this honour. As a judge advocate and Defence Force magistrate he will be required to sit throughout Australia and may from time to time deploy overseas. In his new role, this barrister will maintain and uphold the ethos of the ADF and the integrity of Australia's military justice system.

By KP Tang

Judge Julia Baird

On Friday, 2 March 2018 Julia Baird SC of the Sydney Bar was welcomed to the Federal Circuit Court in a ceremonial sitting held in William Street, Sydney. Present at the ceremony was also Noel Hutley SC, president of the Australian Bar Association who also spoke on behalf of the NSW Bar of which there were many distinguished barristers in attendance.

Her Honour attended Turramurra High School, but her childhood was mostly international, having been born in Mexico and having spent time in South Africa. Her Honour practised from the 12th Floor of Selborne and Wentworth Chambers for most of her career at the NSW Bar.

Her Honour's areas of expertise as a barrister centred in intellectual property and commercial law. Her Honour is remembered as a skilful advocate in copyright, designs and patents and areas of confidential information passing off and consumer and competition law. In recent years her Honour has been published in a number of authoritative textbooks in these areas and has attended as a speaker at many ABA conferences, most recently in London in 2017.

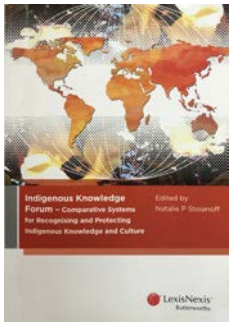
Mr Hutley SC observed her Honour's interests as a leading and distinguished member of the Inner Bar by mentioning her commitment to, and advancement of, women in the legal profession generally. Further, he added that her Honour was committed to mentoring, educating and training of junior barristers generally. Apart from her professional pursuits, her Honour is noted for teaching and training of barristers in a variety of courses aimed at advocacy and has kept an international profile in that respect. She has travelled, taught and presented around South East Asia, South Africa and also at the notable Keble College course at Oxford.

It was also noted that her Honour was appointed a member of the NSW Bar's Professional Conduct Committee. Her Honour was held in high regard during her career at the bar and her appointment reflected this. It was also noted that her Honour was the deputy chair for the NSW Bar Association's Equal Opportunity Committee.

Professional excellence aside, her Honour was noted for her own personal qualities for which she is much admired by her friends and colleagues. Her Honour's positive attitude, sense of warmth and fun were recalled – and her wonderful and infectious laughter, and it was also reiterated that her Honour's sense of style has been noted widely.

Her Honour's elevation is celebrated by all the independent bars, and all of her colleagues at the Sydney Bar offered their sincerest congratulations and good wishes for this new phase in her Honour's professional life.

By Kevin Tang



Indigenous Knowledge Forum – Comparative Systems for Recognising and Protecting Indigenous Knowledge and Culture

by Natalie P Stoianoff (ed)

Published by LexisNexis Butterworths, 2017

This book is a collection of papers arising out of the second meeting of the Indigenous Knowledge Forum in 2014. Natalie Stoianoff, Professor of Law and Director of the Intellectual Property Program at the University of Technology, Sydney, is the editor.

The Indigenous Knowledge Forum began in 2012 to bring together Indigenous people, lawyers, scholars, and government to discuss the legal and policy dimensions of Indigenous and local knowledge, and laws regarding biodiversity and intellectual property. At its inaugural meeting a research project was started for the purposes of formulating legislation that recognised and protected Indigenous knowledge and culture. At the second meeting in 2014 speakers focused on comparative systems of recognition, from which this book arose.

It is a large, comprehensive book. There are 17 chapters split between three parts: the first part discusses the meaning of Indigenous knowledge, the second addresses Indigenous knowledge issues in Australia, and the third focuses on Indigenous knowledge systems in other countries.

Indigenous knowledge is defined as a subset of 'traditional knowledge', which is knowledge, innovations and practices of Indigenous and local communities around the world.

In the early chapters, Professor Stoianoff, with Evana Wright (a PhD candidate) and Ann Cahill (an Australian/NZ patent attorney), develops the concept of Indigenous knowledge with reference to consultation undertaken with Indigenous communities in NSW as part of a White Paper for the NSW Office of Environment and Heritage in 2014. There is reference to various important international instruments, including the Convention on Biological Diversity 1992, and the Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (known as the Nagoya Protocol, which Australia has ratified and which entered into force in 2014).

As a signatory to the Nagoya Protocol, Australia is obliged to ensure that the use of genetic resources in Australia is underpinned by mutually agreed terms between the user of the resource and Indigenous communities. The significance of the obligation becomes apparent when it is acknowledged that Australia has approximately 44,000 species of plants, making it one of only 17 mega-diverse countries in the world.

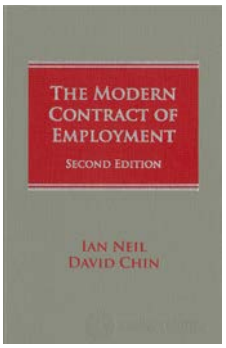
The later Australian chapters identify a desire for *sui generis* legislation in Australia to properly protect traditional knowledge. They also focus on the ways Aboriginal knowledge can differ from other knowledge, including in the way Indigenous Australians may, within stories, imbed privileged information attracting confidentiality, stories being a reliable method of passing information from person to person, generation to generation, from group to group. In chapter 4, there is a very brief introduction to the possible ways that a duty of confidence, equitable estoppel, unjust enrichment, or trade practices laws might protect Indigenous knowledge when knowledge is conveyed to an outsider, such as a researcher, anthropologist, or commercial third party. In chapter 7, Dr Virginia Marshall discusses the common law recognition of Indigenous relationships to land (encapsulated now in the *Native Title Act 1993* (Cth)), and via a case-study on Aboriginal perspectives on water rights in the Murray-Darling Basin system, highlights the unsatisfactory effects of conceptualising Aboriginal laws and knowledge through a Western legal lens.

The authors also consider current regimes in Australia at the Federal level and at the local level. Specific mention is made of Queensland's *Biodiscovery Act 2004* (Qld), which was implemented following the endorsement by all Australian States and Territories in 2002 of the general principles in the *National Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources*. But, as the authors point out, the focus of these regimes is the regulation of biological resources, not traditional knowledge, and so the limits are stark: the relevant Federal legislation only applies to Commonwealth land, and the State and Territory regimes often only apply to Crown land, or, as in Victoria, make no reference to the protection of Indigenous knowledge at all.

The latter chapters of the book focus on regimes protecting Indigenous knowledge around the world. There are fascinating chapters with case studies from Peru, India, Thailand, Costa Rica, Ethiopia, Canada, China, New Zealand and Samoa. For example, in chapter 9, Manuel Ruiz Muller, a lawyer and Director of the International Affairs and Biodiversity Program of the Peruvian Society for Environmental Law in Lima, provides a review of Law 27811, a law to protect traditional knowledge in Peru. The law applies to the collective knowledge of Indigenous peoples associated to biodiversity: the emphasis on collective highlighting the evolution of knowledge within traditional community structures.

The book is almost 500 pages long. The authors range from lawyers to academics and so the style of writing differs, making the flow of the book somewhat clunky. But the book's content is strong, and the depth and range of case studies provides a comprehensive introduction to the protection of traditional knowledge worldwide. It is a very detailed and authoritative introduction to this developing area of law. I would recommend the book to any lawyer, academic, anthropologist, or practitioner working with Indigenous communities, who has an interest in intellectual property, Indigenous property rights and culture, and biological diversity.

Reviewed by Charles Gregory



The Modern Contract of Employment 2nd Edition

Ian Neil SC and David Chin

Brevity in legal writing is to be admired. Combine it with accuracy and you have the makings of a great legal textbook.

2002 was a great year for employment year texts. LexisNexis published Mark Irving's comprehensive text *The Contract of Employment* and Thomson Reuters published Ian Neil SC and David Chin's concise yet potent *The Modern Contract of Employment*.

In late 2017 Neil and Chin produced a second edition of *The Modern Contract of Employment*. It is written by two of the leading employment law practitioners at the NSW Bar. In the preface to the first edition they identify that they look to a textbook primarily for answers, rather than more questions. As a result they wrote a book

which seeks to be definitive and yet concise. They have included those citations that seem to them would help a reader to appreciate the proposition, rather than every citation.

The result is a text that allows a practitioner, whether expert in the area or otherwise, to readily identify the key principles guiding the law of contract of employment and the leading authority or authorities that underpin those principles.

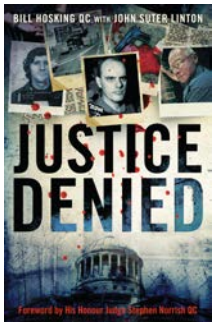
The second edition to this excellent text is very welcome in circumstances where there have been some significant changes since 2012. Not least is the High Court decision in *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 which put to rest the so-called implied term of mutual trust and confidence but has given potential scope to the implied term of good faith as it applies in an employment context.

The new edition also addresses recent authorities on the test for identifying a contract of employment including *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 145 and *Tattsbet Ltd v Morrow* (2015) 233 FCR 46.

There are times as a practitioner when you have the time and inclination to immerse yourself in the full depth of the law on a subject, and there is a place for textbooks which consider what the law might be or should be.

Yet for most practitioners there is a special place on the shelf for textbooks which strive simply to give you the law as it is, and state it briefly and accurately. The Modern Contract of Employment is such a text.

Reviewed by Ingmar Taylor SC



Justice Denied

Hosking QC and Linton

Memoirs of retired judges and barristers are occasionally worth reading, but rarely page-turners.

Bill Hosking's recently published book, *Justice Denied*, is a cracker. It is structured as a series of gripping true-crime short-stories, each telling the tale of a significant case.

I suspect that its very readable style is due in large part to Hosking's co-author, John Linton, who has written extensively for radio, television and print media, and five true-crime books.

But the content is so good because Hosking was in each of the cases, as barrister or judge, and can bring to life the criminals, barristers and Judges that populate each trial. The extract published with this review gives a decent introduction to the book.

Hosking was for much of his career a public defender, and in that role appeared for the defendant in many of the major criminal trials from the 70s onwards. He appeared for one of the Amanda Marga Three and put the submission that 'the well of justice has been poisoned at its source'. He acted for Carl Synnerdahl, who successfully fooled everyone into thinking he was blind, before escaping from prison. He tells the tale of Peter Schneidas, jailed for three years as a young man for a white collar crime whose experiences in jail turned him into a violent murderer. In his last trial he appeared for one of the five convicted of the Anita Cobby rape and murder.

Part of the joy of the book is the descriptions of how the law and the Bar operated in the 70s and 80s. The book is leavened with incisive pen-sketches of leading members of the Bar and the Bench, including Marcus Einfeld, Frank McAlary, Ken Shadbolt, Justice Wood and Sir Kenneth McCaw. Michael Adams is captured by a quote from Shakespeare: 'And then the justice in fair round belly with good capon lined, with eyes severe, and beard of formal cut, full of wise saws and modern instances.'

The book explains by stark examples the 'police verbal': in the age before tape-recorded interviews these were the typed notes of a police interview allegedly recording a confession which the accused had refused to sign, and were often being the only significant probative evidence. The book includes such gems as Roger Rogerson's statement to the Sun Herald in 1991: 'The hardest part for police was thinking up excuses to explain why people didn't sign up'.

The book is, by its nature, made up of harrowing tales, yet it is laced through and through with humour. Hosking recounts his now famous exchange with Justice Roden, who during a sentencing hearing had become deeply unimpressed with the time Hosking was taking to answer the question 'How does your client explain why the gun was loaded?' Hosking, looking down at his brief, said:

> 'I don't f***ing know.' Justice Roden became flustered, understandably angry and threatened to discipline me unless I apologized and spoke respectfully. I looked up and, with my finger digging into the page, explained "I don't f***ing know". This was answer forty-six in my client's record of interview, Your Honour. Justice Roden severely sentenced my client, which, thankfully, was overturned at appeal.

As well as disclosing his sense of humour, Hosking includes in every chapter something to be learned, whether it is the injustice of a police verbal, the inhumanity of the maximum security jails, the suffering of being committed to a mental hospital when sane, the difficulties of sentencing those with a high risk of re-offending, and the importance of legal representation even for the most evil in our society.

Ulitimately, like all good memoirs, one learns as much about the author as the events. The book concludes with a quote from Justice Keith Mason: 'At the end of the day, judges and lawyers find it impossible not to be themselves, more or less, both on and off the bench.'

Reviewed by Ingmar Taylor SC

The following extract from Justice Denied has been reproduced with permission.

Introduction

Public defenders are briefed in the most serious criminal cases, particularly when clients can no longer afford to retain the Bar's elite. My clientele was wide and varied. The notorious, the oppressed, the young and the old. The wise and the foolish. My clients included solicitors, police, schoolteachers, doctors and nurses, underworld heavies and prostitutes.

These memoirs recall some of the many notable cases in which I appeared as a barrister. They provide a rare insight into the emotion and complexity of a defence barrister's role. I have appeared in cases at all levels, the Local Court, District Court, Supreme Court, Court of Criminal Appeal, and six times before the High Court of Australia as leading counsel - only once successfully - and once for the Crown as junior counsel to the Solicitor-General, Harold Snelling QC. These are narratives of my clients' misfortunes.

It is rare and more interesting to read a barrister's frank admission of his own mistakes and errors of judgement, rather than accounts only of courtroom triumphs. There are both in this book. The emphasis is categorically, and unsubtly, from the defence viewpoint. Human frailty and its dark side underline the criminal trial process.

These are not impartial narratives, but my memoirs. There are none drawn from my years as a judge. Enough has been written about that period by the Court of Appeal and the Court of Criminal Appeal.

Justice is an elusive end, and not always

achieved. Hence the title *Justice Denied*.

* * *

Whenever I drive past a gaol I feel a sense of sadness and fear. Going inside the forbidding walls and hearing the inevitable clanging of gates is worse. The Victorian-era East Maitland Gaol, Parramatta Gaol, Goulburn Gaol and the sprawling Long Bay complex are the worst. Thankfully, the first two are now closed.

Imagine entering the prison, handcuffed, from the back of a stuffy, windowless prison van. Being stripped naked, washing in the communal shower, and then being handed the drab prison green garb. Each stage of the 'welcoming' is designed to destroy your self-respect. This is the start of days, months and years of personal danger and torment.

This is the fate of some of the worst villains who falsely claim membership of the human race. As this book tells, it is also, sadly, the fate of too many innocent people.

How many is too many? One is too many.

From time to time, innocent people are convicted. That is the flaw in our system of justice. There can be no greater injustice than a person being convicted of a crime they did not commit. Justice is not infallible and sometimes it is denied. When it is denied, we are all somehow diminished. Traditionally, the mythical goddess Justice is depicted blindfolded, which is said to portray even-handedness and impartiality. The great English advocate Sir Edward Marshall Hall KC told juries the blindfold was to shield her look of infinite pity from public gaze. When an innocent person is sent to gaol, justice truly is denied, and there have been far too many instances of that in Australia.

On 29 October 1982, a pregnant Mrs Alice Lynne Chamberlain received the mandatory life sentence for the murder of her baby, Azaria, and was sent to gaol. Her appeal to the Federal Court of Australia was dismissed. By majority, her appeal to the High Court of Australia was also dismissed. Years later, she was exonerated by a royal commission and paid some money and released. Scientific evidence had proved she was innocent. No crime had been committed by anyone.

The system had well and truly failed her. Mrs Chamberlain is not a lone figure. On 27 May 2008, in an Australian first, the Victorian government pardoned Mr Colin Campbell Ross. Scientific evidence proved he also was innocent of murder. It was too late to pay any money to Mr Ross. In a brief but solemn ceremony, he had been hanged by the neck until dead at Melbourne Gaol in 1922. He was thirty years of age when his life was ended. The system had well and truly failed him.

Bill Hosking QC

For a murder committed in 1936, in central western New South Wales, a trial was held at Bathurst eleven years later. The death sentence was passed upon Mr Frederick Lincoln McDermott. The Court of Criminal Appeal dismissed his appeal and so did the High Court of Australia. Fortunately, the death sentence was not carried out. In 1952, after a royal commission, Mr McDermott was cleared. He was given the princely sum, in today's money, of $1000 as compensation after serving more than five years in prison. He died a broken man in 1977.

In 2013, DNA evidence confirmed Mr McDermott's innocence. The Court of Criminal Appeal not only quashed the murder conviction but, even though McDermott was dead, found him not guilty. This is the only time in Australian history this has ever happened. Sadly, in Mr McDermott's lifetime, the system had failed him.

All three of these trials took place in the twentieth century. Two resulted in the death sentence. In all three cases, the jury verdicts were later proved to be wrong. The appellate courts, all the way up to and including the High Court, also got it wrong. In each case, years later, the government sought, in vain, to make amends with a pittance.

Two other monumental jury miscarriages of justice involved Alexander McLeod-Lindsay in 1964 and Ziggy Pohl in 1973. Mr McLeod-Lindsay was convicted for the attempted murder of his wife, even though she tried to exculpate him at his trial. Likewise, Mr Pohl, a humble and gentle migrant, had been the victim of circumstantial evidence, and convicted of the murder of his wife. He too had served more than a decade in gaol.

Unscientific scientific evidence was the forensic rock on which Mr Alexander McLeod-Lindsay perished. That happened at his trial, on appeal, and at a specially set up judicial inquiry in 1969. It was the so-called expert, but wrong, explanation of his wife's bloodstains on his clothes that convicted him. The police, court and jury all disbelieved his wife when she claimed it wasn't her husband who had bashed her and their four-year-old son. Mr McLeod-Lindsay was cleared, but not before he had served his entire long sentence. He never gave up. It took a second judicial inquiry in 1991 to eventually clear him. But it was not until 26 July 1994 that the Court of Criminal Appeal finally quashed the conviction. Mr McLeod-Lindsay passed away in 2009.

The denial of justice to Mr Pohl, which was not finally recognised by the Court of Criminal Appeal until 17 December 1993, was almost as complete as Mr Ross's tragic and wrongful death by hanging. At all times Mr Pohl had protested his innocence, but in vain. He received a life sentence. His case was simply closed until, years later, the actual killer came for- ward, confessed and was sentenced. Otherwise, the injustice would have remained unrecognised to this day.

* * *

Miscarriages of justice do not recognise national or state boundaries.

On 22 August 2014, a full bench of the Australian Capital Territory Supreme Court quashed the murder conviction and life sentence of David Eastman. At that stage, Mr Eastman had served nineteen long years of his life sentence. The decision followed a top-level judicial inquiry, which found there had not been a fair trial and the conviction was a miscarriage of justice. It must be said, any blemish in the Eastman trial was not through any shortage of talent at the bar table. For the Crown was Michael Adams QC, soon after to be a Justice, and for Mr Eastman, the future leader of the New South Wales criminal bar, Winston 'The Hat' Terracini SC.

The Crown did not hoist the white flag of surrender. Instead, it exercised its right to require Mr Eastman, after all those years, to stand trial again. Not surprisingly, Mr Eastman and a procession of lawyers provided for him by legal aid resisted this decision. A distinguished and experienced trial judge from New South Wales was objected to and eventually stood aside. Senior counsel for Mr Eastman were dismissed. One silk became seriously ill. At the time of writing this book, the prolonged, unresolved, unhappy Eastman saga continues to occupy the Supreme Court of the nation's capital. Justice again denied and heavily delayed.

Mr Eastman was not a once-in-a-generation aberration. On 22 December 2014, the South Australian Court of Criminal Appeal quashed the murder conviction and life sentence of Henry Keogh, who had served, like Mr Eastman, a shade less than twenty years in gaol. The Crown elected

to put Mr Keogh on trial for a third time. Bravely, Mr Keogh elected to set aside a jury trial and be tried by a judge. The Crown rejected this challenge and discontinued the prosecution in November 2015. Keogh's defence was an unusual but not an unprecedented one. He argued there had never even been a murder, as the deceased had died of natural causes.

Roseanne Beckett, formerly Catt, was convicted by a jury in the Supreme Court in 1991 for attempting to kill her husband. She was sentenced to twelve years gaol with a non-parole period of ten years and three months. Her appeal was dismissed. Ten years after going to gaol, she was released on bail when evidence came to light that she had been framed. It was a hollow victory. Her non-parole period was weeks away from expiry and, thus, she was due for release anyway. A new trial was ordered, but this time the DPP hoisted the white flag. Roseanne Beckett sued the government for malicious prosecution. She won. In 2015, the Supreme Court awarded her $2.3 million plus costs, which will exceed $1 million. Over $3 million for all those wrongful years in gaol. Adequate compensation? No. Ten times that amount and more would not be enough for what she suffered. As Justice Harrison so succinctly and eloquently put it, there is no way of knowing what Ms Beckett's life would have been had she not been charged. That applies to all those unfortunates to whom justice has been denied, with Colin Campbell Ross the ultimate, tragic victim.

It was the famous jurist Sir William Blackstone who wrote in the eighteenth century: 'It is better that ten guilty escape than one innocent suffer.' It must be remembered that this presumption in favour of the innocent is never absolute.

The RBG Workout

By Bryant Johnson

Forget the Atkins diet and pack away your Jane Fonda DVDs, 'The RBG Workout' is the authoritative fitness regime for barristers and judges.

This inspiring book is the workout regime of octogenarian United States Supreme Court Judge, Justice Ruth Bader Ginsburg.

In this book, the 'notorious RBG', as she is referred to fondly by admirers, proves that even with an enormous workload there is simply no excuse not to take care of yourself. Indeed, it is the very busy in intellectually demanding jobs who benefit most from exercise, giving them the physical stamina to complement the mental stamina necessary for their work. The indefatigable judge is 84 years old.

Justice Ginsburg has sat on the Supreme Court for 24 years. She trains twice-weekly with the book's author Bryant Johnson, and attributes her continued success and longevity on the court in part to her rigorous workout routine.

It has been reported that US President Donald Trump recently speculated that he would appoint RBG's successor during his administration. Not if the liberal judge has anything to do with it. She plans to sit on the bench for as long as she is healthy and able (unlike the Australian Constitution and other Australian legislation there is no prescribed retirement age for judges in the US).

Johnson, a court clerk, personal trainer and former member of the US Special Forces, has RBG completing overhead tricep curls, planks, one-legged squats and medicine ball push-ups, to name just a few of the exercises in her impressive regime. Remember, she is 84!

The book is full of fantastic illustrations of the judge doing her exercises and also explanations of how to do them properly. Many of the exercises can be done in chambers (just like RBG does) and each exercise has variations to increase the difficulty as your fitness and strength improve.

On doing push-ups, Johnson says 'When I first started training with the justice, she wasn't strong enough to do regular push-ups (she now does 20!), so we began with this easier alternative (standing push-ups against the wall). If necessary, you can work your way up from push-ups against the wall, to push-ups while resting on your knees, to the full-on regular push-up.'

Johnson says, it doesn't matter what you can do or how much you can do, as long as you do something. 'It's not about how much RBG can bench. It's about making sure she feels good enough to stay on the Supreme Court bench. There's nothing wrong with setting specific goals, but the most important outcome of an exercise routine can't be quantified. It comes down to being healthy, feeling good and staying consistent.'

Johnson says 'The body is like a machine – it's made to move. If you don't move it, you will lose it.'

RBG is known for working long hours to get her judgments right. She says 'I am often consumed by the heavy lifting Supreme Court judging entails, reluctant to cease work until I've got it right. But when the time comes to meet with Bryant, I leave off and join him at the gym for justices. The hour-long routine he has developed suits me to a T. This book, I hope will help others to experience, as I have, renewed energy to carry on with their work and days.'

So whether you want to keep up with a US Supreme Court judge, or just reach your own fitness goals, RBG reminds us that it is never too late to start looking after yourself.

Justice Ginsburg's contribution

In her 24 years on the Supreme Court, Justice Ginsburg has been a bastion of liberal thought. These are some of the important cases in which she has been involved.

United States v Virginia, 1996

In 1996, the Virginia Military Institute (VMI) was the United States' last remaining all-male public university. The United States filed a suit against the school, arguing that the gender-exclusive admissions policy violated the 14th Amendment of the Constitution. The state of Virginia argued that women were not suited for VMI's rigorous training. The Supreme Court disagreed and struck down VMI's all-male admissions policy. Justice Ginsburg wrote the majority opinion that made it clear gender equality was a constitutional right. Her Honour held that '[n]either the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women.' She

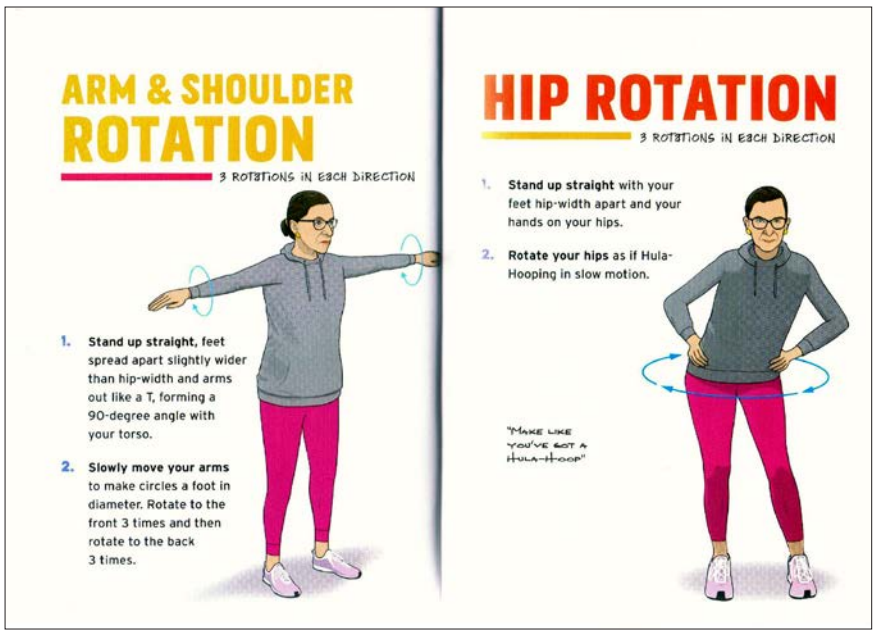
added 'generalizations about 'the way women are,' estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.'

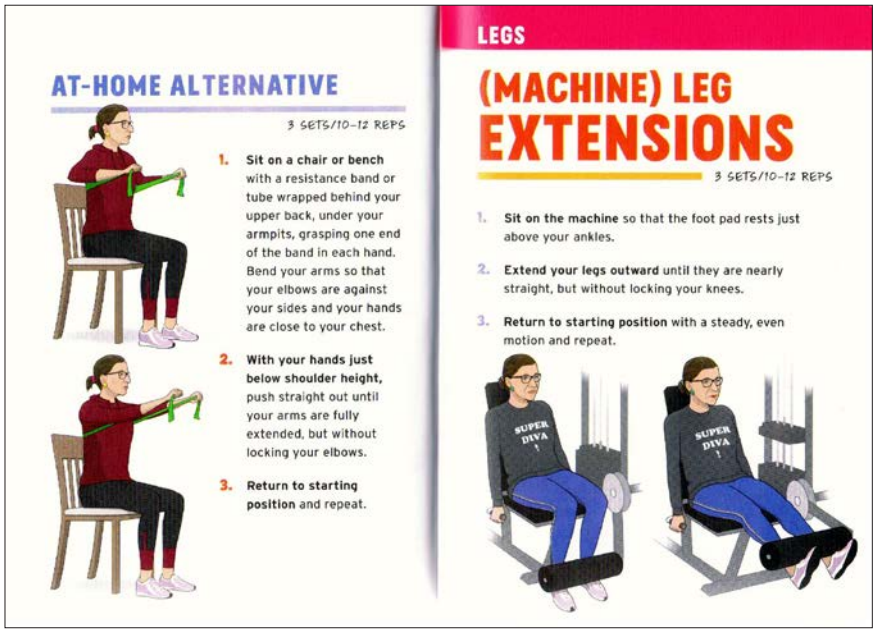
Whole Woman's Health v Hellerstedt, 2016

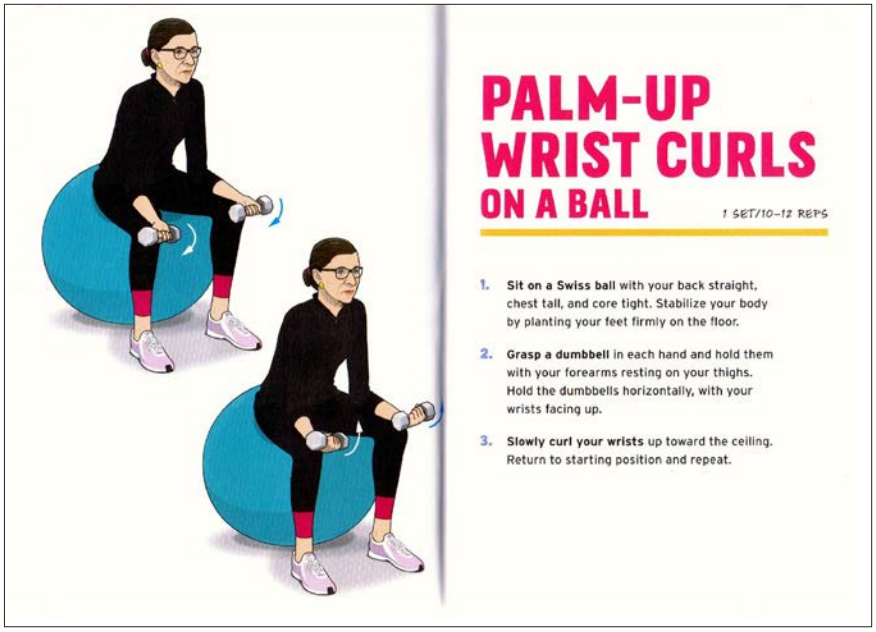
In 2016, the Supreme Court ruled on the most significant abortion case since *Roe v Wade*. *Whole Woman's Health v. Hellerstedt* considered Texas's Omnibus Abortion Bill (known as H.B.2) which imposed restrictions on abortion providers, including a directive that doctors performing procedures have admitting privileges at nearby hospitals.

The Supreme Court struck down the bill 5 votes to 3. Justice Ginsburg was in the majority. She held 'It is beyond rational belief that H.B. 2 could genuinely protect the health of women, and certain that the law would simply make it more difficult for them to obtain abortions…When a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners...at great risk to their health and safety... laws like H.B.2 that do little or nothing for health, but rather strew impediments to abortion, cannot survive judicial inspection.'

Reviewed by Daniel Tynan







Bench & Bar v Solicitors Golf Match

Manly Golf Club 22 January 2018

One might have anticipated that the golf playing solicitors of NSW would give up in advance of what was to be their 4th consecutive attempt to regain the Sir Leslie Herron Mace, but showed up they did, and the Annual drub-fest of a contest took place once again at Many Golf Club on 20 January 2018.

The dust having settled, your correspondent can report on another victory; the match being determined on the basis that the bench and bar average two-ball score of 41.25 edged out the solicitors' score of 39.27. However, the result hides a sad fall in participation by the Bench and Bar in this ancient event, as there were only 8 bench & bar players, as opposed to 32 solicitors: two of whom were press-ganged into playing for the bar for the day.

Bench & Bar were aided by producing the two best scores of the day; Callaway and O'Conner DCJ (48 points) with Laughton SC and Phil Bannister (47 points). Hulme J and your correspondent had the best back nine with 23 points, while Hulme J won the long drive on the first.

If you are a golfer and you want to be part of an historic fifth defence of the mace, set aside the fourth Monday in January 2019 (or thereabouts – keep an eye out in In Brief for details): you are assured a great day with a terrific meal in Manly's fine club-house. In the meantime, take comfort from the fact that your mace is safely ensconced in the chambers of Hulme J on Level 10 of the Law Court Building.

Herbert Warren Wind

The Great Bar Boat Race

The 34th Great Bar Boat Race was held on Monday, 18 December 2017.

Thirteen yachts manoeuvred for position at the starting point off Point Piper in near-perfect conditions, with brilliant sunshine and a steady 12-15 knot northeast breeze.

Competitors completed the 7.5 nautical mile course in about two hours, with Onaview first across the line, followed by Fiction and Reverie.

All entrants dropped anchor at Store Beach for lunch and the prize-giving ceremony. This year's race, once prizes and other costs were met, returned a modest surplus, which will be donated to a suitable charity.

YACHT	SKIPPER	CHAMBERS	HANDICAP POSITION	LINE HONOURS
Onaview	Tony Baker	Wentworth	**1**	**6**
Fiction	Michael Blaxell	UTS Student Legal Svc	**2**	**5**
Reverie	John Turnbull	Windeyer	**3**	**1**
Allegro	Roderic Crow	Frederick Jordan	**4**	**2**
Lolita	Nick Cassim	Gary Cassim & Assoc	**5**	**9**
Red William	James Kearney	Selborne	**6**	**7**
Intro II	Gary Cassim	Gary Cassim & Assoc	**7**	**12**
As You Do	Kylie Nomchong	Denman	**8**	**4**
Singapore Girl	Paul O'Donell	Lachlan Macquarie	**9**	**8**
Ostara	Helen Cox	Public Defenders	**10**	**13**
Pilgrim	John Stratton	Sir Owen Dixon	**11**	**3**
Fortune of War	Adrian Gruzman	Selborne	**12**	**10**
Lumiere	Troy Edwards	Forbes	**13**	**11**
Legacy	Bruce Hodgkinson	Denman	**DNC**	-
Shibumi	Bryan Moore	Apotex/Ashurst	**Scratched**	-
Farrocious	Michael Williams	William Deane	**Scratched**	-

Young Bullfry and the Fox:

A reminiscence of appearing with M S Jacobs QC (1930 – 2017)

'You have a new nickname' young Bullfry's close colleague had said, over a cup of tea, many years before. Adjusting his Wits tie, he leant forward conspiratorially, and intoned softly: 'Seun van die jakkals'.

'If that means what I think it does, it is high praise indeed! I have always enjoyed appearing with him', said Bullfry.

How many cases had they worked on together? At the very beginning, when things had sometimes gone awry with the evidence, Bullfry had always been impressed by the studied calm of his learned leader.

'Paragraphs 8 to 26 are struck out.'

'May it please your Lordship. Might we have leave to file a further supplementary affidavit in support by tomorrow?'

The endless hours in chambers, day and night, weekday and weekend, working, and reworking submissions. The endless cups of tea, of every type and description. The constant recourse to the authorities which lined the walls of the room.

And then in court, the imperturbable countenance, the ingratiating smile, the deep sonorous voice, as his leader moved forward relentlessly, sometimes crab-wise, to his forensic objective. The ability to withstand the annoyance, and vexation of any arbitrator, or jurist – the polite indifference to indications that matters were taking too long, or the cross-examination was misdirected – the fixed determination to ensure that nothing was left undone which might benefit the client.

One matter involved allegations of vast chicane, the alleged theft of very valuable intellectual property, the purloining of an important formula - the cross-examination of the key scientific officer for the defendant company went on for days to the ever-increasing vexation of the arbitrator, questions dropping as water falls on a stone, the seemingly never-ending interrogation directed to the basic work books said to underly the 'discovery' of the formula until – suddenly - just after the morning tea adjournment: 'Please, please stop, Mr Jacobs. I did steal the information, I admit it, I admit it'.

In another, against the cream of the Victorian Bar (two old advocates going toe-to-toe) he adroitly moved the situs of the arbitration which threatened the very survival of a national carrier from New Zealand to a small atoll far out in the Pacific where by some stratagem the matter came to be adjudicated, happily for our client, before its Chief Justice. Because of some misadventure with the luggage, he appeared at the first day of the hearing wearing informal attire including his walking shoes but he was unfazed by this as he was by almost every forensic mishap.

The first Mrs Bullfry had complained about Bullfry's extended absence from pressing domestic duties, sojourning at a luxury hotel in the South Pacific – in truth, for the four days the matter lasted, young Bullfry did not leave the hotel except to attend the offices of the local solicitor – RL Stevenson's grave remained unvisited.

The case of the failed swimming pools; and the certainty, over time, of the 'skin' on the bottom of each peeling off as it reacted with the chlorine in the water; the initial denial of manufacturer's liability – and the ultimate damning concession, extracted after several days of unrelenting chemical analysis, that the whole lining product was 'boiling up like a witch's brew in the drum' before its damaging application.

The titanic battle in the Full Federal Court, (on remitter from Gaudron J) improbably seeking prohibition under section 75(v) on behalf of a justly maligned builder, years after the initial decision of the Federal Court judge in favour of the ACCC – Jacobs QC 'on remote' on the difficult constitutional point, saying to the Chief Justice, without embarrassment, 'I hope you can all hear what my learned junior is saying to me'.

He had arrived in Sydney in his late fifties, from East London in the Cape, as matters became increasingly uneasy there. His grandfather, so he told me, had fled Russia, and made his living selling ostrich feathers, and other things, as accoutrements for hats. He was an accomplished pilot. As he became more established in practice in Sydney, he devoted part of his time to writing, and produced a text on compulsory acquisition, on security for payments, and a multi-volume work on commercial arbitration. Each was a testament to his tremendous industry, and love of his profession.

CP Snow has a barrister-character who says about silk: 'No-one is a hero to his juniors'. But that is not true. A long and bitter court case requires a large mental effort but matters of morale are also vital. It is for this reason that 'teams' develop at the Bar. In a *Tale of Two Cities*, Dickens describes the sympatric relationship between Stryver QC (the Lion) and Sydney Carton (the Jackal). They complement the skills and and supplement the deficiencies of each other other. That was our relationship exactly.

Counsel will frequently choose to work closely and constantly with the same companions. (The suggestion that this natural selection by clubbability has a chilling effect on various cohorts of the Bar is not wide of the mark but it is hard to see what can be done about it – clubbability cannot be enforced). On many Floors, as well, it is everyone's mutual interest to keep as many briefs as possible 'in-house'. To be successful, a Floor needs both a competency of leaders so that work may flow 'down' and a band of keen juniors so that work may flow 'up' as the difficulty of the forensic quest (and thus the need for more senior counsel) becomes apparent as the matter unfolds.

It is always a delicate matter when to sever the tie – in order to become a competent, stand-alone counsel, at some stage the fledgling must forego the comfort of working only with the same leader and head out into the darkness. This may well mean a large drop in income, and the need to find new solicitors. On the other hand, too long with the same leader may well mean that when the latter takes a judicial post, or otherwise alters practice, the permanent junior is left high and dry. There is no answer to this dilemma.

In the end, our own relationship slowly atrophied as more and more matters came in which required an experienced junior alone to fight the fight. I always thought of him fondly and sought him out – he was not a man who gave his acquaintance or friendship easily, but once given it was steadfast.

How best to sum up - CP Snow puts it well in *Time of Hope*:

'[His] mind was muddy, but he was a more effective lawyer than men far cleverer, because he was tricky and resilient, because he was expansive with all men, because nothing restrained his emotions, and because he had a simple, humble, tenacious love for his job.'

In the courtroom

The views of an anonymous judge

In the courtroom, the no man's land between 2.20pm and 3.10pm is a spiritual wasteland across whose desolate emptiness counsel wearily drudge like the dead. From up above on the bench, the judge sat reposed amidst a chaotic mess of Post It notes and innumerable aides-memoir, struggling with almost superhuman strength to keep her eyes open, willing with every fibre of her being this mind-crushing cross-examination on the 2008 draft accounts to end. Briefly she imagined she was away from this dry, stoney place and next to a babbling brook, in an ancient forest gently buzzing with the hum of crickets and bees; faint strains of The Lark Ascending gently flowed through the airy boughs high above. In this verdant haze she imagined herself holding with one hand, but with such delicate poise, cross-examining counsel's bewigged head in the stream and exhaling calmly, but Note 6 to the balance sheet snapped her back to the empty weariness of the courtroom. Agonisingly, the second hand on the clock had but moved 20 seconds. At this rate, it would literally take an eternity to arrive at the inviting pools of relief which lay in the far distance after 3.20pm when her eyelids, no longer besieged by that oh-so-unwise prawn linguine at lunch, would finally be able to remain open without conscious effort. In that moment of spiritual core collapse, she wondered what had become of Miranda in *Picnic at Hanging Rock* and whether she too would end up wherever it was that Miranda had gone (was it the registry; was *that* where Miranda had gone?). Or would she, instead, like Mrs Appleyard, run screaming from the courtroom and throw herself down a deep ravine (or was *that* the registry?). From where she sat, both had their advantages (what had become of the registrar? – she had not seen him in months).

'Your Honour', senior counsel interrupted her reverie, 'I think I might move on to a different topic'. Not such a bad idea really, she thought to her Honourable self, this topic has certainly been ploughed into the ground with salt. 'In fact, your Honour, I was going to suggest that we might break the cross-examination altogether so that we can outline where we are with the written submissions'. Greeks bearing gifts! Her Honour knew exactly where the parties were with the written submissions. In some infernal workshop not too far from the courtroom, juniors of diabolical intelligence and drive were, even now, crafting the instruments of persuasion from blocks of purest malice. The choice of chastisements available to these ingenious wunderkinder were, in the age of the internet, very extensive. There was, of course, the profession's perennial favourite, popular since the rise of the modern word processor, the very long submission ('VLS'). It always astonished her Honour that many counsel regarded the length of a submission to be a virtue as if it were some kind of medieval battering ram ('like, you know, my submissions were totes long' she once overheard in the coffee shop – totes? really?). Then there was the *light-on-detail* submission ('LODS') in which counsel, in a generous gesture of confidence, would usefully tell her that 'the evidence shows that the meeting did not occur' without dropping even the slightest hint or allusion as to what that evidence might be. This kind of counsel worked on the assumption that facts were like truffles, an expensive delicacy not to be consumed in substantial qualities at all; also, that judges were truffle pigs. And, just as in the case of the poor truffle pig, the judge never got the good end of the deal.

By far the worst of all kinds of submissions, however, were those resulting from a twisted conspiracy between opposing counsel to harm the judge by making their written submissions bear no relation to each other. One would discuss estoppel, the other contract; one would launch a spirited attack on the witness Jones, the other would not mention him at all and so on. Often this induced in a judge a destabilising psychological effect, not dissimilar to waterboarding or other enhanced techniques. When this happened to her Honour, as it had on frequent occasions, she often felt that she had heard two, quite unrelated, cases. Unravelling such monstrous cacophonies had sent many judges, including her Honour's immediate predecessor, mad (or, perhaps, in some well-known cases, madder).

Regardless of the content of the written submissions, it was to senior counsel that her Honour would eventually be required to listen in this turgid sideshow. Her Honour was not optimistic. Based on previous encounters she knew that what this silken showman said usually bore little, if any, relation to the written submissions prepared by his much more able juniors. Indeed, his relationship with the submissions was, to use a word he kept using over and over again in the present case, exiguous (at least he was not wearing a chausette). In many ways, he seemed to her to bear the same relationship to the written submissions that vermouth bears to a very dry martini. She wondered, idly, whether he had an atomiser.

At that moment, she looked up. The dissolute youths with the trolleys had arrived and the big hand was nearly on the 12. Immediate relief was at hand. But what would they do to her tomorrow? Only time would tell.

Archon's View is a new column. It provides an opportunity for a current judicial officer to provide an anonymous view of the Bar.

Downtown Girl

It's not that I particularly like Billy Joel or his music, but the words 'Uptown Girl' are constantly on my mind whenever I am 'lucky' enough to obtain that elusive brief 'uptown' i.e. at the Supreme Court of NSW.

For those of us who practice primarily 'downtown', i.e. at the District Court or anywhere that is, well 'downtown' i.e. near Central Station, any 'uptown' experience can be very daunting. Consider the following.

No one knows you

I walk into that 'hallowed' entrance with such enthusiasm, such pride and happiness, yet no one says 'hello', 'good morning', 'how are you', 'what have you got today?'. Rather, everyone stares at you with a look that says 'who are you?', or 'are you sure you are in the right place', or 'you really don't belong here'. Everyone else is talking with someone, laughing, calling the sheriff officers by their first name, asking court staff about their weekends, their children, the latest courtroom gossip. No one wants to talk to me. And then, when you finally make it into the court room the judge looks at me with that same sort of expression i.e. 'who are you', and continually forgets my name.

Robing

All the 'uptown' girls have chambers uptown, naturally, so they do not have to wonder about where to robe in private and not in public. Conference rooms are always full and so the hallways and toilets are left for me.

You don't know where to go for lunch

This is important. The 'locals' have it all worked out either because they just go back to their chambers where sandwiches have been ordered for them (and their team), or they know that small but fabulous coffee shop 'around the corner' where there aren't many queues and everyone gets what they want. I am left to stumble to the obvious coffee shop which has a massive queue so inevitably, one just starves.

It's a long way home

This is obvious. At the end of a hard day's work, one just wants to get back home i.e. to your chambers as soon as possible. This becomes even more important when your matter is to continue into the next day or days. That long walk back to the 'downtown' chambers is even longer after Court than in the morning. Also, carrying all the 'stuff' back to 'downtown' and back again, is really annoying, and you still have hours and hours of prep to do for the next day.

All very difficult!

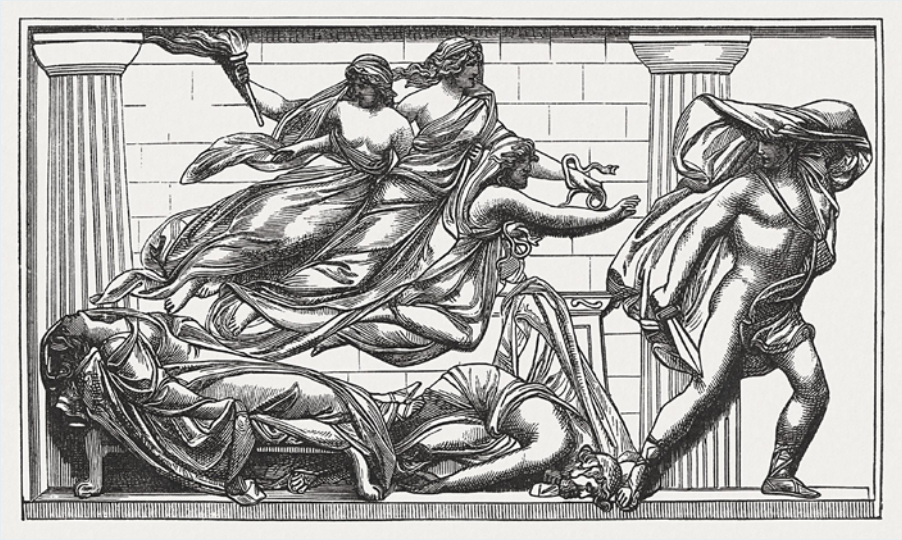
But the pain and suffering does not end there. Any 'uptown' events i.e. Phillip Street, are met with the same drama. One has to leave ages before any 'event' or CLE in Phillip Street, sometimes battling the rain, hail and wind and then, when you get there, no one knows you, no one says anything to you and there you sit, in isolation and dread.

So what can be done?

The 'downtown' girl can of course refuse to go 'uptown'. It is after all not convenient and you can make your professional life in chambers anywhere you please, so they say. Chambers now, are everywhere, not just in Phillip Street. We are as diverse in person as is our geography, which is of course a very good thing, but just maybe, a central place which is good for all, is not a bad thing and should, in fact, be embraced? And maybe that 'uptown' brief is just that-another part of town not necessarily prone to pain and suffering, at least you don't make it so!

In other words, 'downtown' girl can and should embrace it all, introduce yourself and relish the diversity that uptown and downtown brings! You can have it all!

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.



Questions for The Furies

Why does everyone hate my pink post it notes? I use them to mark everything I want: the award winning parts of the many lever arch folders I have to carry; as reminder points in my notebook; all throughout my *Odgers*, and the other books I take to court just in case. Clients look at me in horror, my opposition just laughs and judges stare with that 'You expect me to look at a folder of documents with pink Post-it notes all over the place' expression. Is not possible to be a barrister who uses pink Post-it notes?

Dear Person with a Penchant for Pink,
Insofar as you are handing up anything to the judge, step away from the Post-it notes. They do not assist you, whether they be pink, blue or regulation yellow. Simply communicate the position of the relevant passage by page number and its posiiton on the page (for example, 'one-third down the page' or 'at point seven of the page'). Informing the judge to go to 'the third pink post-it note in the folder' simply does not translate when transcribed, makes no sense to others at the bar table whose own print-out may not be so tabbed and will only prove confusing if the matter goes on appeal.

Otherwise, if pink helps you to prepare, present and think, then go pink. As a colour, it is as useful as any other and perhaps even more so. In fact, pink was the folder colour of choice for one of our number to store her most crucial court documents on the basis it was unlikely ever to be confused with another folder at the bar table. That was true until the day she was led by a female silk with the same idea. There they were on the table: two identical pink folders. And only their owners stared and laughed.

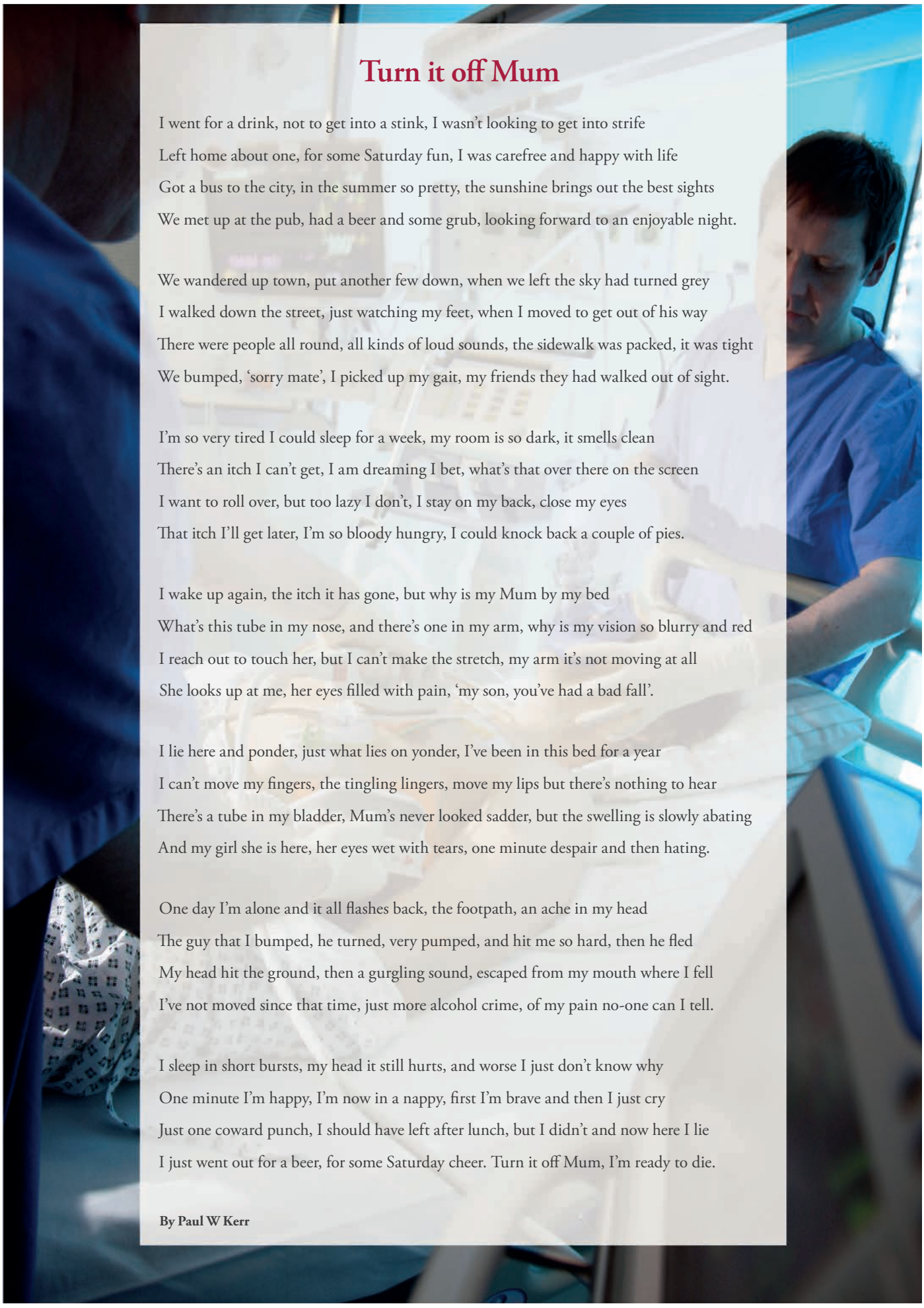
Why do judges insist that I interrupt them when I do not? Often one is working very hard, making important oral submissions non stop, answering questions completely out of the blue and not in the order I want, and then, out of the blue, just because HH wants to say something, I am accused of interrupting when really, it's the other way around. Don't get me wrong, I certainly try and stop all the talking as soon as I can but sometimes, when one is in 'full flight' and talking and answering and answering and talking, I get accused of interrupting! How can I stop these accusations?

Dear Loquacious Lawyer,
People are called to the bar from many walks of life: thwarted thespians, frustrated comedians, obstructed orators. These people believe that what they say is worthwhile listening to because they have said it in a pleasing manner. Occasionally people are called to the bar because they believe their knowledge of the law to be superior. Such people believe that what they say is worth listening to because they wrote a doctorate on the subject three years before. Rarer still are those whose egos are ditched when the wig is donned and their focus is how they may best assist another legally trained person resolve a dispute in a way that best suits their client. This is odd, because that is what, in truth, we do and, further, judges have no interest in listening to anything that does not assist them fulfil their difficult duties no matter how beautifully delivered nor how learned. Accept that and your *modus operandi* will change from *speaking at* judges to *conversing with* judges. Of course, circumstances may dictate a departure from this practice, but such departures ought to be rare and for good reason, for example, because the proper prosection of your client's claim demands it.

We are reminded of just such an exchange between a very, very senior member of the bar and a, then, High Court judge. In answer to a series of particularly thorny questions, typical of that judge, the silk replied, 'I appreciate that your Honour wishes me to enter the killing ground, but would your Honour mind if I take my time getting there'.

The answer was given with charm and humour and it was backed by the privilege of long years of effective advocacy in which the silk had demonstrated a respectful capacity to assist the judiciary. The judge relented. Continue to talk over judges and you may never be afforded that indulgence.

If you have a question you want the Bar's agony aunts to answer send it to: ingmar.taylor@greenway.com.au



Turn it off Mum

I went for a drink, not to get into a stink, I wasn't looking to get into strife
Left home about one, for some Saturday fun, I was carefree and happy with life
Got a bus to the city, in the summer so pretty, the sunshine brings out the best sights
We met up at the pub, had a beer and some grub, looking forward to an enjoyable night.

We wandered up town, put another few down, when we left the sky had turned grey
I walked down the street, just watching my feet, when I moved to get out of his way
There were people all round, all kinds of loud sounds, the sidewalk was packed, it was tight
We bumped, 'sorry mate', I picked up my gait, my friends they had walked out of sight.

I'm so very tired I could sleep for a week, my room is so dark, it smells clean
There's an itch I can't get, I am dreaming I bet, what's that over there on the screen
I want to roll over, but too lazy I don't, I stay on my back, close my eyes
That itch I'll get later, I'm so bloody hungry, I could knock back a couple of pies.

I wake up again, the itch it has gone, but why is my Mum by my bed
What's this tube in my nose, and there's one in my arm, why is my vision so blurry and red
I reach out to touch her, but I can't make the stretch, my arm it's not moving at all
She looks up at me, her eyes filled with pain, 'my son, you've had a bad fall'.

I lie here and ponder, just what lies on yonder, I've been in this bed for a year
I can't move my fingers, the tingling lingers, move my lips but there's nothing to hear
There's a tube in my bladder, Mum's never looked sadder, but the swelling is slowly abating
And my girl she is here, her eyes wet with tears, one minute despair and then hating.

One day I'm alone and it all flashes back, the footpath, an ache in my head
The guy that I bumped, he turned, very pumped, and hit me so hard, then he fled
My head hit the ground, then a gurgling sound, escaped from my mouth where I fell
I've not moved since that time, just more alcohol crime, of my pain no-one can I tell.

I sleep in short bursts, my head it still hurts, and worse I just don't know why
One minute I'm happy, I'm now in a nappy, first I'm brave and then I just cry
Just one coward punch, I should have left after lunch, but I didn't and now here I lie
I just went out for a beer, for some Saturday cheer. Turn it off Mum, I'm ready to die.

By Paul W Kerr