THE JOURNAL OF THE NSW BAR ASSOCIATION | SPRING 2018

barnews

Expert evidence

PLUS

Crisis in Legal Aid

The 2018 Bathurst Lecture

An interview with Greg Tolhurst

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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: Playing in the hot tub, by Rocco Fazzari

A special edition on expert evidence

I own one particularly well-thumbed past edition of *Bar News*: Andrew Bell's December 2006 special edition on expert evidence.

One of my first steps as editor was to commission Hugh Stowe of 5 Wentworth Chambers to curate an updated suite of articles on expert evidence. In this edition you will find his thoughts on the ethical boundaries involved in reviewing (not settling!) draft expert reports. A second article considers the difficult question of whether legal professional privilege can be maintained in respect of communications with an expert. Victoria Brigden has written on cross-examination of experts. David Robertson and Charles Gregory provide an up to date and deeply practical discussion on the admissibility of expert evidence. And there is a comprehensive guide to concurrent expert evidence – or 'hot tubbing' – by Adam Batt and Hugh Stowe. An enormous amount of work has gone into these splendid articles, and *Bar News* records its appreciation to each of the contributors, and to Hugh Stowe in particular.

We are also pleased to publish the inaugural Bathurst Lecture on commercial law, delivered by the Hon Murray Gleeson AC QC. Rocco Fazzari, previously of Fairfax, has painted a portrait of Gleeson to accompany the lecture, along with three marvelous illustrations to accompany our expert evidence pieces.

This edition also carries some great pieces describing the practice of the Bar. First among them is the piece by Alexander Edwards and Ting Lim on the regional bar – the 104 members of the Bar Association whose chambers are outside the Sydney CBD. Heydon Miller (Orange), Shanna Mahoney (Parramatta), Sophie Anderson (Lismore) and Belinda Epstein (Newcastle) each describe the benefits of practicing away from Sydney.

Emmanuel Kerkyasharian has written a searing article on the wholly inadequate Legal Aid rates, which have not increased since 2007. A barrister briefed by Legal Aid to prepare and appear in a four week murder trial for an accused was paid $9.37/hour after expenses, less than half the national minimum wage. Emmanuel's article is echoed in Catherine Gleeson's review of The Secret Barrister, a book by an anonymous British barrister. Baby barristers there at times literally pay to work, with their train fare for a

circuit brief greater than their legal aid brief fee. The book asks the question, why isn't the resourcing of the criminal justice system the subject of debate in the same manner as access to health care? Perhaps it is because most think a brush with the courts will not happen to them – when in fact exposure to crime is as happenstance as a sudden illness or accident.

Michael Kearney SC writes about another area of chronic underfunding - family law, and the extensive delays that occur in that jurisdiction as a result. Matters being commenced today involving children are unlikely to be determined inside three years. In regional centres matters listed for hearing are routinely not reached and stood over for months to the next set of hearing days, when they may again not get reached. At times legal aid funding is exhausted before the matter can be heard.

This edition also carries some wonderful positive stories, including a fantastic interview with Greg Tolhurst, who took over the role of executive director of the NSW Bar Association in October 2016. The article reveals a learned and thoughtful man, whose nascent career as a drummer in a rock band was happily cut short, and who, through a series of fortunate events, became a well-published legal academic before joining the Bar Association. Greg discusses the Bar Association's strategic plan as one with many initiatives, but to achieve them you need an end point. '…the role of the Bar Association is to safeguard the rule of law and support the administration of justice in NSW through a sustainable cohort of high quality independent practitioners at the Bar operating with integrity and thriving in a changing legal environment.'

Bar News remains the home of great articles on legal history. In this edition Michael Slattery tells us the fascinating story of Percy Valentine Storkey, the Sydney Law Student and District Court Judge who won a Victoria Cross in World War I. Geoffrey Watson SC writes about why US Supreme Court Justice Douglas' grave lies in Washington DC's Arlington Cemetery in both senses of the word.

Can I end by thanking the outgoing *Bar News* committee members on behalf of myself and my predecessor. *Bar News* is very much a collaborative effort, and leans heavily on its committee members, and those who have left the committee will be missed.

Ingmar Taylor
Greenway Chambers

Bar News thanks Hugh Stowe for curating the special edition articles on expert evidence.

A legal profession, not a legal business

'The one great principle of the English law,' Charles Dickens once quipped, 'is to make business for itself'.[1] Some 165 years later, our profession still faces accusations that the price to pay to access justice is too high.

While we practise in a period of rapid change, including the increasing internationalisation and commercialisation of the law, the Bar Association's Strategic Plan recognises that these changes occur against the constant of community and court concern about the cost of litigation.

The cost of accessing legal representation and justice services remains a live concern to Australia's legal profession in the 21st century. Cost is often the decisive factor for clients considering whether to engage counsel or pursue litigation. The costs associated with litigation are prohibitive and may deter meritorious claimants from seeking recourse via the courts. Importantly, the affordability of justice impacts on the quality of the rule of law. There is no doubt that costs also impact upon the reputation and integrity of the legal profession. Fee-related disputes make up a significant source of complaints against solicitors and barristers.

As barristers, we have a paramount duty to fearlessly serve the administration of justice and an obligation to resolve matters as justly, cheaply and quickly as possible. Where tensions present in our practice between these three principles, we are called to reconcile these as best we can in accordance with the law and with our ethical obligations.

The chief justice of New South Wales has observed that 'commercialisation is not inherently bad or evil; it is a different set of means and ends, which both complement and conflict with the means and ends of professional legal practice'.[2]

Advocates of third-party litigation funding and contingency fees have long argued that these initiatives actually serve, rather than undermine, the rule of law by facilitating access to the courts for complainants who otherwise could not afford to seek recourse. The Australian Law Reform Commission is currently inquiring into class action proceedings and third-party litigation funders.

The Bar Association welcomes the opportunity for a national discussion on these issues, particularly on two key questions: whether a licensing regime should be introduced to regulate third-party litigation funders; and whether solicitors should be permitted to enter into contingency fee arrangements.

While these are not new arguments, it has become increasingly clear with the rise of class actions that a definitive answer is needed to provide clarity and maintain confidence in our courts and our lawyers. Cost should not prevent justice from being done. However, barristers deserve to be reasonably and properly compensated for the work we perform. Crucially, we believe that the practice of law must remain a profession, not a business.[3]

A national inquiry

In 2017 the attorney-general of Australia tasked the ALRC to consider whether class action proceedings and third-party litigation funders should be subject to Commonwealth regulation and whether there is adequate regulation of related matters including:[4]

- relationships and conflicts of interest between lawyers, litigation funders and plaintiffs;
- prudential requirements;
- distribution of litigation proceeds and the desirability of statutory caps on the proportion of settlements or damages awards that may be retained by lawyers and litigation funders;
- requirements and fitness to be a litigation funder; and
- costs charged by solicitors in funded litigation, including class actions.

The Bar Association has formed an hoc working party comprising E A Cheeseman SC, G A Donnellan and J C Conde to assist us to consider and respond to the ALRC's proposals. In May the ALRC released a discussion paper outlining proposals for reform. In July, the association provided input to the Law Council of Australia on these proposals.

The time is long overdue to explore these issues thoroughly. In doing so, we must be prepared to look to other jurisdictions and learn from their experiences and mistakes.

Disputes and litigation are not limited to NSW, nor should discussions of policy be. I recently had the privilege of meeting with the president of the New York City Bar Association, Roger Maldonado. I walked away from that meeting with the conviction that we are strongest as a legal profession when we stand together with our international colleagues.

Although the NYC Bar is almost ten times the size of the New South Wales Bar, we face many of the same challenges, including disproportionate incarceration rates of minorities and retaining women lawyers. There is much to be gained from sharing our experiences across jurisdictions and borders. This is particularly true of policy responses to the challenges and opportunities posed by third-party litigation funding and contingency fees, as these issues have had a very different history and treatment in the USA as compared with NSW.

Litigation funders

One of the ALRC's most significant proposals for reform is that the *Corporations Act 2001* (Cth) should be amended to require third-party litigation funders to obtain and maintain a 'litigation funding licence' to operate in Australia.[5]

The introduction of the federal class action regime in 1992 was a watershed moment in Australia's legal history. It was not without controversy, in fact it was described by some as a 'monstrosity'.[6] Fears the regime would open the floodgates to litigation do not appear to have eventuated.[7] However, there has been a steady rise in the number of class actions, accompanied by an increase in the number and the involvement of commercial third-party litigation funders.[8]

President Arthur Moses SC with the president of the New York City Bar Association, Roger Maldonado.

It is estimated that 25 litigation funders currently operate in Australia.[9] Litigation funders do not require a licence to operate here,[10] which means there are effectively no minimum standards to be met before a person may represent themselves as being a litigation funder.[11] By regulation litigation funders are exempt from the requirements of the Consumer Credit Code and the definition of a managed investment scheme under the *Corporations Act 2001* (Cth), and may be exempt from the requirement to hold an Australian Financial Services Licence.[12]

The ALRC argues that a licensing regime would ensure continuous scrutiny of funders, better protect consumers and other parties to the litigation, and incentivise compliance.[13]

The Bar Association questions the need for a licensing regime. We believe that the issues this regime would purportedly address can be adequately regulated under current law.

Introducing a licensing regime raises three further issues: who would police the regime; is it clear that the licensing regime could guarantee that only reputable funders enter the market; and how to define who is a 'third-party litigation funder'. If an individual borrows from a bank to fund their litigation, for example, would that make the bank a 'third-party litigation funder'?

The association has said that if a licensing regime is ultimately introduced, there must be adequate funding to set this scheme up for success.

The approach to litigation funding in the USA is more haphazard, with regulation left to each state rather than the federal government. Many states do not have formal regulation, and assessment of litigation funding agreements has fallen to the courts.[14] In May, bills were introduced into the New York State Assembly to regulate litigation funders, such as by capping interest rates or requiring companies to educate their customers about fee structures.[15]

Contingency fees

Australian solicitors are currently prohibited from billing clients on a 'contingency fee basis' where the solicitors' services are provided in exchange for a percentage of the amount recovered by the litigation.[16] Such arrangements must be distinguished from lawful 'conditional fee agreements' where a lawyer appears on a 'no win/no fee' basis and may charge a percentage of uplift of fees.[17]

Lawyers are usually remunerated on a fee-for-professional-service basis. The Bar Association maintains that this model should not be abandoned without a compelling case justified by public benefit.

The ALRC has proposed that solicitors acting for the representative plaintiff in class action proceedings should in limited circumstances be permitted to enter into contingency fee agreements to 'allow class action solicitors to receive a proportion of the sum recovered at settlement or after trial to cover fees and disbursements, and to reward risk'.[18] Additionally, the ALRC has suggested that contingency fee agreements in class action proceedings should only be permitted with leave of the Federal Court.[19]

Arguments in favour of contingency fees rely on the potential to promote increased access to justice, particularly for members

of mid-sized class actions which are rarely funded by litigation funders; to promote competition and reduce commission rates; and to mitigate conflicts of interest, compared with time-based billing which has been said by some to reward 'the dull and the slow'.[20]

The Bar Association has to date opposed contingency fees. A significant issue that has underpinned that opposition is the concern that allowing legal practitioners to hold a direct and potentially substantial financial interest in the outcome of a given case creates a serious risk of compromising the practitioner's fundamental duty to the court, the overriding duty of candour and possibly the duty to their client.

The Bar Association has to date opposed contingency fees. A significant issue that has underpinned that opposition is the concern that allowing legal practitioners to hold a direct and potentially substantial financial interest in the outcome of a given case creates a serious risk of compromising the practitioner's fundamental duty to the court, the overriding duty of candour and possibly the duty to their client. At best, it creates the appearance of a conflict which can be just as damaging to the profession's reputation.

There is also the equally important concern that contingency fees may create risk for vulnerable plaintiffs, exarcerbate rather than ameliorate conflicts of interest and contribute to the bringing of unmeritorious claims.

The key issue in the current debate is whether contingency fees can be implemented in NSW in a manner that does not adversely impact upon the interests of litigants or the duties of lawyers as officers of the court. In contrast to our experiences in NSW, contingency fees have been allowed in the USA for more than 230 years.[21] If there is an appetite to introduce contingency fees here, the US experiences will need to be carefully considered. For more than 60 years, contingent fee lawyers have been required by New York courts to file confidential 'closing statements' with the court when a case is resolved, disclosing their fees, settlement amounts, expenses and related information.[22] This requirement was implemented in response to concerns raised in the 1920s by the New York City bench and bar about contingent fee lawyers' conduct and 'ambulance chasing'.[23] Today, retainer and closing statement requirements apply to all attorneys practising in Manhattan or the Bronx, regardless of which court the case is filed in.[24]

The cost of justice

In an increasingly noisy world, where anyone with an internet connection can be a commentator, and the rule of law is often tossed around like confetti without thought to its meaning, there are many competing voices that may overshadow barristers' voices in the public domain.

That does not mean that the message of the NSW Bar is any less important or urgent.

It is as critical now as ever for the Bar to speak up for the administration of justice and the independence of the legal profession – even and especially when it is unpopular to do so.

The cost of accessing justice remains a significant concern. But the economic and social cost of losing a robust and independent legal services profession is greater. For the New South Wales Bar, outweighing all considerations in the current debate on contingency fees, litigation funding and class actions, is the fact that we are a profession that has an overriding duty to the court as officers of the court and not just a business.

END NOTES

1 C Dickens, *Bleak House* (first published 1853, Wordsworth Editions Limited, 1993) 467.
2 The Hon T F Bathurst, Chief Justice of New South Wales, *Commercialisation of Legal Practice: Conflict Ab Initio; Conflict De Futuro* (Speech to the Commonwealth Law Association Regional Conference, Sydney, 21 April 2012) 3.
3 See, eg, Spigelman CJ, *Swearing In Ceremony of The Honourable J J Spigelman QC as Chief Justice of the Supreme Court of New South Wales* (25 May 1998) <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Spigelman/spigelman_speeches_1998.pdf>.
4 ALRC, *Class Action Proceedings and Third-Party Litigation Funding*, Discussion Paper No 85 (2018) 3.
5 Ibid, Proposal 3-1.
6 Ibid, 14 [1.3], quoting Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991, 3019 (Senator Durack).
7 Ibid, 14 [1.4]-[1.5].
8 Ibid, 14 [1.5], 37 [2.9]-[2.11]
9 Ibid, 16 [3.30].
10 Ibid, 43 [3.1].
11 Ibid, 49 [3.24].
12 Ibid, 43 [3.1] citing *Corporations Amendment Regulation 2012* (No. 6) (Cth) Items 6, 1B and 1.
13 Ibid, [3.2].
14 Incerto, Rodgers & Cummings, 'The Third Party Litigation Funding Law Review – United States', *The Law Reviews* (online) (2018) <https://thelawreviews.co.uk/edition/the-third-party-litigation-funding-law-review-edition-1/1152267/united-states>.
15 Andrew Denney, 'NY Lawmakers Considering Bills to Consumer Litigation Funding', *New York Law Journal (online)* (29 May 2018) <https://www.law.com/newyorklawjournal/2018/05/29/ny-lawmakers-considering-bills-to-regulate-consumer-litigation-funding/>.
16 ALRC, above n 3, 82 [5.5]; see, eg, Legal Profession Uniform Law (NSW) s 183.
17 Ibid, 82 [5.6].
18 Ibid, 88 – Proposal 5-1.
19 Ibid, Proposal 5-2.
20 Ibid, [5.11], [5.13], citing Michael Legg, 'Contingency Fees—Antidote or Poison for Australian Civil Justice?' (2015) 39 *Australian Bar Review* 244, 250-1; Michael Duffy, 'Submission 22 to the Victorian Law Reform Commission, Litigation Funding and Group Proceedings' (5 October 2017) 23.
21 ALRC, above n 3, [5.21], citing Contingency Fee Working Group, Law Council of Australia, '*Percentage Based Contingency Fee Agreements*' (May 2014), 4.
22 Helland, Klerman, Dowling, & Kappner, 'Contingent Fee Litigation in New York City' (2017) 70(6) *Vanderbilt Law Review* 1971, 1971-2.
23 Ibid, 1972-3, citing Isidor Wasservogel, *Report To Appellate Division*, First Judicial Department, 4 (1928).
24 Ibid, 1976.

NEW SOUTH WALES
BAR ASSOCIATION

Bench & Bar Dinner

This year's Bench & Bar Dinner was held on Friday, 4 May in the Ballroom of the Hyatt Regency Sydney. The guest of honour was Chief Justice Susan Kiefel AC. Mr Senior was John Sheahan QC and Ms Junior was Emma Beechey.

Mr Senior John Sheahan QC

The Hon Justice Virginia Bell AC and John Sheahan QC

President Arthur Moses SC

Arthur Moses SC, the Hon James Spigelman, the Hon James Spigelman AC QC and Chief Justice Susan Kiefel AC

Chief Justice Susan Kiefel AC

Margaux Matthews

The Hon Justice Margaret Beazley AO and John Sheahan QC

Meher Gaven, Emily Graham and Lachlan Menzies

James Gibson, David Chin, Elizabeth Raper

Ms Junior Emma Beechey

The Hon Michael Black AC QC

Justin Simpkins

Virginia Lydiard and his Honour Judge Frearson SC

Her Honour Judge Julia Baird SC

Anthony Bellanto QC and Richard Battley

Attorney General Mark Speakman SC

Chief Justice Tom Bathurst AC

Tutors & Readers Dinner

The 2018 Tutors & Readers Dinner was held in the Establishment Ballroom on Friday, 22 June. The guest of honour was Her Hon Judge Julia Baird and the Reader Speaker was Tim Senior.

L to R: Karen Shea, Ermelinda Kovacs

L to R: Kate Lindeman, Claire Palmer

Top L to R: Phoebe Arcus, Wen Wu, Eamonn O'Neill
Bottom L to R: Karen Petch, Diana Tang.

L to R: Connor Bannan, Tim Senior, Laura Johnston, Patrick Reynolds

Matt McAuliffe

Her Honor Judge Julie Baird

Nili Hali

David Jordan

L to R: Simon Snow, Alice Zheng, Elenor Doyle-Markwick

Top L to R: Kim Pham, Craig Lenahan, Shipra Chordia
Bottom L to R: Stuart Lawrance, Domenic Delaney, Christina Trahanas, Michael Izzo

Tim Senior

Bar Practice Course 01/2018

Bill De Mars, Michael Fokkes, Sam Blackman, Stephen Dametto, Thomas Arnold, Aidan Gandar, Tim Senior, John Wydell, Brendan Jones, Bryan Williams, Alex Langshaw, Michael Swanson, Anders Mykkeltvedt

Olla Otrebski, Christina Trahanas, Michael Todd, James Haddock, Craig Longman, Andrew McMaster, Jayne Treherne, Karl Prince, Nicholas Condylis, Eliot Olivier, Wali Shukoor, Paul McDonald, Tommy Bicanic, Michael Keene

Mark Burton, Stephen Dayeian, Joel Cook, Dewashish Adhikary, Adam Guy, Ben Cameron, Nicholas Riordan, Simon Snow, Gilbert Tsang, David Robens, Jonathan Martin, Chris Day, Ronny Chen

Ermelinda Kovacs, Gregor Urbas, Linda Barnes, Lara Nurpuri, Rhea Thrift, Alice Zheng, Anish Bhasin, Dominic Delany, Jake Harris, Gregory Schipp, Stephen Hopper, Hussein Elachkar, Eleanor Doyle-Marwick, Matthew McCauliffe

Kate Nightingale, Andrew Wong, Louise Beange, Constantina Lioumis, Karen Shea, Tanya Harris-Roxas, Carolina Soto, Katrina Curry, Shipra Chordia, Peter Allport, Georgina Westgarth, Laura Johnston, Jason Polese

Ermelinda Kovacs, Linda Barnes, Christina Trahanas, Olla Otrebski, Jayne Treherne, Lara Nurpuri
Kate Nightingale, Louise Beange, Laura Johnston, Constantina Lioumis, Alice Zheng, Eleanor Doyle-Marwick, Georgina Westgarth

Networking with a twist

The 2018 KWM Equitable Briefing Event

On 17 May 2018, King & Wood Mallesons held the 2018 KWM Equitable Briefing Event. It consisted of a 'speed-dating' segment followed by open networking structured around practice areas and had the primary objective of creating connections between in-house counsel, women barristers and KWM lawyers. It was underpinned by the theme for International Women's Day, Press for Progress.

Speaking to the gathering KWM partner, Peta Stevenson, said:

> The event was borne from the shared commitment to equitable briefing between KWM and Woolworths and a desire to take practical action to advance this imperative. We recognise the power of increasing the visibility of female barristers and cultivating connections with corporate counsel and our desire was to do this in a way that was both engaging and productive.

Woolworths chief legal officer, Richard Dammery, Kate Eastman SC and Peta Stevenson each spoke to welcome participants.

A broad range of clients was represented, demonstrating the common commitment to gender equitable briefing.

KWM has adopted the Gender Equitable Briefing Policy as part of a broader gender equality strategy, consisting of a range of initiatives across the firm. For equitable briefing, these include information sessions, resources for staff and a commitment to internal and external reporting to monitor progress.

By Brenda Tronson, Level 22 Chambers

CORRECTIONS

[2018] (Autumn) *Bar News* featured an article 'Practising at the London Bar', which was divided into two sections: 'Reflections from a Sydney barrister' and 'Reflections from a London barrister'. The first was authored by Christopher Parkin of 5 Wentworth Chambers. Unfortunately, attribution for the second section was omitted. It was in fact written by Duncan McCombe, of Maitland Chambers in London. *Bar News* apologises to Duncan and regrets any confusion that might have been arisen.

[2018] (Autumn) *Bar News* featured a number of articles on First Nations people and the law, including a lengthy piece that records what was said by each speaker at the Bar Association seminar on 24 October 2017 regarding the Uluru Statement. That article refers to one of the speakers as Associate Professor Rosalind Dixon. This is incorrect. Her correct title is Professor Rosalind Dixon. *Bar News* apologises for any confusion or inconvenience it might have caused.

Acting for the cause of the free

Arthur Moses SC spoke at the ADF Reserve Panel Dining In for Reserve Lawyers on 27 July 2018. Following his address, the president of the Bar Association said that he offered his heartfelt thanks to all ADF Reserve Legal Officers for their service both in Australia and overseas.

L to R: SQNLDR Arthur Moses SC, RAAFSR, President, NSW Bar Association ARM; LTCOL Graham Barter; LTCOL Jonathan Hyde Judge Advocate / Defence Force magistrate; CAPT Luke Chapman; MAJ John Paccriotta

LCDR Felicity Rogers; CMDR Nanette Williams

LCDR Malcolm Gracie; Flight Lieutenant Petra Geara

L to R: SQNLDR Arthur Moses SC, RAAFSR, President, NSW Bar Association; LTCOL Doug Humphreys, Australian Army, President Law Society of NSW; Commodore Peter Bowers, RAN, Director General, ADF Legal Services; Justice Slattery, Rear Admiral RANR, JAG-ADF.

L to R: LTCOL Doug Humphreys, Australian Army, President Law Society of NSW; Commodore Peter Bowers, RAN, Director General, ADF Legal Services.

L to R: LTCOL Doug Humphreys, Australian Army, President Law Society of NSW; SQNLDR Arthur Moses SC, RAAFSR, President, NSW Bar Association; Commodore Peter Bowers, RAN, Director General, ADF Legal Services.

The limits of cross-examination

By Anthony Cheshire SC

I began my career at the Bar in the early 1990s appearing in many small claim motor vehicle accident trials across England and Wales. Often all that was at stake was the client's excess and no-claims bonus with maybe a few travel expenses. The early temptation was to see the adversarial process as requiring a confrontational approach to every issue, even if the amount at stake was a matter of only a few pence. A similar approach permeated directions hearings, where a request for four weeks would, as a matter of course, be met with a counter of two weeks.

After a few initial frustrating attempts to agree small quantum figures with other fresh-faced and similarly aggressive junior barristers, I came to a rapid realisation – not only that making the court determine every issue did not really assist the court in determining 'the real issues in the case' – but it was often not in the client's best interests since it irritated the court and often distracted it from my best points.

Fortunately, the hostility and rudeness that can characterise some practitioners' conduct is still the exception rather than the rule and, where it does occur, it rarely spills over outside the courtroom. There are at least four reasons for this: the ordinary obligations of the practitioner to the court; the more recent statutory obligations to similar effect; the fact that such an approach is often counterproductive in advancing the client's case; and the fact that this job is hard enough even with professional detachment and objectivity and without the introduction of personal attacks and unpleasantness. Further, the profession is at least to some extent self-regulating, and a good reputation, with both other practitioners and judicial officers, is hard-earned and valuable.

Thus professional obligations override a short term forensic gain (*Day v Rogers* [2011] NSWCA 124) and, whatever the effect upon the particular case, preferring the latter can cause long term damage to a practitioner's standing and reputation.

A useful starting point is the statement of Kitto J in *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 at 298 (cited together with other useful authorities in *Body Corporate Repairers Pty Ltd v Oakley Thompson & Co Pty Ltd* [2017] VSC 435; 322 FLR 355 at [119] and following):

> It has been said before, and in this case the chief justice of the Supreme Court has said again, that the Bar is no ordinary profession or occupation. These are not empty words, nor is it their purpose to express or encourage professional pretensions. They should be understood as a reminder that a barrister is more than his client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. [The barrister] is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with … fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and exceptional obligations.

'Robust advocacy, which is commendable, does not license rudeness, which is not' and thus one should not describe the submissions of one's opponent as 'arrant nonsense'.

To similar effect are the observations of McHugh J in *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 41:

> Despite being in a relationship of confidence with a lay client, the first duty of the barrister is not to the client but to the court in which the barrister appears. The duty to the instructing solicitor or the lay client is secondary. Where the respective duties conflict, the duty to the court is paramount. That duty to the court imposes obligations on the barrister with which the barrister must comply even though to do so is contrary to the interests or wishes of the client. Thus, the barrister can do nothing that would obstruct the administration of justice by: deceiving the court; withholding information or documents that are required to be disclosed or produced under the rules concerned with discovery, interrogatories and subpoenas; abusing the process of the court by preparing or arguing unmeritorious applications; wasting the court's time by prolix or irrelevant arguments; coaching clients or their witnesses as to the evidence they should give; using dishonest or unfair means or tactics to hinder an opponent in the conduct of his or her case.

Thus Pembroke J wrote in *James v Phillips* [2017] NSWSC 148 of the need of practitioners 'to restrain the enthusiasms, and sometimes the vindictiveness, of their clients; and to correct the misapprehensions and wrong-headed notions from which they sometimes suffer'; and in *Thomas v SMP (International) Pty Ltd* [2010] NSWSC 822 of the need to temper 'a strictly adversarial approach to the presentation of a party's case and, where necessary, to restrain the enthusiasms of the client and to confine their evidence to what is legally necessary, whatever misapprehensions the client may have about the utility or the relevance of that evidence'.

As the Court of Appeal noted in *The Owners – Strata Plan 21702 v Krimbogiannis (No 2)* [2015] NSWCA 39, the use of the words 'we are instructed to seek an order' does not exonerate a legal representative from his or her obligations to the court.

The duties and obligations that impose upon practitioners an obligation to be more than a 'mere mouthpiece' in their dealings with their own clients extend to dealings in court and with opponents. Thus, courts expect 'civility and professional comity' with 'a rational and non-combative approach to resolving the issues raised' (*Nair-Smith v Perisher Blue Pty Ltd* [2011] NSWSC 878).

That includes not making baseless allegations of professional misconduct (such as an allegation of 'cunning and deception' made in the absence of 'reasonably compelling evidence' (*Bale v Mills* [2011] NSWCA 226 at [91])). Still less should practitioners make threats of

professional reporting or wasted costs orders as part of an attempt to gain an advantage in the litigation (*Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at [194]).

As Palmer put the matter in *Arena Management Pty Ltd v Campbell Street Theatre Pty Ltd (No2)* [2010] NSWSC 1230: 'Robust advocacy, which is commendable, does not license rudeness, which is not' and thus one should not describe the submissions of one's opponent as 'arrant nonsense'.

Many of the rules governing cross examination derive from the same principles. In *Lets Go Adventures Pty Ltd v Barrett* [2017] NSWCA 243, the trial judge had made adverse credit findings that were based, at least in part, on the fact that a witness' demeanour changed at a particular point in cross examination, which was when it was put to him that he was lying. The Court of Appeal held that there had been no factual basis so to accuse him and further that counsel's questions and comments, many of which had been 'gratuitous and supercilious' and accompanied by 'inappropriate rebukes' made the witness' response understandable.

Apart from the breach of professional obligations in accusing the witness of lying in the absence of a reasonable evidentiary justification, the court put the matter thus at [123]:

> Procedural fairness requires more than merely giving each party an opportunity to be heard. It also requires that each witness be permitted to answer questions without being abused in the process. This is not to say that cross-examination cannot be robust, but it must be fair. The latitude commonly afforded to cross-examiners does not amount to a licence to offend, ridicule or vilify. Fairness requires that no proposition, particularly one which is damaging to the witness, be put without a basis. It also requires that questions be asked one at a time and that cross-examination not be peppered with gratuitous and, as in the present case, insulting, commentary to the witness. It requires that the witness be permitted to finish his or her answer and not be cut off or needlessly interrupted.

Similar observations were made as to counsel's obligations not to allege in court or in a pleading (or indeed otherwise) 'criminal conduct or some lesser but serious discreditable misconduct against a witness or party without a proper foundation to do so' in *Rees v Bailey Aluminium Products Pty Ltd (2008)* 21 VR 478 at [32]:

> …counsel must exercise an independent discretion or judgment to ensure that the conduct of their client's case is in accordance with the dictates of the administration of justice.

"Forget you're a lawyer, Fred, you're cross examining me again."

One of the often breached rules is to confront a witness with the testimony of other persons in order to suggest that the witness is incorrect. This 'technique has elsewhere been described as 'a form of bullying — using unfair means to persuade a person to retract his or her evidence'' (see *Rees v Bailey* at [57]). The prohibition extends to a witness 'being asked to provide an explanation as to why the first witness considers that the evidence of the second witness differs from the evidence of the first witness' (*Chahal Group Pty Ltd v 7-Eleven Stores Pty Ltd* [2018] NSWCA 58). Counsel is, however, 'entitled to ask the witness whether he would agree with other evidence if it were given' (*Rees v Bailey* at [57]).

Earlier in this article, I noted that compliance with the various professional obligations can make a practitioner a more effective advocate. I return to that issue with the comments of Pembroke J in *McLaughlin v Dungowan Manly Pty Ltd (No 3)* [2011] NSWSC 717:

> It needs to be emphasised that the efficient conduct of commercial litigation, indeed all litigation, can only be assisted by restraint, moderation, sensible co-operation and sound judgment by counsel. Indeed the due administration of justice demands it.

His Honour then referred to the wider duty to the court and the more recent statutory duties, before quoting the words attributed to Lord Bingham of Cornhill:

> The effective advocate is not usually he or she who stigmatises conduct as disgraceful, outrageous, or monstrous, but the advocate who describes it as surprising, regrettable or disappointing.

Finally, in *Birketu Pty Ltd v Westpac Banking Corporation* [2018] NSWSC 879, McDougall J considered an interlocutory matter that had been marked by 'discourtesy' and 'pugnacity', where each party had 'been keen to throw epistolary grenades at the other', albeit not rising to the level of the 'offensive, vituperative and gratuitously insulting' correspondence in *McGuirk v The University of New South Wales* [2009] NSWSC 253.

His Honour concluded as follows:

> If it were possible, I would consider giving a direction that each side take a step back and a cold shower and then resume the civilised preparation of the litigation. But that is an order for which no precedent exists, and which I perceive to be beyond even the wide powers conferred by [UCPR] r 2.1.

The Rules Committee might wish to consider introducing an express power to that effect or alternatively a guiding principle for all practitioners as I prefer to express it: don't be a goat.

Legislating to end the Ellis defence

By Attorney General Mark Speakman SC

On a rainy June Sunday in Queens Square, I announced that the NSW Government would be overhauling civil litigation laws in response to the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.

Co-announcing this set of reforms with me was an inspirational advocate, John Ellis. For years, John had been championing the cause of those who, like him, had been scarred by childhood sexual abuse. His advocacy before, during and after the royal commission was instrumental in bringing to light the changes that needed to be made – and in moving governments to implement them.

John understood all too well the legal barriers confronting survivors seeking compensation and accountability for their trauma. He himself had brought proceedings with that objective.

In his proceedings, John contended that legal responsibility for his sexual abuse by a priest (who was deceased by the time proceedings were brought) extended to the archbishop of Sydney, among other things as 'head of the unincorporated association known as the Catholic Archdiocese of Sydney'.[1] Chief among the barriers to a successful claim was a formidable argument that the limitation period should not be extended because the archbishop could not be held liable for torts that, loosely speaking, were said to have been committed by an unincorporated association. If this aspect of John's claim were to succeed, he needed to overcome this argument.

He did not. A Supreme Court judge held that the Catholic Archdiocese of Sydney was not a sufficiently identified class of persons for whose torts the archbishop could be found liable and refused to extend the limitation period in respect of the claim against the archbishop.[2]

Nor was John able to convince the Court

of Appeal otherwise. In a seminal judgment, published on 24 May 2007, the Court of Appeal sided with the first instance judge on this point. The court held that the Archdiocese of Sydney, being an unincorporated association, could not be sued and that a representative order was unavailable to remedy this problem.[3]

The Court of Appeal also allowed an appeal against orders of the first instance judge allowing John's case to proceed against the trustees of the church for the Archdiocese of Sydney.[4] In the Court of Appeal's view, the mere fact that the trustees held property for and on behalf of the church did not mean that the trustees could be held liable for the tortious conduct of John's abuser, especially because the trustees had no power of appointment or oversight of priests.[5]

John's claim was dismissed.

For years, the 'Ellis defence' – a somewhat protean term later given to describe variously some or all of the Court of Appeal's reasons for dismissing John's claims against both the Archdiocese of Sydney and the trustees – cast its shadow over potential claims of child sexual abuse survivors against the Catholic Church.

That is, until the Royal Commission into Institutional Responses to Child Sexual Abuse was convened.

The Royal Commission shone a coruscating spotlight on shameful truths that for too long had lived in the dark. It brought to light the incredible courage and perseverance of child sexual abuse survivors. It drew attention to the individual and institutional failures that had contributed to those survivors' of trauma. And it showed how the law – ostensibly a protector of the vulnerable – had undermined attempts to remedy the effects of the abuse.

Notably, the Ellis defence was identified by the royal commission as being one legal outcome in need of change. According to the royal commission, 'the difficulties for survivors in identifying a correct defendant when they are commencing litigation against unincorporated religious bodies, or other bodies where the assets are held in trust, should be addressed'.[6] But the law giving rise to this set of difficulties was by no means the only example of a civil law that was recognised as discordant with the realities of child sexual abuse.

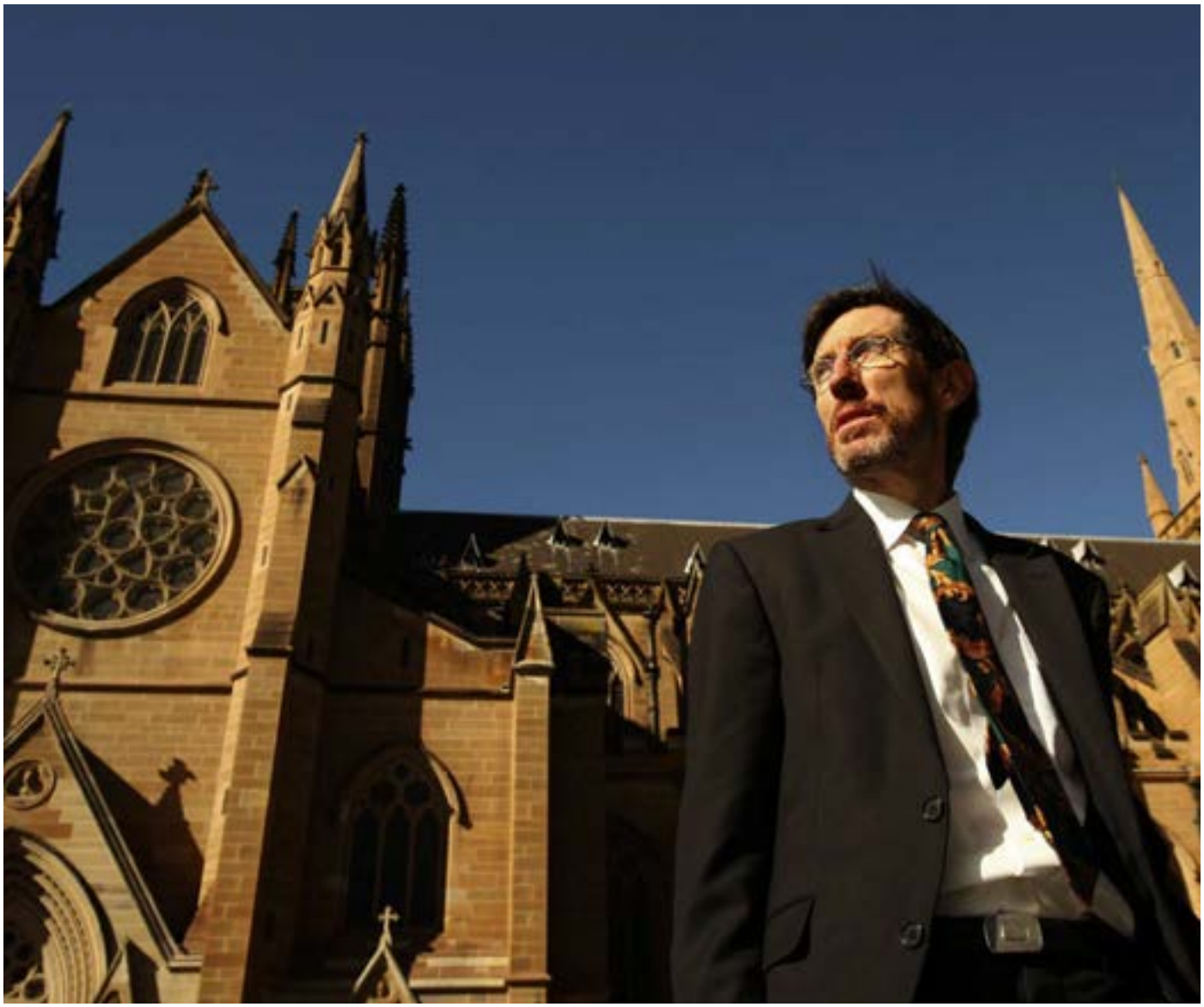
Rather, the royal commission identified a number of ways the law had operated against child sexual abuse survivors seeking compensation, including through an overly narrow conception of vicarious liability that did not clearly extend to torts committed by volunteers or religious officers, and through the absence of an appropriately strict duty of care to prevent child abuse.

In its proposed legislative response to the royal commission, the NSW Government has been determined to implement reforms directed at excising this tendency from the law.

These reforms include:

- codifying and extending the prospective vicarious liability of institutions for employees to cover non-employees, like volunteers or religious officers, who have taken advantage of their position to perpetrate child abuse;

- imposing a new statutory duty of care on



John Ellis, who championed the cause of those who had been scarred by childhood sexual abuse. Photo: Steven Siewert / Fairfaxphotos

all institutions that exercise care, supervision or authority over children, to prevent child abuse (such that an institution will be liable for child abuse, prospectively, unless the institution can prove it took reasonable precautions to prevent the abuse); and perhaps most notably,

- introducing a 'proper defendant' law to prevent institutions relying on the Ellis defence. This law will mean that courts will have the power to appoint trustees to be sued if the sued institution fails to nominate an entity with assets as a proper defendant and to allow the assets of an associated trust to be used to satisfy the claim. Importantly, this law will apply retrospectively and prospectively.

The National Redress Scheme sits alongside these reforms, as a less onerous means for survivors to seek justice without the stress and costs of navigating the courts. NSW was the first state to enact legislation referring powers to the Commonwealth to implement the scheme. The scheme, which began on 1 July 2018, includes a payment of up to $150,000 in recognition of a survivor's hurt and injury, a direct personal response from the institution involved and, in NSW, access to unlimited counselling and psychological support.

These reforms can never undo the hurt and suffering of survivors. Nor do they relieve the government – an institution that itself failed to protect children in its care – of the need to do significantly more work in this area. But these laws will improve access to recognition, or even justice, for those who have been scarred by sexual abuse.

In the words of John Ellis himself, in a letter to the *Newcastle Herald*:[7]

> As the Ellis defence is confined to the annals of legal history, we can look forward to a society in which child protection and accountability of those who take the sacred trust of caring for children are given their rightful prominence.

END NOTES

1 *Ellis v Pell* [2006] NSWSC 109 at [5].
2 Ibid [55]–[56].
3 *Trustees of the Roman Catholic Church v Ellis* [2007] NSWCA 117 at [47], [61], [93].
4 Ibid [151].
5 Ibid [140]–[141], [149].
6 Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report*, 2015, p 58, available at https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_redress_and_civil_litigation.pdf.
7 *Newcastle Herald*, Letters to the editor June 11 2018, 2018, available online at https://www.theherald.com.au/story/5457205/train-between-cities-is-anything-but-pretty/.

The following is a revised version of a speech given by Emmanuel Kerkyasharian in the Bar Association Common Room at a seminar titled 'Crisis in Legal Aid' on 18 April 2018.

Crisis in Legal Aid

Not long ago, a four-week trial was conducted before the Supreme Court. The charge was murder. It involved complex issues of law. The two co-accused on indictment were sentenced to non-parole periods in excess of twenty years.

One of them was represented by a public defender. That public defender cost the State of NSW about $2,800 per day of preparation time. In the weeks leading up to the trial, that public defender spent 12 days preparing to run it. The director of public prosecutions was represented by a salaried Crown. While I have not conducted the analysis, Crowns and public defenders have the same yearly salary, and hence it is likely that that Crown cost the state about the same as a public defender. That Crown prosecutor also spent 12 days or so preparing to run the trial.

The other co-accused was given a grant of Legal Aid with which to engage counsel. Legal aid granted only six days' preparation at $1,150 per day. That is, the accused was granted $6,900 in order to pay counsel for the 12 days' work necessary for the preparation of a murder trial. That barrister calculates his overheads for the period at about $6,000. This means, in effect, that for those 12 days' work, counsel made $900 profit. Assuming an eight-hour day (and which barristers work only eight-hour days preparing a serious trial?), that amounts to $9.37 per hour: about half the minimum wage.

In NSW the person whose job it is to make sure that the wrong person doesn't spend a lifetime in prison is paid about half what we pay our cleaners.

There is a crisis in Legal Aid.

The last decade

2007 was the last time Legal Aid raised the amount it provides accused to pay for counsel in ordinary District Court criminal trials. Notionally, they provided about $987 per day. I say notionally because even back then there was an expectation that a practitioner engaged by the accused would work for more hours than those for which he or she was paid.

For all but the most complex matters, the rates provided to accused people to engage private practitioners in criminal matters have not increased in 11 years.

The *Legal Aid Commission Act 1979* (NSW) prescribes that rates to engage private practitioners must be less than the commercial rate. This is, perhaps, as it should be. The

difference between what one might charge as a private rate and Legal Aid rates can be considered, reasonably, as a contribution of the legal profession to the community. However, that 'contribution' has reached the point where it is becoming increasingly difficult for accused to secure experienced and skilled practitioners to act for them.

In NSW the person whose job it is to make sure that the wrong person doesn't spend a lifetime in prison is paid about half what we pay our cleaners.

There is a crisis in Legal Aid.

In 2007 the minimum wage was $13.74 per hour. In 2018 it is $18.29 per hour. The minimum wage has increased by about 25 per cent. The salary of a backbencher in the New South Wales Parliament has increased by more than 20 per cent over that time. The salary of the director of public prosecutions has gone from $309,000 to $435,000 – an increase of about 36 per cent. The salary of most, if not all, government lawyers has increased by 20 per cent or more over that time.

In 2007 Legal Aid's budget was about $190 million. In 2016–17 the budget was about $308 million. That amounts to a 62.3 per cent increase over that 10-year period. It is true that Legal Aid is now granted for certain matters previously excluded from its purview, for example, applications in the Supreme Court to detain high risk offenders, but these are a fraction of Legal Aid's total expenditure. It is also true that it has been cut for some things, like many summary hearings before magistrates.

The wages of in-house Legal Aid lawyers have kept pace with the wage rise of all government funded law jobs. So have the wages of the administrators who work there.

Conservatively, there has been at least a 20 per cent reduction – and one has only anecdote on which to base that figure – in the amount that Legal Aid will provide for an accused to pay for their lawyers' preparation. In addition to the 'contribution' by way of a discounted rate, lawyers are expected to provide a further 'contribution' by working additional hours for free.

Successive governments over that same 10-year period have established various programs directed at extracting from a defendant in a criminal matter an earlier guilty plea. These, and other measures, have been put into place ostensibly to improve the efficiency of courts. All of those measures, however, require more preparatory work from counsel prior to trial. And yet, historically at least, no additional funding has been provided for them. On the contrary, as noted above, there has been a reduction in funding for preparation.

Moreover, the administrative rigmarole that one must go through in order to get a grant of Legal Aid, and in particular to acquire a reasonable amount of preparation funding, has increased, hitting solicitors particularly harshly.

It is becoming increasingly common that accused do not get a grant until either a few days before, the day of, or a few days *after*, their trial. This means that accused must rely on the good will of counsel and solicitors to prepare their matter. It also means unnecessary delays in court.

Worse, where a matter, despite days of preparation, resolves in a plea of guilty, Legal Aid on occasion will not provide the funding for preparation that it would have otherwise provided had the matter run for trial. An example: having initially been advised in writing that four days' funding for preparation was available for a particular matter, that figure was nevertheless halved when the matter settled on the first day of trial, despite the preparatory work (and a lot more) having already been done by counsel.

Perhaps most troubling is the policy introduced a few years ago for Local Court matters, whereby for a large number of criminal matters, those that are not likely to result in gaol sentences, if you plead guilty, qualify for legal aid. But if you dare avail yourself of a

Legal professionals from across Victoria at a Rally For Legal Aid fundraiser outside the County Court of Victoria on 17 May 2016 in Melbourne. Photo: Vince Caligiuri / Fairfax Media

hearing, you are on your own. The pressure placed on an accused to plead guilty is perverse.

Outside of criminal law

The situation outside of criminal law is even worse. Funding for citizens with civil matters is so paltry that one cannot make sensible comment about it, beyond noting that it is barely existent. Family law and care and protection funding has been stripped bare.

It is no exaggeration to say that the funding provided for Care and Protection, including, for example, lawyers to represent children who are being sexually abused, is abominable. The following hypothetical will suffice to illustrate that:

A barrister of ten years' experience is briefed to appear for the Independent Legal Representative for a child in a Care and Protection matter. The matter involves sexual abuse allegations. There are competing experts involved and complex issues of fact and law. As the matter is an appeal from the President's Children's Court the appeal is held in the Supreme Court, where it is listed for a five-day *de novo* hearing.

As the brief is to appear for a child, no preparation time has been allocated. Despite this, counsel spends considerable time preparing the matter. It settles by way of consent orders in the first hour of the first day of the hearing due, in part, to the hard work of counsel. The presiding justice of the Supreme Court congratulates the parties and their legal representatives on their good sense and diligence. Under the current funding scheme, counsel might only be entitled to charge $150 for the entirety of their involvement in the matter. By way of comparison, if you drive from Castle Hill to the CBD down the toll roads and back for a few days it will cost you about $145.

The role of lawyers

It is tempting to see this solely as a funding issue and blame the executive government. However, it is important to acknowledge that lawyers too have a role to play. Barristers, be they prosecutors or defence counsel, are at least some part of a system that is burning through public funds. Judges also bear some responsibility.

It took an appearance at a country District Court to open my eyes to the problem. Four defence counsel, their solicitors, a Crown, a District Court Judge, her associate, and then all the non-lawyers – the accused, witnesses, and most importantly the alleged victims of serious crime – are all present at 10am to get the trial started. Despite the matter having been set down some months before, Counsel at the bar table said the five-day estimate was too short, and therefore the matter could not be heard in the sittings.

The trial date was vacated on the spot. There was no inquisition by the presiding judge as to why the error was made and if the matter could run. $4,400 in Legal Aid barrister's fees were thrown away on that day

alone, not to mention the cost of our travel and accommodation.

A barrister from the UK, here on a sabbatical, who was assisting me was appalled. In the UK, time limits would be set on things like cross examination and speeches. Counsel would be required to justify how long they were going to spend with each witness and why they wanted that witness called. The matter would be forced into the allocated time.

Under the current funding scheme, counsel might only be entitled to charge $150 for the entirety of their involvement in the matter. By way of comparison - if you drive from Castle Hill to the CBD down the toll roads and back for a few days it will cost you about $145.

It got worse. As often happens on trial days, a deal was cut by the experienced practitioners on the ground. It was agreed to by the complainant. So, hopeful of a solution, we adjourned to the next day.

Crown prosecutors cost the state in excess of one quarter of a million dollars each year. They are statutory appointees with (albeit limited) tenure. They are skilled and experienced advocates. They are also not permitted by the director of public prosecutions to make decisions about whether matters should run or settle in a particular way. Instead, their advice is subjected to a complicated process of review.

My understanding of the process is that the advice of the Crown prosecutor goes to a solicitor in the 'Director Chambers' (in effect the executive suite of the director and deputy directors of public prosecutions). There, that solicitor reviews the advice provided by the statutory appointee Crown and may issue a further advice. A decision is then made, usually by a deputy director of public prosecutions.

Whatever the merits of the decision made in this case, it is far from clear why a statutory appointee, trusted to find indictments and run trials for the Crown, experienced and deeply involved in a matter, should have his or her independent advice reviewed by a solicitor who has limited knowledge of the brief and then overturned by a deputy DPP relying in part on that advice. It is an abject waste of money both for the prosecution and relevantly, Legal Aid.

The net result is that we arrived on Wednesday morning – having spent another $4,400 of Legal Aid money – to be told that a deputy director had said no. Three days wasted, $13,200 of Legal Aid fees thrown away.

What's worse, this is not unusual. It happens Mondays through Thursdays (since nobody sets a trial down for a Friday) in tens if not scores of trials each week. It is reasonably common around the state to find 30 counsel, sitting around, with no judges, waiting to be not reached or adjourned because of late service of material or some other reason. Scores of victims of serious crimes, witnesses, police, sitting around wasting time, and burning money.

EAGP

We are told that the Early 'Appropriate' Guilty Plea Scheme will fix at least some of this. The basic idea of the scheme is to push parties to arrive at a plea arrangement in the Local Court so as to avoid occurrences like the one described above. It is important to note that it is not designed nor expected to increase the number of guilty pleas, but just to shift them forward in time, so it's not going to fix everything.

$200 million dollars has been set aside by the government for a suite of changes to the criminal justice system, $92 million of which is for the Early Appropriate Guilty Plea Scheme. Less than 10 per cent of that – some $9 million – has been allowed for Legal Aid.

The attorney general in his second reading speech introducing the reforms said:

> In addition to the five elements of legislative reform, additional funding is being provided to the Office of the Director of Public Prosecutions and Legal Aid to ensure the continuity of senior lawyers for both the prosecution and the defence from start to finish...
> …
> These measures are designed to remove the perverse incentives that currently operate …

At first blush, this seemed like great news: And then Legal Aid sent us the proposed fees. The scales are completely unrealistic. They highlight the danger of fixed fees. For three thousand dollars, regardless of the brief size (except in exceptional circumstances), an accused is expected to find counsel who will:

- conference with them;
- read their brief (we were told orally that there would be extra preparation, but have not been told that in writing);
- provide an advice on evidence, i.e.: what evidence is missing, what should be asked for, what should not be ask for;
- talk to the Crown about getting that evidence;
- advise on subpoenas;
- advise on whether they can/should call witness in the Local Court prior to committal;
- write submissions to call for witnesses;
- appear on the hearing about calling witnesses;
- appear at the arraignment in the District Court;
- spend two hours travelling to and from a gaol on at least one occasion, if not more.

When the trial finally comes, counsel won't get any preparation funding, on the basis that it has already been provided in the Local Court. At least that is what the first proposal said. We have been told orally that there will be more, but again, we are yet to see that in writing.

So with a bit of back and forward, we put together a revised task list and a reasonable rate of $180/hour. Legal Aid tells us that that this, for barristers alone, will cost an additional $16.8m per annum.

Since the whole scheme relies on senior barristers having the matters, we've asked the government for that amount. We await their response.

I am not hopeful. [Since the time of writing, the government has made $10m more available for all lawyers, not just barristers. While this step is both significant and to be commended, in my view the EAGP scheme remains gravely underfunded].

Other negotiations

Parallel to the discussion about Guilty Plea scheme funding, Legal Aid is putting together a proposal for greater funding overall. It has been predicted by BOCSAR that District Court trial work will increase by five per cent per annum for at least the next few years, meaning significant extra costs for Legal Aid, which are not funded.

So Legal Aid needs more money for itself, and to fund private practitioners. That process is ongoing. But the squish is on: there is a push for fixed fees. And fixed fees, like the one proposed for the EAGP scheme, are the beginning of the end. Once they have barristers on fixed fees, then the screws really start turning, which is what has been happening in the UK.

Fixed fees mean a transfer of risk from

Barristers in London protest at cuts to the legal aid budget. Photo: Andrew Cowie / Alamy Stock Photo

the state (the court, the prosecutors and the police) to the barrister and the client. From this, the freedom and clarity of decision-making becomes dangerously compromised: if, for example, you're not going to get another $150 for the next hearing day, should you adjourn because the police just threw 500 pages of telephone intercept material at you at the door of the court? Perhaps you should encourage your client to plead today, because, as the bench makes clear, 'I can deal with your client's matter today Mr Kerkyasharian but only if she pleads…'

Fixed fees mean a diminution in the quality of justice. Studies conducted after the imposition of a fixed fee regime in Scotland showed that lawyers dramatically increased the number of cases they undertook, and correspondingly significantly reduced the time they spent preparing each one.

UK barristers report that Legal Aid matters involving 100 hours of pre-trial preparation and a full week in the Crown Court sometimes pay only £1000. Instructing solicitors do not appear in court in legally aided matters – counsel are almost invariably on their own. The same is happening here: caps and a ridiculous funding arrangement, where solicitors only receive five hours a day, and only for time physically in court, means barristers are increasingly appearing uninstructed, or instructed by clerks.

Around Australia

The above illustration shows just where we are headed. In Australia, the Law Council's 'Justice Project Interim Report' published in March 2018 reports:

- 14 per cent of people live below the poverty line, yet legal aid representation is only available to eight per cent of Australians.
- Most people charged with crimes or requiring representation in family law matters do not qualify for legal aid grants.
- People who are cash poor but have some assets can expect not to receive help.

Legal Aid is not a funding priority anywhere.

Should it be?

A question with which we ought to grapple is should there be Legal Aid at all?

It is important to remember that Legal Aid has not existed since time immemorial; the access to justice it provides is a relatively new privilege that, for many years, those accused of crimes, and the poor, did not enjoy.

It seems to me though, a system worth protecting. It is the presence of highly trained, skilled, well-armed advocates on both sides that ensures justice. Sadly, we have already given up so much of it. Committals are gone. Jury trials in all but the most serious criminal matters are gone. All of it sacrificed on the altar of efficiency.

Like all repositories of power, the justice system's legitimacy comes from competence. No matter how efficient, if the outcomes are unfair, then it is illegitimate. Every reduction in legal aid funding diminishes the justice

system.

Poorly paid barristers cannot afford chambers, or where they can, cannot afford to participate in the life of chambers. They cannot give to the Bar. They are unlikely to take silk. They are never going to get a junior brief and learn all that one does from such encounters. They are too often self-excluded from the hallowed basement that is the bar common room, and, despite often being the best of us, they are excluded from the bench. Poorly paid barristers have to go home having been chastised by a judge for being unprepared; embarrassed, distraught, and unable to pay their mortgage.

It means that the talent is running away. It means abhorrent mental health. Worst of all, it means that innocent people may go to gaol, and the guilty may roam free. And in the Care and Protection jurisdiction, it means that children who are getting raped by their parents might not be able to escape their clutches.

Like all repositories of power, the justice system's legitimacy comes from competence. No matter how efficient, if the outcomes are unfair, then it is illegitimate. Every reduction in legal aid funding diminishes the justice system.

What we have been doing

We are late to the fight. Legal Aid is required by its constituent Act to consult with the Bar Association whenever it changes its fee scales. For more than a decade the Bar Association has worked with Legal Aid on fees and refrained from demanding increases that were clearly justified. We continue to try and work with Legal Aid, however there is a desperate need to push for more funding both from Legal Aid and from the state and federal governments, and we are now in the fight.

Part of the problem is that barristers have utterly failed in communicating to the community why we are necessary. Outdated and out of touch with the *zeitgeist*, we are the apparently pompous men and women in wigs.

It is ironic that professional communicators have communicated so miserably. Whatever the reason, we have failed to deal with the enormous changes to the cognitive environment in the last 20 years.

Our media skills are childlike compared to those of our colleagues in other countries. Our social media skills are non-existent: our Twitter accounts are dull at best, and full of puerile virtue-signalling at worst. More likely for criminal barristers, they are non-existent. We have failed completely to engage in the very media that guides modern policy processes.

And where we have engaged, our message has been wrong.

Barristers are, to use the words of Angela Rafferty QC, head of the English Criminal Bar Association:

> …the people who fairly prosecute and fearlessly defend. Without us, innocent people would now be locked up. Without us, the guilty would have walked free. Without us and our good will, the system would have broken a long time ago.

It is our fault that the community does not know that.

Study after study shows the ways in which Legal Aid funding cuts affect the disadvantaged in society. Few, if any, focus on the effect on the justice system as a whole. We have to get across to the great majority of society – the failing middle class – that we are not servants of particular privileged sections of society (the super rich, those with a lobby, and, of course, the crooks) but rather servants of all.

It is our job to make sure that everybody else – the government, the police, the bureaucrats who come into your house and take your kids away – are getting it right and held to account. We are the guardians of the guardians themselves. To my mind, that's the message that we should be broadcasting.

What can we do?

In Northern Ireland, fees were successfully raised when a campaign by barristers to refuse to take new legal aid work was put into effect. This is not so much a strike as it is a refusal to be engaged as a private contractor at the rates offered. Just as a banking interest would not build a toll road unless the fees were 'reasonable,' each of us can refuse the briefs.

More generally, barristers can apply for adjournments and temporary stays where funding has not been put in place or is inadequate.

Legal Aid obtains silks at greatly discounted rates and essentially never pays for a junior. This is a cause of great harm to the profession, and consequently to the community in the future, and the institutional knowledge and skill of the criminal bar will be much diminished.

It is also the case that we barristers subsidise the government in all kinds of matters. It is not clear to me why, say, counsel appearing for the Crown in an asset forfeiture matter should get paid less than counsel for Joe Bloggs.

These are all matters that barristers in their own practices might reflect on. We are under no duty to work for insufficient money, and certainly for not less than the minimum wage. We ought all communicate that to our government clients.

Whether or not the Bar Association can lawfully arrange collective action is beyond my expertise; but it seems likely, should we continue down the road of fixed fees, that such action will become necessary. Such action has had some, albeit limited, success in the UK.

This year marks 39 years since the Legal Services Commission Bill 1979 was presented to the NSW Parliament. That Bill laid the foundation of the Legal Aid framework that is in place today.

We have failed completely to engage in the very media that guides modern policy processes.

Frank Walker QC, then attorney general, said in his second reading speech:

> It is pointless to have Legal rights if one cannot afford to pursue them in the courts. Without extensive legal aid, justice becomes the prerogative of a privileged minority, and the processes of the law become a weapon that the rich can use against the poor with impunity. Both the judicial system and the legal profession suffer from the lack of public confidence that results.

He went on to say:

> The objective of the government is simply to provide the means by which all citizens might have the same practical access to courts, and to achieve equality before the law. Reasonable limits must be imposed on what it will spend on this, but within those limits the government will, without apology, commit whatever resources it can fund to the removal of injustice against its helpless fellows.

That is how it ought be. And if we still believe that, then it is incumbent on us to get it back there.

Photo: iStockphoto.com

Market manipulation: s 1041A and the sole or dominant purpose test, revisited

By Penelope Abdiel, Banco Chambers

Section 1041A of the *Corporations Act 2001* (Cth) (Act) prohibits any person from taking part in or carrying out a transaction that has or is likely to have the effect of creating or maintaining an artificial price for financial products on a financial market. The provision has attracted increased scrutiny in the wake of the 'Bank Bill Swap Rate' (BBSW) cases, which directs attention towards the test derived from the High Court's decision in *Director of Public Prosecutions (Cth) v JM* (2013) 250 CLR 135 (JM) as to when a transaction will have the impugned effect. In the BBSW cases, ASIC alleged that several large banks had manipulated the market for trading in prime bank bills.[1] Trading in prime bank bills informed the setting of the BBSW, a benchmark interest rate. The effect of the trading – it was said by the regulator – was that it created or maintained an artificial price for certain financial products that were set by reference to that rate.

ASIC also alleged that the Banks' 'sole or dominant purpose' was to engage in trades to that effect. The 'sole or dominant purpose' test was drawn from the High Court's decision in *JM*. In that case, the test was proffered by the DPP, and accepted by the Court, as a way in which the effects element of section 1041A – that is the effects of creating or maintaining an artificial price for financial products – may be satisfied. In *JM*, the accused had borrowed money to exercise some options in a company. The underlying shares were to be used as security for the loan. To the extent the shares fell below a certain price, the lender was entitled to issue a margin call requiring *JM* to provide additional security for the loan. *JM* then procured his daughter to purchase shares in the company, ensuring that the price never fell below the level at which the lender could make the call.

The High Court held that the 'effect' of creating or maintaining an artificial price could be proven by demonstrating that the manipulator had the sole or dominant purpose of achieving that effect. This was because, '[w]here a person has the sole or dominant purpose of setting a price at a particular level, that price does not reflect forces of genuine supply and demand in an open, informed and efficient market'.[2] The forces of genuine supply and demand are those forces which are created in a market 'by buyers whose purpose is to acquire at the lowest available price and sellers whose purpose is to sell at the highest realisable price'.[3]

On one level, the decision in *JM* simplified the task for proving market manipulation allegations. That is, theoretically, it provided a means by which to prove the effects element of market manipulation without reference to an expensive and detailed forensic analysis, demonstrating that the impugned transactions did in fact create or maintain an artificial price.

But the decision in *JM* has also generated some significant complications – and likely unintended consequences – in the application of section 1041A.

First, section 1041A contains no express intention element. The decision in *JM* allowed for price effects to be proven by adducing evidence of the subjective purposes of the contravener; or at least that from such purposes, one could draw an inference of effect on price.[4] Either way, it changed the scope of the evidentiary burden in a way that is not expressly articulated in the provision itself.[5] This appears out of step with provisions that are similar to, or preceded, section 1041A: see, for example, former sections 997 and 1259 of the Act, section 70 of the *Security Industry Act 1970* (NSW), and section 130 of the *Futures Industry Act 1986* (Cth), all of which contained 'intention' elements.[6]

The reasoning in *JM* may also be contrasted with the approach taken in other areas of the law where effects-based proscriptions operate. Competition lawyers, for example, are accustomed to proving that impugned conduct has had the effect or likely effect of substantially lessening competition. Market effects of restrictive trade practices cannot be proven simply by demonstrating the nefarious purposes of the market participants (although nefarious purposes might reveal the intended effects of the impugned conduct). Where purpose is relevant and effects need not be proven – for example, in relation to s 45AD of the *Competition and Consumer Act 2010* (Cth) – the provisions are expressly framed as such (reflecting the

public policy position that certain collusive conduct between horizontal competitors is considered so pernicious as to not require a demonstrated effect on competition in the relevant market).

Second, if 'sole or dominant purpose' is used to demonstrate market effects, determining whose purpose is relevant will not always be straightforward. In the context of corporate liability, questions of agency, and who holds the directing mind and will of a company, will become relevant; that is, if an employee or officer of a corporation engages in a transaction with the requisite purpose, whether that purpose can be imputed to that corporation. It also raises issues in relation to accessorial liability. In last year's decision of *Gore v Australian Securities and Investments Commission* (2017) 249 FCR 167, the Full Federal Court held that – in order to make a finding of accessorial liability pursuant to s 79 or s 1324(1) of the *Corporations Act 2001* – it must be shown that a defendant had knowledge of all the elements of the primary contravention. In the context of section 1041A, this includes knowledge of the sole or dominant purpose of the primary contravener. In circumstances, for example, where a stockbroking firm employs a 'rogue trader', the stockbroking firm may need to have had knowledge of the trader's sole or dominant purpose in order to be accessorily liable.

Third, in criminal market manipulation proceedings, the sole or dominant purpose test may be difficult to reconcile with the *Criminal Code* Act 1995 (Cth) (Code).[7] Section 5.6 of the Code provides that, if the law creating an offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the requisite fault element. For an effects provision like section 1041A, this begs the question of how a Court is supposed to apply both the sole and dominant purpose test, and a recklessness standard to determine whether the fault element has been met.

This issue arose in the Victorian case of *R v Jacobson*, [2014] VSC 368, in relation to market manipulation allegations. There, the Victorian Supreme Court observed that there was 'a necessary inconsistency between the conduct element (taking part in a transaction with the sole or dominant purpose of setting or maintaining an artificial price for GTG shares) and the fault element (being reckless as to whether the transaction had that effect)'.[8] The issue was not resolved, because the parties, between themselves, agreed on the elements of the criminal case that the prosecution would be required to prove.[9]

Fourth, the test may not be appropriate in circumstances where the manipulation of the price of one product (or benchmark rate) is intended to have some desired effect on the price of another product. ASIC's case in the Westpac BBSW Case was premised on traders holding the relevant sole or dominant purpose in respect of trading in Prime Bank Bills, to achieve a particular setting of the BBSW, resulting in an artificial price for certain financial products, being BAB futures, interest rate swaps and cross-currency swaps.[10] Significant in Beach J's reasoning in the case was the disconnect between the sole or dominant purposes of traders in respect of Prime Bank Bills, or BBSW, and whether that sole or dominant purpose was directed to, or achieved, in relation to those ultimate financial products whose prices were referable to that rate.[11] If the case were premised on showing 'effects' alone, the question of where a person's purpose is directed becomes moot.[12]

Finally, under *JM*, a person can contravene section 1041A by engaging in a transaction with the requisite purpose, irrespective of whether their conduct has had any *actual* effect on the price for those securities. The absence of evidence of such effects may be relevant to penalty. In the case of *Heath v R* [2016] NSWCCA 24 the NSW Court of Appeal considered a sentence following a guilty plea on charges for s 1041A conduct. Before the sentencing judge, the appellant had given evidence that his trading had achieved no lasting price impact on the relevant stocks, and he was not able to take advantage of any short term price impact his trading had caused. The Court of Appeal determined that the sentencing judge, in assessing the objective seriousness of the crime, had 'overlooked or misapprehended the fleeting impact of the applicant's trading on the market and the unlikelihood that he would in fact obtain any lasting financial benefit as a result of his trading'.[13] In a statement of agreed facts, the appellant had admitted that he undertook each of those transactions for the sole or dominant purpose of maintaining or increasing the price of the shares. As the Court noted, however, 'that purpose could never have been achieved by trading at the volume and frequency of the applicant's trading'.[14]

Certainly the sole or dominant purpose test effectively presupposes that the ulterior motive of a trader is what actually renders a price artificial.[15] Nevertheless, the approach of the Court of Appeals in Heath does not resolve the fundamental difficulty of the ruling in *JM*: that the effects requirement of s 1041A might be satisfied absent proof of effects.[16]

Beach J has cautioned that 'no part of s 1041A expressly authorises me to substitute and treat as conclusive the subjective motivations of an individual trader for the 'effect' of the transaction' and that the test was not some separate element of a market manipulation offence. Rather, it is just one source of information from which to prove effects.[17] His Honour also noted that the *ratio* in *JM* was directed to transactions of a particular kind; that is, on-market transactions in ASX-listed shares. The ubiquity or importance of the sole or dominant purpose test in market manipulation proceedings should therefore not be overstated. Nevertheless, there are several unresolved aspects of the test for section 1041A, and it is likely attended by some level of uncertainty for the foreseeable future.

END NOTES

1 As described by Beach J, in the recent decision of *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* [2018] FCA 751 (*Westpac BBSW Case*), prime bank bills are prime bank-accepted bills of exchange, that are instruments by which banks may either borrow or lend funds for a short term. Prime Banks are certain banks elected and recognised as such, pursuant to a process of election and recognition specified by AFMA. Trading in Prime Bank Bills inform the setting of the BBSW, which is the key benchmark interest rate in Australian financial markets and which provides a reference (i.e. pricing) rate for a range of futures, interest rate swaps and cross-currency swaps. .

2 *Ibid* at [72].

3 *Ibid* at [71].

4 Cf. ibid at [1958].

5 There may be good public policy reasons for the decision. For example, transparency between buyers and sellers; and the 'efficient allocation of capital and preservation of market confidence': ASIC Report 440, July 2015 at [59]. But it is nevertheless a curious result for a provision that contains no express mental element.

6 The majority decision was based in part on Mason J's reasoning in *North v Marra Developments* (1981) 148 CLR 42, with respect to section 70 of the *Securities Industry Act* (NSW). But section 70 prohibited persons from doing anything 'which is *calculated* to create a false or misleading appearance of active trading.' That is, there was arguably an intention-element in the provision that is not evident in s. 1041A. The High Court in *JM* also contrasted the position in relation to the futures commodities context and section 130 of the former *Futures Industry Act 1986* (Cth). But again, that provision prohibited persons from engaging in 'transactions *intended* to have, or likely to have, the effect of 'creating an artificial price for dealing in futures contracts on a futures market'. See also, Beech J in the Westpac BBSW Case at [1918].

7 Notably, the Full Federal Court in Australian Securities and Investments Commission, in the matter of *Whitebox Trading Pty Ltd v Whitebox Trading Pty Ltd* [2017] FCAFC 100, determined that the *Criminal Code* was not applicable in civil penalty proceedings, but it nevertheless will be applicable in criminal penalty proceedings.

8 *Ibid*, at [122].

9 That is, (i) that the accused intentionally took part in or carried out the transaction and (ii) that his sole or dominant purpose in so doing was to set or maintain the price of the securities at a particular level: at [122].

10 Westpac BBSW Case at [24].

11 *Ibid*, at [1962].

12 *Ibid* at [1989].

13 *Ibid* at [61] – [63].

14 *Ibid* at [63].

15 ASIC proceeded at some points in a slightly different way in the Westpac BBSW Case; that is, on the basis that conduct engaged in with the intention of achieving a particular outcome may properly be inferred to have achieved that outcome: ibid at [1947]; cf at [1951]. This is a slightly different proposition to the reasoning in *JM*, that a lack of bona fides on the part of a buyer or seller in a particular transaction will effectively render a price – by definition – artificial.

16 Beach J noted that he agreed 'that it does not matter whether the yield or price accords with true value or is set at a reasonable level because of trading with a sole or dominant purpose of affecting price or yield. I also accept that it does not matter whether the trader's intention is to correct or to manage a price or yield or to oppose or counteract manipulative trading in the opposite direction. Such conduct where a buyer is not concerned to buy at the lowest price and a seller is not concerned to sell at the highest price is necessarily a distortion of the interaction of market forces of supply and demand': Westpac BBSW Case at [1930].

17 *Ibid*, at [1957]-[1958].

No memory: The ultimate defence? An insight into John Locke's jurisprudence

By Kevin Tang

Introduction

In Mobile, Alabama, 33 years ago, Vernon Madison shot dead a police officer, Corporal Julius Schulte. Since April 1985, justice has taken a winding path for Madison. He has waited almost a lifetime to die. Madison has developed severe dementia while incarcerated. He recalls nothing of the past. He is the perfect example of the philosopher's *tabula rasa* – a clean slate. Should he be punished further? The circumstances of Madison's case can be considered through John Locke's *An Essay Concerning Human Understanding* (1690), a seminal natural law work in jurisprudence from the Enlightenment.[1]

Background

On Australia Day this year, Madison was due to be executed by lethal injection. However, 30 minutes before the execution, Justice Clarence Thomas of the United States Supreme Court granted Madison a stay of execution.

The US Supreme Court will hear Madison's petition this year. In 1986, the US Supreme Court made a ruling that the execution of a person who does not understand the reason why they are being executed is a violation of the 8th Amendment to the United States Constitution which prohibits 'cruel and unusual punishment'.

In 2016 the Circuit Court of Appeal made a ruling on Madison's case. In a nutshell, according to Madison's perception of reality, he had not committed the murder and therefore could not understand the reason for his possible execution for murder.

Is a person who cannot remember committing a crime capable of understanding why they are being executed? Or in other terms – can a person who cannot remember performing a deed be held morally responsible for it and suffer the consequences which might flow? This goes beyond discharging the requirements for punishment. Can such a person be the locus for moral guilt?[2]

Lockean view

This brings us to the jurisprudence of John Locke (1632 – 1704), an English philosopher and physician. He was one of the most important philosophers from the Enlightenment, a father of liberalism and supporter of Sir Francis Bacon's notion of a social

contract. Locke was a proponent of natural law and rights. According to Locke's view, Madison should not be executed. If one is unable to recall performing a specific action, one is then not the same person as the person who did perform the specific act. It should be noted that Locke defined a person as a purely forensic notion[3]. A person is only used to locate moral responsibility[4].

Madison's perception, at this moment in time, is that he did not commit the crime. John Locke would say that Madison cannot therefore be held morally responsible for the murder. Madison is a different person from the murderer of 1985.

Moral responsibility – can you remember committing the crime?

Let us take Dr Jekyll and Mr Hyde. Dr Jekyll has no control over when he becomes Mr Hyde and he cannot remember anything about Mr Hyde's escapades or actions. Is Dr Jekyll responsible for the crime of Mr Hyde? Answer: No. Dr Jekyll cannot be morally responsible for what Mr Hyde does because he is unable to remember what Mr Hyde did. Lockean jurisprudence says that Dr Jekyll and Mr Hyde are two different people[5].

In this instance, the transition from Dr Jekyll to Mr Hyde is involuntary. It might be somewhat different if Dr Jekyll could turn into Mr Hyde voluntarily, and he knew that Mr Hyde was accustomed to committing crimes, then Dr Jekyll would be (to an extent) morally responsible for Mr Hyde's crimes.

Another example is that of a person who knows they act badly while drunk, but does not remember doing anything untoward when they wake up the next morning. If you know that you behave badly after drinking, then not remembering the events is no excuse. The rationale in this case is that if a person did not drink excessively, and exercised greater control, they might not have become inebriated[6].

Naturally unjust

Locke would assert that the sober person is not exactly the same person as the drunkard on a rampage. One didn't exert enough control earlier to curb the possibility of the criminal rampage later on. There is indirect moral responsibility at that juncture (derivatively). Nil recall doesn't make it any better, and moreover it should not relieve a person of moral responsibility. It was a foreseeable consequence.

Madison is a case which exposes the Lockean natural law point. One cannot be morally responsible for something that one cannot remember doing[7]. There is a distinction between direct and derivative responsibility. That is the crux of the issue.

Perversity: No memory. No crime. No punishment.

Of the 180 or so death row inmates in Alabama, three have been incarcerated for longer than Madison. Madison cannot remember his crime that day in April 1985 due to his severe vascular dementia which developed after a series of strokes. He is legally blind and has mobility problems.

Madison has become grey and ashen as he hovers between death and life. The darkness may consume him. Will the executioner come before God? It will all happen soon. John Locke's scholastic theory says that Madison is not guilty of any crime and is not a murderer. He does not understand *now* why he is going to be executed. Let's not over-philosophise the reality.

END NOTES

1 Ed. Fraser, Alexander Campbell *John Locke An Essay Concerning HUMAN UNDERSTANDING* by Oxford Clarendon Press 1894 Book 1 and Book 2.
2 See Note 1 Book 2 Chapter XXVII page 467.
3 See Note 1 Book 2 Chapter XXVII page 468.
4 See Note 1 Book 2 Chapter XXVII page 461 and 462.
5 See Note 1 Book 2 Chapter XXVII page 461.
6 See Note 1 Book 2 Chapter XXVII page 462.
7 See Note 1 Book 2 Chapter XXVII page 464.

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The common form statutory 'proviso' in criminal appeals: *Weiss v R* affirmed

Helen Roberts reports on *Kalbasi v Western Australia* [2018] HCA 7; 92 ALJR 305; 352 ALR 1

Introduction

Under Western Australia's criminal appeal statute, the Court of Appeal must allow an appeal against a conviction by an offender where the court is of the view that there has been a miscarriage of justice, subject to the proviso that the court may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.[1] This case considered the application of that proviso, which closely mirrors the common form proviso and which in NSW is expressed as follows: '[t]he court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.'[2]

The appellant was convicted for the attempted possession of 5kg of methylamphetamine with intent to sell or supply to another. The trial judge incorrectly directed the jury in accordance with a statutory presumption of intent to sell or supply upon proof of possession. The Western Australian Court of Appeal dismissed the appeal, holding that although the direction was incorrect, the proviso applied.

On appeal to the High Court, the appellant sought to have the High Court reconsider its earlier decision in *Weiss v R*[3], submitting that *Weiss* had left uncertain the principles that engage the proviso, and the uncertainty had not been resolved by subsequent decisions of the court.[4] The High Court, by a narrow majority (Kiefel CJ, Bell, Keane and Gordon JJ; Gageler, Nettle and Edelman JJ dissenting) dismissed the appeal[5] and held that there was no reason to depart from *Weiss*.[6]

The facts and error in the trial

Police had intercepted a drug shipment, replaced the drugs with a substitute, and then relied upon various forms of surveillance to establish that the drugs were unpacked in front of, and with the involvement of, the appellant.[7] The appellant did not give evidence. The issue at trial was whether the Crown could establish that the appellant possessed the drugs, that is, that he relevantly had 'control' over them rather than simply being present at the premises with the drugs.[8]

With the concurrence of counsel for both the Crown and the accused at trial, the jury was incorrectly directed on the basis that proof of possession was sufficient to prove possession for the purposes of sale or supply.[9] However, as this was an attempt offence, the deeming provision did not apply.[10] The WA Court of Appeal held that the misdirection was an error of law, but dismissed the appeal on the basis that no substantial miscarriage of justice had occurred.

Application of the proviso

The only question on appeal was the correctness of the application of the proviso. The majority of the High Court held at [12]:

> *Weiss* settled the debate in an analysis that is grounded in the text of the common form provision. The apparent tension between the command to allow an appeal where the court is of the opinion that there was a miscarriage of justice, subject to the proviso that it may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred, is resolved by reference to history and legislative purpose. Consistently with the long tradition of the criminal law, any irregularity or failure to strictly comply with the rules of procedure and evidence is a miscarriage of justice within the third limb of the common form provision (here s 30(3)(c)). The determination of whether, notwithstanding the error, there has been no substantial miscarriage of justice is committed to the appellate court. The appellate court's assessment does not turn on its estimate of the verdict that a hypothetical jury, whether 'this jury' or a 'reasonable jury' might have returned had the error not occurred. The concepts of a 'lost chance of acquittal' and its converse the 'inevitability of conviction' do not serve as tests because the appellate court is not predicting the outcome of a hypothetical error-free trial, but is deciding whether, notwithstanding error, guilt was proved to the criminal standard on the admissible evidence at the trial that was had. (footnotes omitted)

Their Honours held that approaching the proviso by attempting to identify classes of cases in which the proviso can or cannot be applied is 'distracting' and not possible.[11] Nevertheless there may be some errors, the nature of which will prevent the appellate court from being able to assess whether guilt was proved to the criminal standard.[12] These may include, but are not limited to, cases which turn on issues of contested credibility, cases in which there has been a failure to leave a defence or partial defence for the jury's consideration and cases in which there has been a wrong direction on an element of liability in issue or on a defence or partial defence.[13] As was established in Weiss, the fundamental question remains whether there has been a substantial miscarriage of justice.[14]

The majority held that the Court of Appeal did not err by rejecting the submission that the misdirection was an error of a kind that precluded the application of the proviso. Further, the Court of Appeal was correct to reason that proof beyond reasonable doubt that the appellant attempted to possess nearly 5kg of 84 per cent methylamphetamine compelled the conclusion that it was his intent to sell or supply it to another. There was no basis in the evidence or the way the defence case was run which left open the possibility that he may have been in possession of some smaller amount of the substitute drugs with a view to purchasing it for personal use. In those circumstances, the misdirection did not occasion a substantial miscarriage of justice.[15]

The issue at trial was whether the Crown could establish that the appellant possessed the drugs, that is, that he relevantly had 'control' over them rather than simply being present at the premises with the drugs.

In dissent, Gageler J held that the manner in which the trial judge had directed the jury upon possession left open to the jury a pathway of reasoning which allowed the jury to be satisfied that the appellant possessed the drugs but which would not necessarily compel a conclusion that he did so with an intent to sell or supply.[16] Thus the Court of Appeal's own satisfaction that the evidence at trial established beyond reasonable doubt that the appellant exercised control over the whole of the 'methylamphetamine' with the intention to sell or supply it to another was insufficient to allow the Court of Appeal to be satisfied that the jury would have returned a verdict of guilty if the proper direction had been given, and the Court of Appeal was wrong to conclude that no substantial miscarriage of justice had occurred.[17] Justice Nettle, also addressing the very broad definition of possession that the trial judge left to the jury, held that it was possible that the jury convicted the appellant on the basis of a form of possession which would not have satisfied the definition of possession for the purposes of sale or supply,[18] and therefore despite a powerful circumstantial case it could not be said that no substantial miscarriage of justice had occurred.[19] His Honour would have allowed the appeal. Justice Edelman agreed with the reasons of Nettle J and held that the case was one to which the proviso could never apply because the direction removed an element of the offence from the jury and was therefore 'a fundamental defect, amounting to a serious breach of the presuppositions of the trial'.[20]

END NOTE

1 Section 30(3)(c) *Criminal Appeals Act* 2004 (WA).
2 Section 6(1) *Criminal Appeal Act* 1912 (NSW); see *Reeves v R* [2013] HCA 57; 88 ALJR 215; 304 ALR 251 at [9]. The WA provision does not include the qualifier 'actually', but nothing turned on its absence for the purposes of the argument: *Kalbasi* at [4].
3 (2005) 224 CLR 300.
4 *Kalbasi* at [8].
5 Kiefel CJ, Bell, Keane and Gordon JJ; Gageler, Nettle and Edelman JJ each dissenting in separate judgments.
6 At [9].
7 At [19]-[23].
8 At [29]-[30].
9 Section 11 *Misuse of Drugs Act* 1981 (WA).
10 *Krakouer v R* (1998) 194 CLR 202.
11 At [16].
12 At [15].
13 At [15].
14 At [16].
15 At [60].
16 At [76]-[81].
17 At [82]-[83].
18 At [138]-[139].
19 At [140]-[144].
20 *Wilde v R* (1988) 164 CLR 365 at 373; at [162].

No judicial review for errors of law in adjudications under the *Building and Construction Industry Security of Payment Act 1999*

Alexander Langshaw reports on *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 351 ALR 225; [2018] HCA 4

The High Court has held that the Supreme Court does not have jurisdiction to quash decisions made by adjudicators under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (SOP Act) for errors of law.

Background

Shade Systems Pty Ltd (Shade) was engaged by Probuild Constructions (Aust) Pty Ltd (Probuild) to install louvres in an apartment development pursuant to a subcontract. Shade served a payment claim on Probuild pursuant to s 13 of the SOP Act claiming that a progress payment was due. In response, Probuild served a payment schedule under s 14 of the SOP Act indicating it would not make any payment to Shade. The basis for the payment schedule was a claim by Probuild for liquidated damages that exceeded (and thus fully set off) Shade's payment claim.

Shade applied under s 17 of the SOP Act for adjudication of its payment claim. The adjudicator rejected Probuild's liquidated damages claim in its entirety. Accordingly, the adjudicator upheld Shade's payment claim and determined that Probuild was required to make a progress payment to Shade.

Procedural history

Probuild then commenced proceedings in the Supreme Court of NSW seeking an order in the nature of certiorari quashing the adjudicator's determination pursuant to s 69 of the *Supreme Court Act 1970* (NSW) (SCA).[1]

The primary judge (Emmett AJA) found that the adjudicator had wrongly construed the subcontract and, accordingly, had made two errors of law in rejecting Probuild's liquidated damages claim.[2] Those errors were not in the nature of jurisdictional errors. However, the errors appeared in the adjudicator's decision, or 'on the record' within the extended meaning of s 69(4) of the SCA. In those circumstances the question that arose was whether the court had jurisdiction to quash a decision of an adjudicator under the SOP Act infected by an error of law on the face of the record.

Their Honours confirmed that the Supreme Court's jurisdiction to quash a decision infected by an error of law on the face of the record may be excluded by statute and that an intention by the legislature to do so must be expressed clearly.

Section 69(3) of the SCA provided, relevantly, that the court generally had jurisdiction to make an order in the nature of certiorari to quash decisions made on the basis of an error of law on the face of the record. However, s 69(5) confirmed that legislative provisions preventing the exercise of that jurisdiction would be effective. Accordingly, this question turned on whether the court's jurisdiction to quash the adjudicator's decision for an error of law on the face of the record had been effectively excluded by the SOP Act.

The primary judge held that the absence of any express words or privative clause in the SOP Act were determinative of that issue despite the fact that the overarching scheme of the SOP Act favoured the exclusion of judicial review for non-jurisdictional error.[3] Accordingly, the court made orders quashing the adjudicator's decision.

Shade appealed on the sole issue of whether the SOP Act was effective to exclude the court's jurisdiction to quash an adjudicator's decision for an error of law on the face of the record.[4] The appeal was unanimously upheld by the Court of Appeal sitting as a bench of five.[5] Basten JA (with whom the other judges agreed) considered the lack of express words excluding the court's jurisdiction was not determinative. Rather, the court held that the underlying purpose and structure of the SOP Act, as a matter of statutory construction, necessarily excluded the availability of judicial review for errors of law.[6]

High Court's decision

Probuild was granted special leave to appeal to the High Court on the same jurisdictional issue that had arisen before the Court of Appeal. The appeal was unanimously dismissed.

The primary judgment of the High Court was a joint judgment of Kiefel CJ, Bell, Keane, Nettle and Gordon JJ. Their Honours confirmed that the Supreme Court's jurisdiction to quash a decision infected by an error of law on the face of the record may be excluded by statute[7] and that an intention by the legislature to do so must be expressed clearly.[8]

However, their Honours did not accept that express words, such as a provision in the nature of a privative clause, were required to manifest that legislative intention. Rather, the relevant question was one of statutory construction – namely, whether the SOP Act

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read as a whole evinced a sufficiently clear expression of the legislature's intention to exclude the jurisdiction.[9]

The joint judgment conducted a detailed review of the SOP Act. Their Honours focussed particularly upon the following matters: [10]

- the SOP Act was enacted to 'reform behaviour in the construction industry';
- the express purpose of the SOP Act was to ensure that persons undertaking construction were entitled to receive and recover progress payments;
- the statutory entitlements to progress payments under the SOP Act were distinct and separate from the parties' contractual entitlements and those contractual entitlements were preserved for later determination;
- the scheme under the SOP included tight timeframes because of the importance of cash flow within the construction industry and those timeframes were 'not conducive to lengthy consideration by an adjudicator of detailed submissions on all questions of law';
- the SOP Act permitted informal procedures to determine an adjudication; and
- the SOP Act deliberately omitted any right of appeal from the decision of an adjudicator.

Their Honours concluded on that basis that the SOP Act displayed the requisite intention11 and, accordingly, held that orders in the nature of certiorari could not be made by the Supreme Court in respect of a decision made by an adjudicator appointed under the SOP Act containing errors of law on the face of the record.[12]

Gageler J reached the same conclusion by a different route. His Honour, contrary to the joint judgment, accepted there was an existing rule that the Supreme Court's judicial review jurisdiction could only be excluded by clear words.[13] However, after conducting a detailed review of the history of that rule,[14] his Honour concluded that it was no longer suitable or appropriate to apply the rule with respect to the exclusion of the Supreme Court's jurisdiction to quash decisions for errors of law on the face of the record. Rather, his Honour indicated that the correct approach would be to simply apply 'ordinary statutory and common law principles of interpretation' to determine whether the court's jurisdiction to quash a particular decision for an error of law had been ousted.[15] Applying those principles of statutory construction, his Honour reached the same substantive conclusion as the majority.[16]

His Honour indicated that the correct approach would be to simply apply 'ordinary statutory and common law principles of interpretation' to determine whether the court's jurisdiction to quash a particular decision for an error of law had been ousted.

Edelman J similarly acknowledged that a 'narrow approach' had always been applied to the exclusion of the Supreme Court's judicial review jurisdiction, whether for jurisdictional or non-jurisdictional error.[17] However, unlike Gageler J, his Honour was not prepared to abandon that approach. Rather, his Honour indicated the 'narrow approach' should apply only 'weakly' with respect to the exclusion of the court's jurisdiction to review decisions for non-jurisdictional error, [18] the practical effect of which was that 'necessary implication' was sufficient to exclude that jurisdiction in addition to express words.[19] Applying that approach, his Honour reached the same substantive conclusion as the majority.[20]

END NOTES

1 *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSWSC 770.
2 Ibid., at [78].
3 Ibid., at [65]-[74].
4 *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd* (No 2) [2016] NSWCA 379.
5 Ibid., at [1], [90]-[92] (the bench comprised Bathurst CJ, Beazley P, Basten, Macfarlan and Leeming JJA).
6 Ibid., at [85].
7 *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 351 ALR 225 at [30], applying *Kirk v Industrial Relations Commission* (NSW) (2010) 239 CLR 531.
8 *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 351 ALR 225 at [34].
9 Ibid.,, [34].
10 Ibid., [36]-[43].
11 Ibid., [35].
12 Ibid., [53].
13 Ibid., [59].
14 Ibid., [62]-[77].
15 Ibid., [60].
16 Ibid., [82]-[83].
17 Ibid., [85].
18 Ibid., [102].
19 Ibid., [98].
20 Ibid., [108].

Ability to bring defamation proceedings against search engines

Daniel Klineberg reports on *Trkulja v Google LLC* [2018] HCA 25

Introduction

In a unanimous decision, the High Court[1] has rejected a claim that a defamation proceeding brought against Google Inc (now Google LLC) by the appellant had no real prospect of success. The proceeding concerned text and images seen by people undertaking searches on the Google website for 'melbourne criminals' and the like. Google sought summary dismissal of the proceeding on the basis, in particular, that the material was not defamatory of the appellant. The High Court held that the material was capable of conveying the defamatory imputations pleaded.

Facts

The appellant, Mr Trkulja alleged in a proceeding commenced in the Supreme Court of Victoria, that Google had defamed him by publishing material which conveyed imputations that he 'is a hardened and serious criminal in Melbourne', in the same league as figures such as 'convicted murderer' Carl Williams, 'underworld killer' Andrew 'Benji' Veniamin, 'notorious murderer' Tony Mokbel and 'Mafia Boss' Mario Rocco Condello, that he is an associate of Veniamin, Williams and Mokbel and that he is 'such a significant figure in the Melbourne criminal underworld that events involving him are recorded on a website that chronicles crime in [the] Melbourne criminal underworld'.

Mr Trkulja alleged that Google published the defamatory material between 1 December 2012 and 3 March 2014 to persons in Victoria upon those persons accessing the Google website, searching for Mr Trkulja's name or alias (Michael Trkulja and Milorad Trkulja) and then viewing and perceiving the material presented on-screen in response to the search.

There were two groups of alleged defamatory material. The first concerned Google images search results pages that were alleged to display images of Mr Trkulja mixed with images of convicted Melbourne criminals and included one of the following phrases:

The appellant, Mr Trkulja alleged in a proceeding commenced in the Supreme Court of Victoria, that Google had defamed him by publishing material which conveyed imputations that he 'is a hardened and serious criminal in Melbourne'.

'melbourne criminals', 'melbourne criminal underworld figure', 'melbourne criminal underworld photos', 'melbourne underworld crime', 'melbourne underworld crime photos', 'melbourne underworld criminals', 'melbourne underworld killings' and 'melbourne underworld photos'.

The second group of allegedly defamatory material concerned individual web pages with various statements. By way of example, one was a post which said 'I hear Milorad 'Michael' Trkulja is a former hitman who shot a music promoter in the balaclava',

The High Court upheld the appeal by Mr Trkulja from that decision. In so doing, the High Court criticised strongly the judgment of the Court of Appeal.

under which was an image of predictions generated by Google's autocomplete functionality showing the phrases 'michael trkulja', 'michael trkulja criminal', 'michael trkulja melbourne crime' and 'michael trkulja underworld'.

Mr Trkulja alleged that the material was defamatory in its natural and ordinary meaning and, further, that the material carried various defamatory imputations to the effect summarised above.

Proceeding history

Google applied to set aside the proceeding brought against it (and also the service on it out of the jurisdiction). At first instance, McDonald J rejected Google's contention that the proceeding had no real prospect of success.[2] On appeal, the Court of Appeal held to the contrary, finding that the proceeding had no real prospect of success.[3]

Before McDonald J, Google put its application for summary dismissal on three grounds: (i) that it did not publish the images or the web material; (ii) that the material in issue was not defamatory of Mr Trkulja; and (iii) that Google was entitled to immunity from suit.

As to the first ground, McDonald J held that it was strongly arguable that Google's intentional participation in the communication of the allegedly defamatory search results relating to Mr Trkulja to users of the Google search engine supported a finding that Google published the allegedly defamatory results. His Honour also rejected Google's second contention that a Google search engine user would not think less of a person such as Mr Trkulja because his photograph is included in the search results or because his photograph or references to his name appear in 'snippets' and hyperlinks returned by web searches and autocomplete predictions.[4]

McDonald J further rejected Google's third contention that Google should be immune from suit as a matter of public interest. The High Court said that his Honour was correct in holding that the range and extent of the defences provided for in Division 2 of Part 4 of the *Defamation Act 2005* (Vic) 'militate heavily against the development of a common law search engine proprietor immunity'.[5]

Google advanced the same grounds before the Court of Appeal. The Court of Appeal found it unnecessary to decide the

Photo: iStockphoto.com

first ground. It rejected the third ground. However, it upheld the second ground ruling that Mr Trkulja 'would have no prospect at all of establishing that the images material conveyed any of the defamatory imputations relied upon' and, in relation to the web material, that Mr Trkulja 'could not possibly succeed in showing that the web matter upon which he relies carried any of the pleaded defamatory imputations'.[6]

Reasoning of the High Court

The High Court upheld the appeal by Mr Trkulja from that decision. In so doing, the High Court criticised strongly the judgment of the Court of Appeal. The High Court said:[7]

- the judgment was 'of extraordinary length and complexity for the resolution of an appeal against dismissal of a summary disposition application in which the only real question was the capacity of the published matters to defame';
- it ranged 'across a broad tract of the law of defamation extending to a substantial, proleptic analysis of the juridical basis of primary and secondary publication in relation to computer search engine proprietors, of the application of innocent publication defences to computer search engine proprietors, and of how and why, in view of the social utility of computer search engines, the existing law of defamation might better be shaped to relate to search engine proprietors or relieve them from liability';
- 'problematically', the judgment 'also effectively treats the judgment of Beach J in *Trkulja v Google (No 5)*[8] as if it were plainly wrong (despite the fact that Google did not appeal against that judgment and that it has been considered with implicit approval in another common law jurisdiction[9])';
- the Court of Appeal mischaracterised the observations of Blue J in *Duffy v Google Inc*[10] (that they went to capacity to defame, 'notwithstanding that Blue J was describing the process of reasoning by which his Honour, sitting as trial judge, reached findings of mixed fact and law in the trial of a defamation proceeding before judge alone');
- the judgment is 'replete with direct and indirect references to Google's affidavit evidence … and, despite the summary nature of the application and, therefore, the impracticability of affording Mr Trkulja access to an opportunity for meaningful cross-examination of Google deponents, ordinary interlocutory processes and tendering opposing evidence, the judgment includes a range of purportedly definitive findings of mixed fact and law drawn from Google's affidavit evidence adverse to Mr Trkulja'. The making of a purportedly determinative finding of mixed fact and law was 'not an appropriate way to proceed' and that given the nature of the proceeding, there should have been no thought of summary determination of issues relating

to publication or possible defences, 'at least until after discovery, and possibly at all', with the High Court noting that no defence yet had been filed; and

- the Court of Appeal was incorrect to say that it was incumbent on Mr Trkulja to plead that Google was a primary or secondary publisher of the allegedly defamatory matters since it is not the practice to plead the degree of participation in the publication of defamatory matters, for the reason that all degrees of participation in the publication are publication.

The High Court said that the question of whether words or images complained of are capable of conveying a pleaded defamatory imputation is a question of law. Such a question 'permits of only one correct answer' however it is a question 'about which reasonable minds may sometimes differ'. Therefore, 'it is only ever with great caution that a defamation pleading should be disallowed as incapable of bearing a defamatory imputation'. Their Honours noted also that on an application for summary dismissal, the plaintiff's case as to the capacity of the publications to defame is to be taken at its highest.[11]

The High Court noted that the test for whether a published matter is capable of being defamatory is what ordinary reasonable people would understand by the matter of which complaint is made. Their Honour's referred to the observations of Lord Reid in *Lewis v Daily Telegraph Ltd*[12] that '[s]ome [people] are unusually suspicious and some are unusually naïve' and said that what is required is 'attempting to envisage a mean or midpoint of temperaments and abilities and on that basis to decide the most damaging meaning that ordinary reasonable people at the midpoint could put on the impugned words or images considering the publication as a whole' which is an exercise in 'generosity not parsimony'. The question of what words convey to an ordinary reasonable person is often a matter of first impression.[13]

Their Honours distinguished between the way in which the Court of Appeal approached the matter and the way in which the case was pleaded. The Court of Appeal considered Mr Trkulja's claim to be a composite claim such that all of the search results comprised in the images were to be looked at as one single composite publication and all of the search results comprised in the web material were to be looked at as another single composite publication. However, Mr Trkulja's pleading conveyed that each search and the result which appeared in response to it were to be considered together but separately from each other separate search and response, for the reason that each search may have been conducted by a different person without engaging in any of the other searches.

The High Court held that the way the case was pleaded accorded with the view expressed by Callinan J in *Dow Jones & Co Inc v Gutnick*[14], namely that each hit on a website is a separate publication. Their Honours agreed with McDonald J that at least some of the search results complained of had the capacity to convey one or more of the defamatory imputations alleged and, whether viewed individually or as a composite did not affect that conclusion. Their Honours rejected the Court of Appeal's reasoning to the contrary.[15]

The making of a purportedly determinative finding of mixed fact and law was 'not an appropriate way to proceed'

Their Honours described the Court of Appeal's conclusions on Google's capacity to defame as 'unacceptable'.[16] The test of capacity of a published matter to defame is whether any of the search results of which complaint is made are capable of conveying any of the defamatory imputations alleged and not, as the Court of Appeal stated whether 'any of the defamatory imputations which are pleaded [are] arguably conveyed'. To express the test as the Court of Appeal did runs the risk of judging the issue according to what the court may think the allegedly defamatory words or images say or depict rather than what a jury could reasonably think they convey.

The High Court also said the Court of Appeal erred in treating the earlier High Court decision of *Google Inc v Australian Competition and Consumer Commission*[17] as supportive of the conclusion that, although an image of Mr Trkulja may have appeared in responses to Google searches which included the words 'criminal', 'melbourne' and 'underworld', that was simply because those terms appeared in a webpage which contained that image, and for that reason were not capable of conveying to the ordinary reasonable user of a search engine the imputation that Mr Trkulja was a criminal or part of the Melbourne criminal underworld. *Google v ACCC* concerned whether Google had engaged in misleading and deceptive conduct contrary to s 52 of the *Trade Practices Act* 1974 (Cth) by displaying misleading and deceptive 'sponsored links'. In contrast, the present case concerned the law of defamation in relation to responses to Google searches of another kind.[18]

Their Honours described the Court of Appeal's conclusions on Google's capacity to defame as 'unacceptable'.

The result was that the High Court rejected the Court of Appeal's conclusion that the matters upon which Mr Trkulja relied were incapable of conveying any of the defamatory imputations which were pleaded and that, therefore, the Court of Appeal erred in concluding that Mr Trkulja's proceeding had no real prospect of success.

END NOTE

1 Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.
2 *Trkulja v Google Inc* [2015] VSC 635.
3 *Google Inc v Trkulja* (2016) 342 ALR 504 (Ashley, Ferguson and McLeish JJA).
4 *Trkulja v Google LLC* [2018] HCA 25 at [25]-[26].
5 Ibid., at [27].
6 Ibid., at [28].
7 Ibid., at [36]-[40].
8 [2012] VSC 533.
9 i.e. *Dr Yeung Sau Shing Albert v Google Inc* [2014] HKCFI 1404; [2014] 4 HKLRD 493 at [103]-[106].
10 (2015) 125 SASR 437; [2015] SASC 170 at [375].
11 *Trkulja v Google LLC* [2018] HCA 25 at [30].
12 [1964] AC 234 at 259.
13 *Trkulja v Google LLC* [2018] HCA 25 at [31]-[32].
14 (2002) 210 CLR 575; [2002] HCA 56 at [197]-[199].
15 *Trkulja v Google LLC* [2018] HCA 25 at [34]-[35].
16 Ibid., at [52]-[55].
17 (2013) 249 CLR 435; [2013] HCA 1.
18 *Trkulja v Google LLC* [2018] HCA 25 at [56]-[62].

If NCAT is not a court it has no standing to hear interstate party disputes

Talitha Fishburn reports on *Burns v Corbett* [2018] HCA 15

The significance of this decision lies in its consequence that the NSW Civil and Administrative Tribunal ('NCAT') and other state tribunals do not have jurisdiction to hear 'federal matters' (being matters arising under sections 75 and 76 of the *Constitution*) including disputes between residents of different states of Australia.

The much-awaited decision is unanimous in its orders. But the 'knotty constitutional problem' is not entirely unfurled; the judgments are a smorgasbord of diverging constitutional reasoning. The case raises important issues about the powers and limits of parliament (federal and state) to confer jurisdiction on courts and other bodies concerning 'federal matters'. While offering an intriguing (and contrasting) judicial anthology on federalism for constitutional law enthusiasts, it carries very real and practical import for practitioners, particularly in property matters where one or more parties is resident outside NSW.

Factual background

The circumstances leading to the ultimate legal journey in Canberra had remarkable origins. It spanned three state borders (this being its gateway to the High Court). In 2013, Ms Corbett, a political aspirant (resident in Victoria) controversially stated she wanted no 'gays, lesbians or paedophiles working in my kindergarten'. This was published by the *Hamilton Spectator*. Mr Gaynor, a Senate candidate (resident in Queensland) publicly supported the statements. Mr Burns (resident in New South Wales), an anti-discrimination activist, said the statements vilified homosexuals contrary to the *Anti-Discrimination Act 1977* (NSW). He complained to the Anti-Discrimination Board of New South Wales. Proceedings ensued in the (then recently formed) NCAT.

New South Wales Court of Appeal

Following various steps in NCAT, a threshold jurisdictional issue was considered by the New South Wales Court of Appeal. The Court (Leeming JA, with whom Bathurst CJ and Beazley P agreed) held that NCAT did not have standing to determine Mr Burns' complaints against Ms Corbett or Mr Gaynor; the parties were residents of different states of Australia. This stirred flurries across Australia; Mr Burns, the State of NSW and the attorney general for NSW each appealed by special leave to the High Court. The attorneys-general of Queensland, Western Australia, Tasmania and Victoria intervened in support of NSW.

Common ground

In the High Court proceedings, various assumptions were accepted without argument. One such assumption was that NCAT is not a 'state court' for the purposes of Chapter III of the *Constitution*. Recently, in *Johnson v Dibbin*; *Gatsby v Gatsby* [2018] NSWCATAP 45, NCAT held that NCAT is a 'court of a state'. Conversely, in *Zistis v Zistis* [2018] NSWSC 722, Latham J was unpersuaded that NCAT is a 'court of a state', having regard to the analysis undertaken in *Trust Company of Australia Ltd v Skiwing Pty Ltd* [2006] NSWCA 185.

The High Court

All appeals were dismissed.

The Commonwealth contended that NCAT lacked jurisdiction to determine the complaints on two bases. First, there is an implied constitutional constraint against state legislative power; a state law (such as the *Civil and Administrative Tribunal Act 2013* (NSW)) is invalid if it confers judicial power over federal matters on a body (such as NCAT) which is not a court of the state ('Implication Submission'). Second, such a State law is inconsistent with section 39 of the Judiciary Act and invalid by operation of section 109 of the *Constitution* ('Inconsistency Submission').

The majority (Kiefel CJ, Bell and Keane JJ) accepted the Implication Submission. They did not determine the Inconsistency Submission. Gageler J agreed with the majority. Conversely, Gordon J (with whom Nettle J agreed, although also providing a separate judgment) rejected the Implication Submission but accepted the Inconsistency Submission, as did Edelman J. The minority judgments reached the same conclusion as the NSWCA.

Kiefel CJ, Bell and Keane JJ

Their Honours accepted the Implication Submission. That is, the *Constitution* impliedly prevents state laws conferring adjudicative authority over federal matters (including 'Diversity Matters' which are matters between residents of different states) on a body (such as NCAT) that is not a state court. This conclusion was 'compelled' by the constitutional text, structure and its purpose. They emphasised that federal matters were exhaustive, and Chapter III of the *Constitution* provided for the authoritative adjudication of these matters by federal courts (and state courts coopted for that purpose) but *not* state administrative bodies, such as NCAT. Their Honours turned to *The Boilermakers' Case* (1956) 94 CLR 254 at 267-268:

> A federal constitution must be rigid. The government it establishes must be one of defined powers; within those powers it must be paramount, but it must be incompetent to go beyond them ...the demarcation of the powers of the judicature, the constitution of the courts of which it consists and the maintenance of its distinct functions become therefore a consideration of equal importance to the States and the Commonwealth. While the constitutional sphere of the judicature of the States must be secured from encroachment, it cannot be left to the judicial power of the States to determine either the ambit of federal power or the extent of the residuary power of the States. The powers of the federal judicature must therefore be at once paramount and limited.

Their Honours held that the 'demarcation' of powers of the judicature in Chapter III demanded that only courts may adjudicate

federal matters, not tribunals. Integral to their reasoning was the need to have consistent and coherent adjudication throughout Australia. And although a Commonwealth Parliament can select courts in which federal jurisdiction may be conferred, this does not permit a state parliament to pre-empt Commonwealth Parliament.

In considering the historical context and purpose of the *Constitution*, their Honours (emphatically) concluded (at [56]): '[there is not the] faintest suggestion in any historical materials that our founders entertained, even for a moment, the possibility that disputes ... of residents of different states might be ... adjudicated by institutions of government of the states other than their courts'.

Gageler J

His Honour agreed with the conclusion of the joint judgment. Separately, he considered the meaning of specific Constitutional terminology (including 'matters', 'jurisdiction' and 'court'). He also considered colonial courts and stressed, 'On federation, everything adjusted' (at [72]) and 'I reiterate, on federation, everything adjusted' (at [112]).

While accepting that history is apposite to constitutional interpretation, he warned, 'concentration on historical minutiae can distract from the discernment and exposition of constitutional principle' (at [107]) and chunks of pre-federation history cannot be 'bootstrapped' to aid Constitutional interpretation (at [111]). The interpretation of the *Constitution* has 'taken time' as has the unfolding of its *implications* (at [113]) because it was not 'framed for the moment of its creation, but as an enduring instrument of government' (at [116]).

In conclusion, Gageler J noted the inevitability of the soundness of the Implication Submission (at [118]), ironic, given the opposite conclusions in the minority judgments. 'To no one who has studied the ... court's exegesis of Ch III over the past half-century, who has [read] ... the considered reasoning of intermediate appellate courts [in] the past decade, or who is abreast of leading contemporary academic commentary, could ... [it] come as a surprise ... [that the High Court would confirm that the Constitution impliedly denies] ... state legislative power [conferring] state judicial power [for s 75 or s 76 matters].'

Gordon J

Her Honour rejected the Implication Submission but accepted the Inconsistency Submission. She was unpersuaded that the federal matters were topics of 'special' federal concern for which the *Constitution* required a 'closed scheme' exclusively reserved for courts but *not* tribunals (at [177]). Rather, federal matters were 'facultative' and federal control over the jurisdiction of those matters was not 'pre-ordained' by the Constitution (at [179]). To the extent that there was control over their adjudication, it depended on whether there was *legislation* enacted (as permitted by section 77 of the Constitution). Here, there was legislation so enacted; the *Judiciary Act 1903* (Cth) by which Commonwealth Parliament exercised jurisdiction over federal matters. Her Honour said (at [184]) that '[u]ntil [the legislative power in section 77(ii)] was exercised [i.e., in 1903] there was nothing inherently problematic about state tribunals exercising jurisdiction in matters between residents of different states. Once the power ... was exercised ... it ... became incoherent, or at least problematic, for the states to continue to be free to confer such jurisdiction on tribunals. But any such incoherence did not exist until the enactment of the Judiciary Act.'

While offering an intriguing (and contrasting) judicial anthology on federalism for constitutional law enthusiasts, it carries very real and practical import for practitioners, particularly in property matters where one or more parties is resident outside NSW.

Her Honour referred to *Felton v Mulligan* [1971] HCA 39 in support of the proposition that the source of a state court's authority to adjudicate on matters between residents of different states is federal. Following from this, a state law (such as the NCAT *Act*) conferring authority to determine a federal matter on a body other than a state court is inconsistent with section 39 of the Judiciary Act; a state court's jurisdiction for federal matters must derive from a federal source. By operation of section 109 of the *Constitution*, the inconsistent state law is invalid (at [150]). She rejected the Implication Submission as 'logically flawed' and 'hinged on a concern that federal control might be circumvented' (at [184]).

Gordon J held that pre-1903 (i.e. before the enactment of the Judiciary Act) the jurisdiction of a body such as NCAT (if it had existed then) to hear federal matters was not barred by the Constitution nor any implication therein (at [183]). She raised doubts over the historical arguments supporting the Implication Submission; she maintained there was no historical basis for contending that the Constitution created a 'closed scheme' in which only courts could exercise jurisdiction in federal matters. Plainly, bodies other than courts exercised judicial power prior to federation (and prior to 1903) without objection (at [185]).

Nettle J

His Honour provided separate reasons but agreed with the conclusions of Gordon J and proceeded upon very similar reasoning. He also acknowledged the 'considerable assistance from the lucid reasons in the Court of Appeal of the Supreme Court of New South Wales' (at [209]).

Edelman J

His Honour delivered a separate judgment but his reasoning was closely aligned with Gordon J. He rejected the Implication Submission (at [205]) noting that it lacked a principled basis (at [210]), was devoid of authority and the *Boilermakers' Case* did not compel an implication being drawn '117 years after federation' (at [207]). He referred to legal history (including United States constitutional history) and examined the operation of tribunals at the time of federation (e.g. local Land Boards and Boards of Railway Commissioners). He concluded that the historical context at federation was inconsistent with the Implication Submission (at [210]).

Implications of the decision

Implications abound. Volumes of NCAT's work comprise residential tenancies and retail leases. Now, these cannot be aired in NCAT if one or more of the parties is resident of another state. The newly amended NCAT Act (Part 3A) *partly* deals with the jurisdiction gap; enabling a referral to a court if NCAT lacks jurisdiction, but it remains to be seen how costs will be governed in referrals (a very different costs regime applies in NCAT as opposed to courts). Uncertainty persists for cases determined prior to the amendments. In other states, for example, Victoria, uncertainty remains. Under the *Retail Leases Act 2003* (Vic) only VCAT, and *not* courts, has jurisdiction to hear retail leasing matters (with only limited exceptions). This is likely to require imminent legislative amendment.

A version of this article was first published in the *Law Society of NSW Journal*, p 90-92, Issue 45, June 2018.

Eddie Obeid arrives at Darlinghurst Court complex for sentencing on 15 December 2016. Photo by Daniel Munoz / Fairfax Media

The duty of a member of parliament and exclusive cognisance

Bharan Narula reports on *Obeid v R* (2017) 350 ALR 103

Introduction

In *Obeid v R* (2017) 350 ALR 103; [2017] NSWCCA 221 (*Obeid*), the NSW Court of Criminal Appeal (constituted by Bathurst CJ, Leeming JA, R A Hulme, Hamill and N Adams JJ) considered, inter alia, the content of the duty of trust owed by a member of parliament and the contours of exclusive cognisance. The appellant had been found guilty of the common law offence of misconduct in public office following trial before Beech-Jones J (the trial judge) and a jury.

Background

The appellant was tried on an indictment that between August and November 2007, while a member of the Legislative Council of NSW, he wilfully misconducted himself by making representations to the Deputy CEO and GM of a division of the Maritime Authority of NSW (the officer) with the intention of securing an outcome favourable to Circular Quay Restaurants Pty Ltd (CQR) in respect of its tenancies of properties at Circular Quay, knowing at the time he made those representations that he or his family had a financial interest in the said tenancies which he did not disclose to the officer.

CQR had purchased two businesses operating at Circular Quay. Through a series of trusts, 90 per cent of the interest in the businesses flowed to a discretionary trust that included the appellant and his wife as potential beneficiaries. The purchases had been funded in part from the proceeds of a mortgage of the house in which the appellant and his wife lived and which was registered in the name of his wife.

The Crown case was that the appellant called the officer, expressing displeasure in strong terms about the way tenants at Circular Quay had been treated, and asked the officer to speak to a professional negotiator, who had been retained by three tenants (including CQR) to lobby the Maritime Authority to achieve better security of tenure and a change in the relevant competitive tender policy. The appellant did not indicate that he had any financial interest in any of the businesses, and the officer believed that the appellant was calling on behalf of constituents.

Duty of a member of parliament

The trial judge directed the jury in the following terms:

> I direct you that, as a matter of law, in performing their functions members of the Legislative Council must act only according to what they believe to be in the public interest and the interests of the electorate, and must not use their position for the purpose of promoting their own pecuniary interests or those of their family or entities close to them.

The appellant argued that there was no such duty and, to the extent there was, the formulation was erroneous. Consistent with the former submission, the appellant declined to proffer a formulation of the direction which should have been given.

The chief justice rejected the argument that the duty imposed on a parliamentarian was a matter of conscience not subject to legal sanction.[1] His Honour referred to several authorities which explained the high public duty imposed upon members of parliament,[2] including the prescription of Isaacs and Rich JJ in Boston (at 400) that the 'fundamental obligation' of a member of parliament is 'the duty to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community'. Bathurst CJ held at [62]:[3]

> Members of parliament are appointed to serve the people of the state, including their constituents and it would seem that a serious breach of trust imposed on

them by using their power and authority to advance their own position or family interest rather than the interests of the constituents who they are elected to serve, could constitute an offence of the nature of that alleged.

Bathurst CJ further held that the trial judge's direction accurately identified the issues in the case and merely reflected the positive and negative elements of the duty. Questions of conflicting duties between the interests of the public and the interests of the electorate were not in issue at the trial, and the offence additionally requires wilfulness and seriousness of the conduct to be established.

Error in the formulation of duty

The appellant also criticised the trial judge's formulation because it did not cover the situation in which the appellant's purpose in speaking to the officer was not solely to advance his own pecuniary interests, and submitted that the trial judge failed to direct the jury that the improper purpose must be the substantial or dominant purpose. The chief justice noted the Crown case was one of sole purpose (or motivation), and the defence in closing submissions put in issue that the jury would not be satisfied that the sole purpose of the appellant in making the representations was to advance his pecuniary interests. In the circumstances, there was no misdirection and the direction was favourable to the appellant as it required the jury to be satisfied, beyond reasonable doubt, that the sole purpose of the representations was to promote his own interests or those of his family. It was thus unnecessary to consider whether it is sufficient to constitute the offence if the improper purpose or motivation is a dominant or causative purpose.[4]

Exclusive cognisance[5]

The appellant argued that the issues in the case were within the exclusive cognisance of the parliament of NSW and should not have been determined in the Supreme Court of New South Wales. In making that submission the appellant was faced with the ruling in *Obeid v R* (2015) 91 NSWLR 226; [2015] NSWCCA 309 (*Obeid* (2015)) that the court had jurisdiction to hear the charge the subject of the indictment. The appellant argued that the court should exercise a self-denying ordinance and not exercise its jurisdiction. Bathurst CJ held that the reasons given earlier in *Obeid* (2015) were 'equally applicable' to the reframed argument. His Honour noted that exclusive cognisance was originally based on the proposition that parliament had its own peculiar law which was not known to the courts, however this has 'no bearing' on the court's jurisdiction, nor does it provide a basis to decline to exercise jurisdiction.

His Honour referred to the remarks of Lord Rodger in *R v Chaytor* [2011] 1 AC 684 at [108] that if the impugned conduct would constitute an offence under the ordinary criminal law of England, then the offence can be prosecuted in the criminal courts in the usual way. The chief justice held that the exceptions to this principle include where the existence of the parliamentary privilege makes it 'impossible to fairly determine the issues between the parties' or if the proceedings 'in fact interfered with the freedom of the House of Parliament to conduct its legislative and deliberative business without interference from the court'. Outside these exceptions, declining to exercise jurisdiction in many such cases would constitute 'an affront to the administration of justice'.

His Honour noted that s 14A of the *Constitution Act 1902* (NSW), which empowers the making of regulations relating to the disclosure of a member's pecuniary interests, said nothing to suggest an exclusive jurisdiction of a chamber of parliament. Furthermore, s 13A of the Act, which entails that the composition of the chamber may be affected by a curial determination of criminality, was inconsistent with that submission.

The chief justice noted that other cases[6] were consistent with the court having jurisdiction over members of parliament and also exercising it. Furthermore, the indictment did not make allegations of conduct within the walls of parliament relating only to the internal practices of the chamber; nor did it impugn speech within parliament.[7] Leeming JA explained that it was 'very difficult to see how any of the offending conduct relates to proceedings in parliament.'[8]

Special leave

Special leave was declined on 23 March 2018 on the basis that there were insufficient prospects of success: *Obeid v The Queen* [2018] HCATrans 54 (Bell, Keane and Edelman JJ).

Conclusion

Obeid confirmed that a breach of the duty of trust owed by a member of parliament is capable of amounting to an offence. Furthermore, a close and direct connection with parliamentary proceedings would be required for the court to decline to exercise its jurisdiction. However, as the factual substratum rendered it unnecessary, the question of whether a breach of duty may be established if the impugned conduct occurred where the improper purpose or motivation is the dominant or causative purpose remains, for the moment, unanswered.

END NOTES

1 R A Hulme, Hamill and N Adams JJ agreeing (*Obeid* [336], [470], [474]); Leeming JA also agreed and gave additional reasons by way of elaboration rather than qualification (*Obeid* [291]; [330]).

2 Including *Wilkinson v Osborne* (1915) 21 CLR 89; *Horne v Barber* (1920) 27 CLR 494 and *R v Boston* (1923) 33 CLR 386 *(Boston); McCloy v State of NSW* (2015) 257 CLR 178 at [169]-[171] (Gageler J); *Re Day (No. 2)* (2017) 91 ALJR 518 at [49]-[50] (Kiefel CJ, Bell and Edelman JJ); at [179] (Keane J) and at [269] (Nettle and Gordon JJ).

3 See too *Obeid* [196]-[199].

4 *Obeid* [82]-[96], cf. *R v Macdonald; R v Maitland* [2017] NSWSC 337 (Adamson J) at [39].

5 This principle was subsequently referred to in *Alley v Gillespie* (2018) 92 ALJR 373 at [108], [112] (Nettle and Gordon JJ) in the context of s 47 of the Constitution (see too at [77] (Gageler J)). Professor Blackshield also discussed the principle in an article published on 3 April 2018 on AusPubLaw titled: *'Exclusive Cognisance' and Cognitive Dissonance: Alley v Gillespie*.

6 *Boston; R v White* (1875) 13 SCR (NSW) (L) 322; *R v Greenway* [1998] PL 357.

7 Article 9 of Bill of Rights 1689 (1 Will & Mar sess 2 c 2) provides: '[t]hat the Freedom of Speech and Debates or Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament' (spelling modernised)': *Obeid* (2015) [27].

8 *Obeid* [321].

New South Wales Bar Association Commercial Law Section Inaugural Bathurst lecture

Advocate, judge and arbitrator: perspectives on commercial law

By the Hon A M Gleeson AC QC

The Hon A M Gleeson AC QC by Rocco Fazzari

The decision of the Commercial Law Section of the Bar Association to institute a lecture series in honour of the chief justice of New South Wales, Chief Justice Bathurst, was an excellent idea, and a fitting recognition of a former President of the Bar Association and current leader of the state's judiciary. As a practitioner, Tom Bathurst had an extensive practice in the commercial field and was held in the highest esteem by his professional colleagues and by judges of whom at the time I was one. His work since he took over from James Spigelman in what had earlier been my job has been universally applauded.

I was invited to speak on some aspects of commercial law, as someone who has been a barrister, a judge, and an arbitrator. I have an ideological preference which, in these transparent times, I should disclose. We live in a market economy. It probably does not resemble the kingdom of heaven, but it is better than anything else presently on offer. A central value of a market economy is honouring contractual obligations. To support that value, it is necessary to have a fair, efficient and credible system of enforcement of those obligations.

When I left the Bar in 1988 and took up my appointment here, there were extreme delays in both civil and criminal cases, which were dealt with by the Common Law Division. There was also a Commercial Division of the court, presided over by a vigorous judge, where commercial matters were handled under a special regime of case management. The list was up to date. With various refinements of detail, this had been the system in the Supreme Court since the enactment of the *Commercial Causes Act 1903* (NSW). Some commentators of an inclination to the left, and even one or two judges, deplored what they said was a system that gave 'the big end of town' special treatment. That complaint fell on unsympathetic ears: mine. I agreed that delays in ordinary civil and criminal cases should be tackled, hard, by a *Common Law Delay Reduction Programme*, but I had no interest in weakening the regime that applied to commercial cases.

The New South Wales legislation of 1903 was modelled on the United Kingdom precedent. The history in the United Kingdom is summarised in a chapter written by Sir Richard Aikens, a former judge of the English Commercial Court, in a book about another former judge of the court, Lord Bingham.[1] The establishment of the Commercial Court was in part a response to competition from arbitration, and to the establishment, at the instigation of the City of London, in 1892, of a Court of Arbitration. To this day, the London Court of International Arbitration, which functions quite separately from the regular court system, as an arbitral institution, is a major centre for commercial dispute resolution.

During the 19th century, there was a great expansion of international trade, and by the end of that century London was its major centre. This dominance was reinforced by the use of standard forms of contract in commodity trade, shipping and insurance which made English law the proper law, and which identified England as the venue for dispute resolution. Dispute resolution was itself an important form of business, and a source of substantial intangible earnings.

Although the royal commission whose work led to the Judicature Acts of the 1870s noted

general dissatisfaction with the way courts of justice dealt with mercantile disputes, those Acts did not address the problem. One major complaint was lack of knowledge and experience of the ordinary judges as compared with specialist Tribunals of Commerce that existed elsewhere in Europe. Another was delay and resulting uncertainty for business people who needed to know, in short order, where they stood when a dispute arose. In 1892 a judge, in a public statement, said that the dissatisfaction was so great that some businessmen 'prefer even the hazardous and mysterious chances of arbitration, in which some arbitrator, who knows about as much of law as he knows of theology, by the application of a rough and ready moral consciousness, or upon the affable principle of dividing the victory equally between both sides, decides intricate questions of law and fact with equal ease'[2].

This prompts a digression. Especially in disputes in commodity trades, much arbitration was more like what we would now call expert determination. A dispute about product quality, for example, could be resolved quickly by someone knowledgeable in the trade who would examine the product, and make a ruling, and the parties could get on with their business. This overlap between arbitration and expert determination was reflected in my own experience when I first started practice. In the 1960s in New South Wales, the most common form of arbitration was in building cases. As young barristers, we were sometimes sent up to the premises of the Master Builders' Association where building disputes were determined by an arbitral panel consisting of a builder, a representative of an owner, and, commonly presiding, an architect. This was because the standard form of contract for a domestic or commercial building, issued by the Master Builders' Association, provided for that form of dispute resolution. The link between standard forms of arbitration clauses in commercial contracts and the practical realities of dispute resolution is of major importance. A large part of the legal work that comes to London is built upon it.

Large construction contracts usually had more tailor-made provisions, but they reflected the same basic scheme. The first major arbitration in which I appeared, as a junior counsel, arose out of a dispute between a Commonwealth instrumentality and the Australian subsidiary of an American civil contractor. The construction contract provided for arbitration. The case involved a large amount of money. The hearing lasted several months. There were senior and junior counsel on both sides. Points of law were argued, including issues about the meaning of the contract. The arbitrator, an eminent retired engineer, dealt with them all without apparent difficulty. He listened courteously to the lawyers arguing about the contract. I am sure he would have suspected that to them it had the charm of novelty, whereas he had spent a large part of his professional career administering contracts of this kind. That is why he was chosen as arbitrator.

What was going on in such arbitrations involved an expectation of expertise on the part of the arbitrator; expertise, not in process, but in the subject matter of the dispute. To this day, at the interface of the topics of arbitration, expert determination and expert evidence, there are theoretical distinctions that are sometimes rather blurred in practice. Expert evidence may be necessary in order to make technical language in a contract comprehensible, or to explain matters of context, but the meaning of a contract is ultimately a question of law. Putting matters of foreign law or technical terms to one side, a party could not call an expert lawyer to give an opinion about the meaning of a contract but, surprisingly, experts from other fields are sometimes asked by counsel to express their views on contractual construction. Confining expert evidence to its proper field can be a challenge for judges and arbitrators. An expert called to provide information relevant to the understanding of a contract may find it hard to resist the temptation to tell the tribunal what the contract means.

Some businessmen 'prefer even the hazardous and mysterious chances of arbitration, in which some arbitrator, who knows about as much of law as he knows of theology, by the application of a rough and ready moral consciousness, or upon the affable principle of dividing the victory equally between both sides, decides intricate questions of law and fact with equal ease'

Between the 1960s and the 1980s, a change occurred, for which I cannot account. It might be described as the judicialisation of the arbitral process. At the time of my appointment to the Bench, I was in the second phase, which was being conducted in London, of an arbitration of which the first phase had taken place in Melbourne. The contract concerned oil and gas. The parties on both sides were represented by lawyers from Sydney, Melbourne and the United States. The arbitrators were a former Australian Federal Court judge, a former United States Federal judge, and a former United Kingdom Law Lord.

Somewhere along the way, commercial arbitration in Australia expanded beyond the confines of building and construction work, and other trade disputes, into general commercial law. Perhaps in this respect we were merely entering into a field that for more than a century had been familiar to lawyers in London; a field which, by reason of standard forms of contract used in commerce, had to some extent been their preserve.

To return to commercial litigation, there was in the United Kingdom at the end of the 19th century a common complaint that judges who dealt with large commercial disputes had no relevant expertise. A senior English judge famously observed that the primary judge in a notorious shipping case 'was a very stupid man, a very ill-equipped lawyer and a bad judge [who] knew as much about the principles of general average as a Hindoo about figure-skating'[3]. However, it was inappropriate that the judiciary should attempt to replicate the expert determination aspect of arbitration. It is incompatible with the judicial process; and the strength of some arbitrators based on their personal business experience was often matched by weakness in legal competence. What commercial people pressed for was a half-way measure; they wanted a court, or at least a list, dedicated to their disputes, with judges experienced, not as participants in trade or commerce, but in commercial law and the process of commercial dispute resolution, which would be more expeditious than that of the ordinary courts and better adapted to commercial requirements.

They achieved that with the establishment, in 1895, within the Queen's Bench Division of the Supreme Court, of a Commercial List, which became popularly known as the Commercial Court. Sir Richard Aikens wrote:[4]

> In the early years most of the cases involved shipping and marine insurance disputes but a look at the Times Reports of Commercial Cases reveals that the court took commodities cases, banking disputes, intra-company disputes, and appeals from arbitrations. The procedures were quick and informal. Pleadings were often dispensed with altogether; and evidence was dealt with much more informally than in other courts.

The *Commercial Causes Act 1903* (NSW) was said to be an Act to provide a more expeditious method for trial of commercial causes; an expression that was defined to include causes arising out of the ordinary transactions of merchants and traders, among others those relating to the construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking and mercantile agency

and mercantile usages. It provided for the establishment of a Commercial List, and, in the practice of the Supreme Court thereafter, a particular judge was assigned to that list. In the 1960s, when I commenced practice, the Judicature Act pleading system had not yet been transported to New South Wales. Common law pleadings followed the 19th century forms set out in the pre-1870 edition of *Bullen & Leake*. Equity cases, with a different form of pleading, were dealt with by a separate division of the court. Commercial causes were received into the Commercial List only if prompt application was made, and they were retained in the list only if requirements of expedition were satisfied. The initiating process, after the formal writ by which all common law actions were commenced, was a summons. Directions were then made with a view to defining the issues. Most common law cases were tried by jury; commercial causes were tried by judge alone, as were Equity cases. Commercial work tended to be the preserve of Equity barristers. The common law bar was mainly concerned with personal injury work, although some of the leading common law advocates were in demand in all fields.

For a time in the later part of the 20th century, the internal arrangements of the Supreme Court provided for a Commercial Division but today the Commercial List is operated by the Equity Division. The current Practice Note (SC Eq 3) dates from 2008, and has to be read with SC Eq 4 (Corporations Law) of 2011, SC Eq 6 (Cross Border Insolvency) of 2017 and SC Eq 9 (Commercial Arbitration List) of 2012. The court's general objective is said to be to 'facilitate the just, quick and cheap resolution of matters'. I did not coin that phrase and I would stress the importance of punctuation. The practice note deals with various matters of procedure, including, I notice, stopwatch hearings. I have only once conducted a stopwatch hearing in an arbitration although, of course, in most arbitration hearings, there are somewhat less formalised time limits imposed on evidence and argument. The stopwatch procedure was a little inflexible for my taste; but it seemed to work well enough, mainly because counsel co-operated successfully. Perhaps it is at its most useful where there is a risk that the presiding judge or arbitrator lacks sufficient force of personality to control counsel.

The corresponding practice note in the Federal Court of Australia is the Commercial and Corporations Practice Note of 25 October 2016. The practice area to which it applies covers commercial and corporations disputes within federal jurisdiction, including commercial contract disputes; disputes concerning the conduct of corporations and their officers; commercial class actions; insurance disputes; insolvency matters; international commercial arbitration disputes and others.

I was interested to see that the practice note provides for the possibility of a 'memorial' style process to be adopted similar to that used in some international commercial arbitrations. I have been involved in arbitrations that use that process, and I have mixed feelings about it. As with many of the available techniques of case presentation and management, its efficacy largely depends upon the capacity and motivation of counsel. In the hands of counsel who understand the difference between issues, evidence and argument, and whose appreciation of the merits of their case motivates them to respect that difference, it works well. In other cases it can produce a document that is messy and confusing. The same, however, can be said of much court process.

A recent decision of the Full Court of the Federal Court, *Hancock Prospecting Pty Ltd v Rinehart*[5] examined the scope of the concept of 'commercial arbitration' in its application to a dispute between members of a certain family and interests associated with the family.

It is not only the process of commercial dispute resolution that has been influenced by the demands of consumers; it is the substance of commercial law also. There is a revealing sentence in the speech of Lord Bingham in *Golden Strait Corporation v Nippon Yusen Kubishka Kaisha (The Golden Victory)*.[6] He said:

> [I]n my respectful opinion, the existing decision [of the Court of Appeal] undermines the quality of certainty which is a traditional strength and *major selling point* of English commercial law, and [the decision] involves an unfortunate departure from principle. (Emphasis added.)

The reference to a particular value, certainty, being a major selling point of English commercial law reflects the origins of that law and also one of its aspirations. Lord Mansfield set out to make the custom of merchants part of the common law of England. This, in turn, made the common law attractive to merchants as the law to govern their transactions, and England attractive as a forum for dispute resolution. I have seen statistics as to the proportion of cases in the Commercial Court in England where one or both parties are foreigners. Many arbitrations in London are between foreign parties and arise out of transactions that have no connection with the United Kingdom except that United Kingdom law has been chosen as the proper law of the contract, or England has been named as the place of arbitration. The imperialism of the common law has outlived the British Empire, and almost matches that of the English language. English judges and lawyers have been astute to identify and protect the qualities that have made this so. One of those, as Lord Bingham said, is certainty. Absence of certainty means risk.

In commerce, profit is the reward for risk. Where risk exists, someone will have to pay for it. In international trade, a well-known example is what is sometimes called sovereign risk. It would be invidious to mention them by name, but it is easy to think of countries where the risk of government intervention means that an investor or trader will require a higher rate of return before doing business there. Where governments or their instrumentalities are parties to contracts, resisting enforcement of contracts by relying on sovereign immunity (where it exists) or interference (where it does not) will add to their costs of doing business.

There is a constant trade-off between the value of certainty and pressures for appropriate legal development and refinement. This can be illustrated by a course of litigation in which I became involved at the final stage.

Midland Silicones Ltd v Scruttons Ltd[7], a case decided by the House of Lords in 1962, turned on an unsuccessful attempt by a third party (stevedores) to obtain the benefit of a contractual limitation of liability in a shipping contract. Opposing counsel were Mr Ashton Roskill QC for the cargo interests and his brother Mr Eustace Roskill QC for the shipping interests. The former successfully argued that, on the application of established rules of privity of contract, the third party's attempt to rely on the contractual limitation failed. The report of his argument records[8]

Many arbitrations in London are between foreign parties and arise out of transactions that have no connection with the United Kingdom except that United Kingdom law has been chosen as the proper law of the contract, or England has been named as the place of arbitration. The imperialism of the common law has outlived the British Empire, and almost matches that of the English language. English judges and lawyers have been astute to identify and protect the qualities that have made this so.

that he said: 'It is more important that the law should be clear than that it should be clever'. His argument prevailed, but that was not the end of the story. The legal development that was attempted in that case reflected reasonable commercial aspirations, and the shipowners and their contractors were not inclined to give up on them.

Contracts of carriage and affreightment are good examples of contracts that are made in the expectation that third parties will be affected by their provisions, sometimes because the work involved in performance of such contracts is to be done by third parties such as stevedores. A provision limiting the liability of the carrier, which in turn is likely to reflect the insurance cover taken out by the principals to the contract, and is a well-known form of allocation of risk, is going to be of little practical effect if it does not apply to the people who actually perform the contract. International conventions regulate these risk allocation practices. Contracts for the carriage of goods routinely allocate the risk of loss or damage to the goods according to which party bears the cost of insurance, and the cost of the carriage will vary according to the choices made in that respect. You will find that out if you send a parcel by Australia Post.

After *Midland Silicones Ltd v Scruttons Ltd*, the shipowners' lawyers went back to the drawing board.[9] They drafted the contract of affreightment to extend to servants, agents and independent contractors of the carrier defences and immunities available to the carrier, and they used the law of agency to make that effective. Their new provision (called a Himalaya clause) was described by Lord Bingham in a 2004 decision[10] as 'a deft and commercially-inspired response to technical English rules of contract, particularly those governing privity and consideration'.

The clause was tested in 1975, in the New Zealand case of *The Eurymedon*[11]. The Privy Council upheld the effectiveness of this technique. The opinion was delivered by Lord Wilberforce, who said:

> The carrier [in an American case] contracted, in an exemption clause, as agent for, *inter alios*, all stevedores and other independent contractors, and although it is not in doubt that the law in the United States is more liberal than ours as regards third party contracts, their Lordships see no reason why the law of the Commonwealth [of Nations] should be more restrictive and technical as regards agency contracts. Commercial considerations should have the same force on both sides of the Pacific.
>
> In the opinion of their Lordships, to give the appellant the benefit of the exemptions and limitations contained in the bill of lading is to give effect to the clear intentions of a commercial document, and can be given within existing principles. They see no reason to strain the law or the facts in order to defeat those intentions[4].

The same clause was later tested in Australia in the case of the *New York Star*[12] which, in 1981, was the last appeal to go from the High Court to the Privy Council. A cargo from overseas was stolen from a Sydney wharf while in the custody of the stevedores, in circumstances found to involve their negligence. The bill of lading limited liability for such loss, and one question was whether the stevedores could take the benefit of the exemption. At first instance, and in the New South Wales Court of Appeal, the judges followed *The Eurymedon*. In the High Court, when counsel for the stevedores came to address on that point, he was stopped. The court said it did not need to hear him. The High Court reserved its decision and then decided against the stevedores, declining to

follow the Privy Council. There was a dissent from Chief Justice Barwick. The majority judgments included some nationalistic overtones. The stevedores briefed new counsel. They were advised that, if the Privy Council granted special leave to appeal, an appeal would succeed, but that special leave would be hard to get. Appeals from the High Court to the Privy Council had been abolished some years before, and although pending cases had been grandfathered, the English judges would be reluctant to get involved, especially since the High Court had made a conscious choice that, on the point in question, Australian law should depart from English (and New Zealand) law.

Sitting on the bench that dealt with the special leave application in London was Lord Wilberforce. Of course he did not approve of the outcome in the High Court, which had refused to follow his decision in the New Zealand case. What also troubled all their Lordships was the fact that the High Court had decided the point against the stevedores without giving them an opportunity to present their argument. This made the task of persuading them to grant special leave easier. Leave was granted, although not without some intensity of argument.

The appeal, which was heard a year later, was plain sailing. One of the members of the appeal bench was Lord [Eustace] Roskill. The respondents were represented by leading English counsel, a relative by marriage of Lord Roskill, who was quick to remind his Lordship that his argument in *Midland Silicones Ltd v Scruttons Ltd* had failed. 'But in that case,' said Lord Roskill, 'I did not have a decent contract to rely on'. The Privy Council upheld the dissenting judgment of Chief Justice Barwick and followed its own earlier decision in *The Eurymedon*.

That litigation was a dispute between two insurance companies, and the amount of money involved was modest. What was at stake superficially was a question whether the cost of the theft of a cargo of razor-blades would be borne by the insurers of the stevedores, or the insurers of the consignees. But it raised a deeper question of the uniformity of the common law, and of where commercial law was to come down as between being clear and being clever. In these respects, the law is conscious of its own marketability.

One of the principal successes of English law has been in maintaining the objectivity of contractual interpretation. Like the doctrine of consideration, this is an example of the commercial orientation of the common law of contract.

In his rationalisation of the objective theory of interpretation, Lord Devlin said that 'the common law of contract was designed mainly to serve commerce'.[13] He explained that, typically, a contract is 'embodied in a document which may pass from hand to hand when the goods it represents are sold over and over again to a string of buyers, or when money is borrowed on it, or insurance arranged . . . The document must speak for itself. For the common law has its eye fixed as closely on the third man as on the original parties; and the final document is the only thing that can speak to the third man'.

To use a more recent expression, a typical commercial contract is intended to be a bankable document. A contract for the construction of a power station is likely to be an elaborate instrument, drafted over negotiations between well-lawyered parties. It will be shown to and relied upon by financiers. What do those financiers know of the exchanges between the parties and their lawyers during the drafting process? They only see, and must rely upon, the text. The common law's resistance to permitting information about the drafting process to influence the meaning of the text is pragmatic, and satisfies legitimate commercial expectations.

'It is more important that the law should be clear than that it should be clever'.

Other practical considerations point in the same direction. If two individuals, in a private or domestic setting, make an agreement, it may make sense to speak of a common subjective intention. But if a complex legal instrument is negotiated between two large corporations, each with legal advice, where the drafters of the document had no legal capacity to bind their principals, and the directors or managers whose signatures gave the document binding effect may never have read it in any detail, where does an enquiry as to subjective intention lead? Whose intention is relevant? Principles of agency are sometimes pressed into service where a particular person can be regarded as to guiding mind or will of a corporation, but the drafters of commercial contracts rarely fall into that category.

The primary common law principle of interpretation is that the meaning of the terms of a contractual document is that which a reasonable person, in the position of the parties, would have understood them to mean.[14] Lord Hoffman pointed out in *Attorney General of Belize v Belize Telecom Ltd*[15] that the objective meaning of a legal instrument, that is, the meaning which it would convey to a reasonable person, 'is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body is deemed to be the author of the instrument'. In a Constitutional context, it is orthodox and legitimate to express a construction of a statute as reflecting the intention or the will of Parliament. Such a mode of expression reflects the constitutional relationship between Parliament and the courts, and the legal foundation of a law enacted by statute. It is not to be understood, however, as a reference to the psychological state of some person or persons involved in drafting the Act, or debating it, or undertaking the formal procedures necessary to give it force. So it is also with references to the intention of the parties to a commercial contract.

A reasonable person's understanding of the meaning of the terms of a written document may require consideration not only of text but also of context, including surrounding circumstances known to the parties, and the purpose and object of the transaction.[16] This, in turn, may (or may not) give relevance to information appearing from pre-contractual negotiations.[17] In how many commercial cases is the judge spared a reference to the 'factual matrix'? That phrase, coined by Lord Wilberforce, is a reference to the organic environment in, or out of which, something develops; it is not a reference to all the chatter that goes into the drafting of a contract. The prize does not go to the party whose lawyer had the most to say during the drafting process.

The common law's way of dealing with this question is not the only way, even in the case of commercial transactions. A different technique, based on the civilian approach, may be seen in *The United Nations Convention on Contracts for the International Sale of Goods*, the Vienna Sales Convention, which has been ratified in Australia, where the objective approach is a kind of default option to be applied when there is insufficient information about the subjective state of mind of the parties to the contract.

Consistent with the common law's stress on objectivity of meaning, questions of fault and blame are frequently immaterial to a commercial dispute. If a party to a contract fails to perform its obligations, the reason why that has occurred may, and commonly does, not matter. More often than not, it will have no bearing on the consequences for the other party. There may be any number of reasons why a party may fail to comply with contractual obligations. Morally, they may be good, bad or indifferent. One of the most common reasons for failing to perform a contract is lack of necessary funds. The reason for the lack of funds is usually irrelevant.

The English courts, in the context of contracts for the sale of land, appear to have become concerned, for a time, that some decisions of the High Court of Australia[18] in the 1980s had assumed an over-expansive jurisdiction to grant equitable relief against the exercise of a right to terminate a contract for breach of an essential condition by a purchaser.[19] The concern was misplaced. In two cases decided in 2003,[20] the High Court held that, where there was no question of a penalty, or of unjust enrichment, or of a vendor's

conduct having contributed to the breach, or of the transaction being in substance a mortgage, and where no more was involved than the application of strict contractual provisions as to time, then such provisions would apply. The court said that the equitable jurisdiction to relieve against unconscientious exercise of legal rights was not an authority 'to reshape contractual relations into a form the court thinks more reasonable or fair where subsequent events have rendered one side's situation more favourable'.[21] That was said in a case concerning a large sale of development land. Time was made of the essence, in circumstances of previous extension of the completion date. The purchasers were relying on finance to come from overseas, and there was a last-minute hitch in the transfer of funds. Settlement could not occur in the time stipulated. The vendors terminated. The High Court upheld their contractual right to do so. It was argued their termination was unconscientious, but nobody could explain why. If a purchaser, in circumstances that are in no respect attributable to the vendor, cannot come up with the money within the time stipulated, and time is of the essence, why should the vendor be concerned about or affected by the reason for the delay? Why should it make a difference to the vendor if the delay is the result of bad luck, or bad management, or simple poverty? It is the contract that allocates the risk.

Perhaps the high point of the amorality of contract law is the well-known proposition that the law gives a party to a contract a choice between performing the contract and paying damages for breach.

This does not mean that all commercial disputes are resolved in a moral vacuum, but only that, in many cases, it will be the scheme of contractual allocation of risk, rather than some search for blame, that will decide who, as between the parties, bears the consequences when things do not go as planned. Perhaps the high point of the amorality of contract law is the well-known proposition that the law gives a party to a contract a choice between performing the contract and paying damages for breach. In some circumstances that is an over-simplification, but it is true often enough to make it a sobering check on over-enthusiastic advocacy. It is also part of the conceptual framework for analysis of primary and secondary obligations.

As with most of the common law, in practice the application of contract law is now heavily influenced by statutory intervention. A prime example of this is the legislation prohibiting misleading and deceptive conduct in trade or commerce and providing remedies, including damages, and potential reformation of contracts, for breach. Such legislation, which is now to be found in Federal and State enactments, originated with s 52 of the *Trade Practices Act 1974* (Cth). Two features were established early on. First, the section was not confined to conduct that was intended to mislead or deceive or that resulted from failure to take reasonable care.[22] As Gibbs CJ put it in 1982[23], '[T]he liability imposed by s 52, in conjunction with ss 80 and 82, is . . . quite unrelated to fault'. Secondly, although presented politically as a consumer protection law, the legislation created a norm of behaviour which applied regardless of whether a particular case involved any consumer in need of protection. Gibbs CJ said in the same case:[24]

> It may have been thought that the unequal position of consumers as against the corporations which supply them with commodities justified a measure that from the point of view of the latter seems draconic, but although s 52 is intended for the protection of consumers it is enforceable by a trade competitor who is not a consumer . . . and is not infrequently used by one trader against a rival . . .. The section may have been designed to protect the weak from the powerful, but it may be used by a large and powerful corporation to restrain the activities of a smaller competitor.

An allegation of misleading and deceptive conduct is now a feature of much commercial disputation, often in circumstances remote from any context of consumer protection. Similarly, there are statutory provisions against unconscionable conduct. The High Court dealt with s 51AA of the *Trade Practices Act 1974* (Cth) in *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd*[25]which concerned the terms of a renewal of a lease of business premises. The context was commercial. The Court decided that good conscience did not require the lessor, in circumstances where there was no exploitation of any special disability or disadvantage, to do other than pursue its own legitimate business interests. There is a tendency on the part of some advocates to assert unconscionable conduct in the event of any exercise of unequal bargaining power. The great majority of contracts are made between parties of unequal bargaining power, and most people routinely enter into contracts whose terms and conditions are not open to negotiation. Businesses, whether run by private enterprise or government agencies, commonly contract with their customers as to such terms and conditions on a take-it-or-leave-it basis.

In the joint judgment in *Bridgewater v Leahy*,[26] there was an attempt to remind lawyers of the scope of unconscionability as applied in practice by the courts. It was said (case references omitted):

> It is of interest to note the findings of fact at first instance in some of the leading cases on this topic. In *Wilton v Farnworth*, a person who was 'markedly dull-witted and stupid' was persuaded to sign over to another his interest in his wife's estate without having any idea of what he was doing. In *Blomley v Ryan* the defendant took advantage of the plaintiff's alcoholism to induce him to enter a transaction when his judgment was seriously affected by drink. In *Amadio* the special disability of the guarantors included a limited understanding of English, pressure to enter in haste into a transaction they did not understand, and reliance upon their son. In *Louth v Diprose* the primary judge found that the donee, with whom the donor was 'utterly infatuated', had threatened suicide, manufactured a false atmosphere of personal crisis, and engaged in a process of manipulation to which the donor was vulnerable. The judge found the donee's conduct 'smacked of fraud'.

Legislation imposing broad normative standards of behaviour, some of it based upon legislative power with respect to trade and commerce, now potentially affects the outcome of many contractual disputes. Even so, a commercial context will often influence the approach of a court, or an arbitrator, to issues such as reliance, or obligations of disclosure.

Chief Justice Allsop, in a paper published in the October 2017 issue of the *Australian Law Journal*,[27] made the important point that commercial contracts themselves are not value-free zones, and are often expressed in terms of values and norms, sometimes well understood by people in an industry, sometimes of more general application, which reflect expectations of honest and reasonable dealing. He went on[28] to consider the wider question of good faith in contractual performance, considered at least as a principle in furtherance of the contractual bargain, and gave a series of examples of familiar implications and principles of construction which gives effect to the elements of good faith and fair dealing. This led him to explore the potential relationship between the development of the common law's approach to good faith and modern legislative intervention in commercial dealing. Current events in respect of financial services may be telling us to watch this space.

The relationship between common law

and statute is a complex topic, and emphasis on a particular aspect of it may risk over-simplification. Even so, one point worth considering is the liberating effect upon judges of statutory intervention in aid, for example, of consumer protection. This point was made by Lord Wilberforce in *Photo Productions Ltd v Securicor Ltd*[29], in a judgment that has been referred to in later High Court decisions. His Lordship said that consumer protection legislation made it unnecessary for courts to give strained and unnatural meanings to the language of contracts in order to avoid harsh consequences. Hard cases can make bad law, but if the hard cases are adequately covered by legislation, then the pressure upon courts to attempt to avoid injustice by doctrinal distortions or strained interpretations of language is relieved.

In his paper, Chief Justice Allsop showed that, in the United States, some leading judges have felt obliged to temper the use of the concept of good faith in contractual performance by insisting that it is fidelity to the bargain that is at the centre of the concept. An everyday example is the implication of a term that each party to a contract will co-operate in the doing of acts necessary to perform, or to enable the other party to secure a benefit provided by the contract[30]. The old-fashioned officious bystander would readily accept that such a term goes without saying because it is inherent in the bargain. But the pursuit of self-interest is not foreign to commercial relationships, even when it is at the expense of the other party. People would not need contracts if their interests were never going to diverge. Whatever the scope of an obligation of good faith, it cannot be to turn ordinary commercial relationships into partnerships. Fidelity to the bargain is a coherent principle; self-denial is not.

To return to the matter of commercial dispute resolution, both litigation and arbitration are choices of last resort; neither is the principal method employed by business people resolving disputes. This is why I am puzzled by occasional statements of regret that, by going to private arbitration, parties deprive the public of the benefit of judicial clarification of the law. Business people have no obligation to contribute to the clarification or development of legal principle. Most disputes that arise in commerce, even if they find their way into the hands of lawyers, never get to court or to arbitration; they are settled by the parties based upon an assessment of where their interests lie. Once litigation arises, most court cases are settled, on the same basis, without the need for any judicial decision. Almost every arbitration clause I have seen in recent years is part of a wider dispute resolution provision that involves anterior stages of a resolution process that is often quite elaborate. There is now a developing body of jurisprudence concerning the jurisdiction of arbitral tribunals in cases where there has been a failure to follow the antecedent process. It often depends upon whether, on the true construction of the contract, the antecedent process is mandatory or facultative.

In the case of domestic, as distinct from international, commercial arbitration, the question why some parties choose arbitration over litigation can, I think, be answered in one word: privacy. To revert to the 'just, quick and cheap' formula, arbitration is neither quicker nor cheaper than litigation in the Federal Court, or the Supreme Court of New South Wales, subject only to one qualification, and in terms of justice I have not seen any material difference. The qualification I mentioned concerns the matter of finality, which can in turn affect cost and delay. Because of the limitations on appellate review of arbitral awards, arbitrations are more likely to produce finality at an earlier stage in most cases. However, the value that parties attach to finality normally depends on whether they win or lose. It is important to remember the point in time at which the choice of arbitration is made. Most arbitrations result from agreements made before parties have fallen into dispute and, therefore, at a time when they will value the prospect of finality more highly than they may come to at a later stage. The principal attraction of arbitration, however, is that it is private. The parties to an arbitration agreement, of course, can always, by consent, by-pass their agreement and litigate. Nothing better illustrates the essentially contractual foundation of arbitration than the consideration that the parties can agree not to enforce their contract, or waive a right to arbitrate. Litigation, on the other hand, invokes the exercise of the judicial power of government. Save in exceptional circumstances, that must be done in public. The publicity necessarily associated with litigation is, from my experience, the most likely explanation of why parties make arbitration agreements at a time when they are not in dispute, and cannot foresee what their disputes might be, keeping also in mind that modern arbitration agreements are usually part of more elaborate dispute resolution procedures which, at least in their early stages, are essentially private.

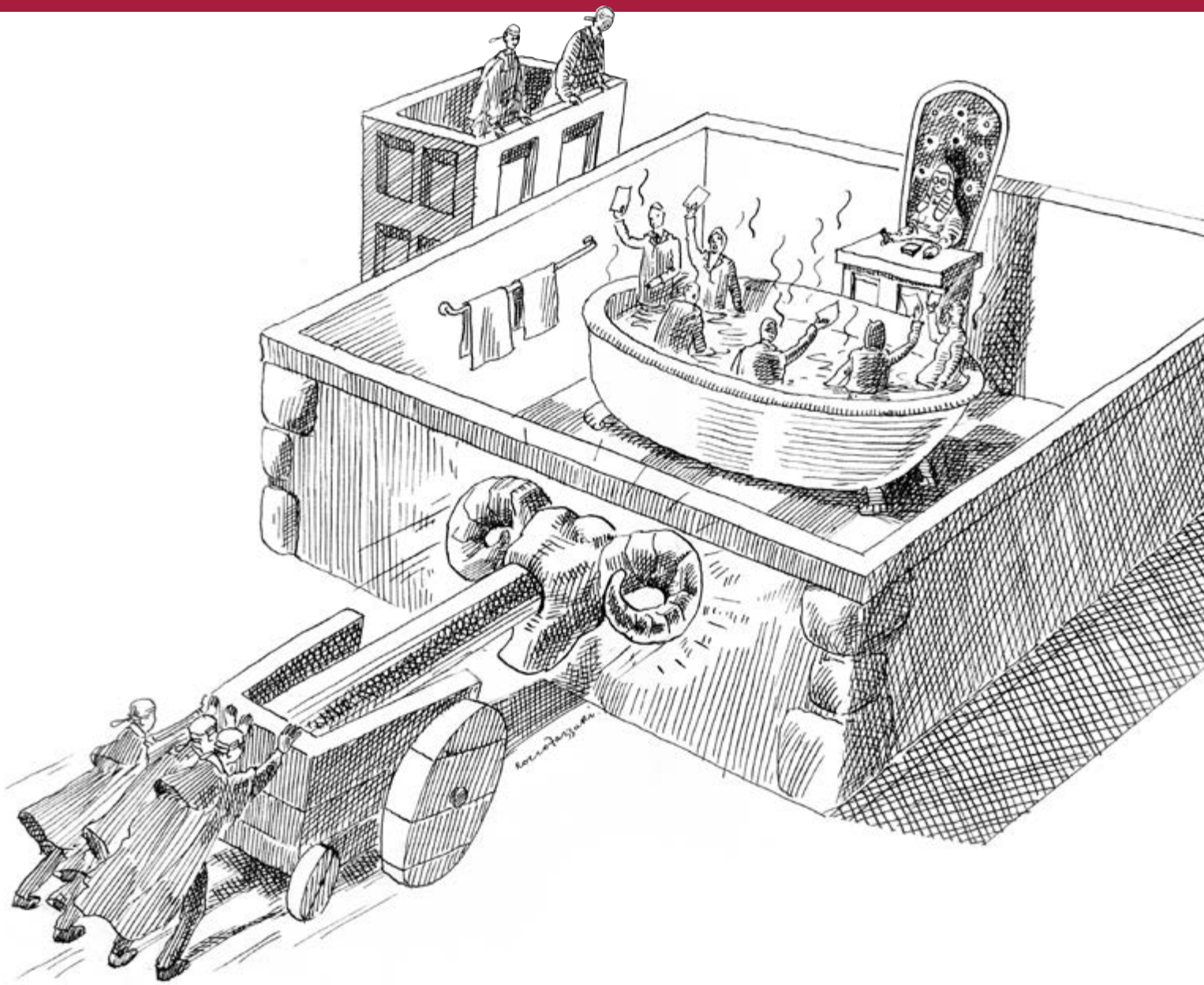
In the case of international commercial arbitrations, an additional consideration is often at work: forum neutrality. Parties to international commerce are sometimes cautious about entrusting the resolution of their disputes to the courts of the home country of the other party. (Caution of this kind may also explain the striking fact that, by reason of international conventions, enforcement of foreign arbitral awards is more widely accepted than enforcement of foreign judgments.) This, again, reflects the basic difference between dispute resolution by the exercise of the judicial power of a government and dispute resolution by an agreed process, where the parties are free to choose the place of arbitration and the tribunal. Whereas, in the case of litigation, emphasis is often placed on identifying a natural forum; in the case of arbitration, there is often a conscious attempt to seek out a neutral forum.

The proper law of a contract is not necessarily the law of arbitration under that contract. The place of arbitration (which in turn is not necessarily the venue of the arbitration hearing or hearings) may be selected for the very reason that it is not the home territory of one of the parties to the contract, or the place where the contract is to be performed. Some arbitration clauses specify that the arbitrator or arbitrators must not be of the same nationality as the parties.

Commercial considerations are important both to the substance of commercial law and to the process of commercial dispute resolution. Australian governments and courts are alive to that.

END NOTES

1 R. Aikens, ' "With a view to despatch and the saving of expense". How the Commercial Court has attempted to meet the demands of the business community for efficient and cost-effective litigation procedures', in T*om Bingham and the Transformation of the Law*, M. Andenes and D. Fairgrieve (eds), OUP, 2009, pp 563-587.
2 Ibid at 568-569.
3 Ibid at 569.
4 Ibid at 571.
5 [2017] FCAFC 170.
6 [2007] UKHL 12, [2007] 2 AC 353
7 [1962] AC 446.
8 At 459.
9 The history is recounted by the House of Lords in *Homburg Houtimport BV v Agrosin Private Ltd* [2004] 1 AC 715 (HL).
10 Above at 744 (n 41)
11 *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd* [1975] AC 154 (PC).
12 *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd* [1981] 1 WLR 138 (PC).
13 Patrick Devlin, *The Enforcement of Morals* (1965) at 44. (PUBLISHER?)
14 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* 92004) 219 CLR 165 at [10].
15 [2009] UKPC 10 at [16].
16 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40].
17 *Oceanbulk Shipping SA v TMT Ltd* [2010] UKSC 44, [2011] 1 AC 662 at 680.
18 Such as *Legione v Hately* (1983) 152 CLR 406 and *Stern v McArthur* (1988) 165 CLR 489.
19 See, for example, *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 (PC).
20 *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315; *Romanos v Pentagold Investments Pty Ltd* (2003) 217 CLR 367.
21 *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 337.
22 *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* [1978] HCA 11; (1978) 140 CLR 216.
23 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44 at [7]; (1982) 149 CLR 191.
24 Ibid at [7].
25 (2003) 214 CLR 51.
26 (1998) 194 CLR 457 at [46].
27 *Conscience, Fair-Dealing and Commerce: Parliaments and the Courts* (2017) 91 ALJ 820 at 823.
28 Ibid at 833.
29 [1980] UKHL 2; [1980] AC 827.
30 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at [61].



Playing in the hot tub - a guide to concurrent expert evidence in New South Wales

By Adam Butt, 8 Wentworth and Hugh Stowe, 5 Wentworth

A. Introduction

Concurrent expert evidence ('hot tubbing') is a method for adducing and testing expert evidence which has been championed in Australia[1] and is now used to varying extents in the common law world and in international arbitrations. In New South Wales, concurrent evidence has for a number of years been a default or normalised evidentiary process in major courts and tribunals.

This article provides a guide to concurrent evidence and takes a closer look at its practical side. The article focuses on some key considerations that practitioners may wish to keep in mind when preparing for pre-trial and trial sessions, to maximise their client's position in such sessions. The paper also flags some tensions which have surfaced in relation to the model, for the purposes of exploring how it might best be developed as an evidentiary tool.

To endeavour to provide readers with a current and diverse perspective on the topic, the authors have consulted several eminent practitioners and judges for their perspectives on the method.[2] We incorporate individual and group responses into our analysis. We

are grateful to everyone who took the time to share their perspectives.

Concurrent evidence model

Australia's version of concurrent evidence typically involves two interrelated processes. First, there is a pre-trial joint expert conferencing ('conclave') phase. During this part, the parties' experts meet to clarify the areas of agreement and/or disagreement between them, in order to produce a joint report on such matters. The conference may or may not be conducted with a facilitator present, depending on context. The parties' lawyers will normally not be present.

The second part of the process, if any, is the giving of concurrent expert evidence at trial. During this phase, the parties' experts sit together at court in what has colloquially been called the 'hot tub'[3] (e.g. a witness box), and present evidence concurrently in an interactive process which is moderated by the judge. The experts still give their separate opinions and are still cross-examined by counsel, as occurs in a traditional adversarial trial. However, in this instance the experts present their viewpoints concurrently instead of sequentially, and there may be interaction among the experts should they see a need to 'correct' or to 'disagree' with each other's views. The judge will also intervene as appropriate with questions to enhance the fact-finding process for him or herself. The process is intended to be a discussion among professionals which enhances the search for the truth. It involves certain inquisitorial features, yet it also maintains fundamentally adversarial techniques albeit in a non-traditional setting.

According to Hon. Peter McClellan, one of concurrent evidence's key proponents, the process is 'one of the most important recent reforms in the civil trial process in Australia.

This model has been designed to, and does, in general, help to narrow, clarify and resolve issues in dispute with greater efficiency and accuracy across a broad range of subject areas. According to Hon. Peter McClellan, one of concurrent evidence's key proponents, the process is 'one of the most important recent reforms in the civil trial process in Australia.'[4]

Today, numerous Australian courts and tribunals have incorporated concurrent evidence into their rules.[5] In those jurisdictions concurrent evidence is increasingly 'the norm rather than the exception.'[6] The process of concurrent expert evidence has been used in diverse areas including toxics, accounting, quantity surveying, pharmaceutical patents, metallurgy, naval architecture, mechanical engineering, medical negligence and anthropology.[7] The process is generally confined to civil proceedings, yet it has also been introduced, by the parties' consent, in criminal trials before a judge sitting alone, in *voir dire* examinations, and before magistrates in summary criminal proceedings.[8] Despite the conventional wisdom that concurrent evidence is only used in non-jury cases,[9] as Pepper J notes, it 'is now used in both judge-alone trials and jury trials, in both criminal and civil proceedings.'[10]

Rules and practice notes

Rules on concurrent evidence are now broadly provided for in Australian legislation.[11] Although the rules of different jurisdictions have certain distinctions among them, the processes are substantially similar. The process is always intended to enable the 'real issues in dispute between experts to be identified and narrowed from an early stage,' for the purpose of achieving a proceeding's just and efficient resolution.[12] At its core essentials, concurrent evidence aims to shorten trials (and reduce associated work), enhance fact-finding and judicial decision-making, and improve settlement prospects.[13]

Under r 23.15 of the *Federal Rules*, for example, if two or more parties to a proceeding intend to call experts to give opinion evidence about a similar question, any party may apply to the Court for an order that the experts undertake a joint conference before or after they write their expert reports, or that the experts give concurrent evidence.[14] Moreover, the Court itself can order that expert conferencing or concurrent evidence take place.[15] The Court's power to make such an order in civil cases is a defining feature of the process,[16] although in Australian jurisdictions in which concurrent evidence is now well developed the process is typically preferred by the parties.[17]

The effectiveness of concurrent expert evidence in Australia is buttressed by the presence of an Expert Code of Conduct which emphasises that experts have a duty to assist the court (not the party retaining them) and to act impartially at all times. This can help to reduce bias and enhance participation in conclaves and hot tubs.[18]

B. Advantages and disadvantages of concurrent evidence

Advantages

It is generally recognised that the benefits of concurrent evidence include the following:[19]

- enabling all involved at a trial to hear the experts discussing the same issues, at the same time, enhancing the comprehension and exploration of the evidence;[20]
- promoting a cooperative, collegiate environment in which the experts more readily act to assist the Court rather than to act as advocates;
- narrowing or resolving the issues before the Court and clarifying differences, thereby enhancing prospects of settlement[21] and efficiencies at hearings;[22]
- enabling a judge to chair a discussion which assists the judge in their fact-finding and in structuring the interactive evidentiary process;
- having the experts appear together promotes greater care and accuracy in their expression of opinion because of the prospect of immediate peer review;
- clearer and fuller communication of expert opinion is facilitated by 'refocussing emphasis to professional dialogue rather than cross-examination',[23] and easing experts' tension regarding the process of giving evidence;
- counsel may also benefit when cross-examining because they can immediately invite responses from either expert regarding a matter in question;
- by reason of the above matters, the process usually assists in the 'just, quick, and cheap' disposition of proceedings.

Disadvantages

In contrast, some concerns have been raised which include the following matters:

- lawyers are usually excluded from the conclaves, creating uncertainty and anxiety due to a loss of control, and depriving clients of whatever legitimate role lawyers properly have in the testing and expression of the opinion expressed in an expert's report;
- although rules of court typically provide detailed procedural guidelines, uncertainty and a lack of structure is still a concern to some;
- some are concerned that experts may be turned into advocates and or more persuasive experts may win a judge's mind by overshadowing others;[24]
- a perception by some that conducting

cross-examination about an expert's credit during concurrent evidence can be more difficult;[25]

- smaller matters may not justify the up-front costs of conclaves.

Overall, the prevalence of the model in NSW tends to confirm that these concerns are outweighed by the process' benefits, when properly and responsibly executed. Alternatively, the concerns may be incorrect or misguided.[26] For example, concerns about exacerbating the problems of expert partisanship appear not to have been realised. This conclusion is supported by our interviews and relevant statistics which show that users generally prefer concurrent evidence over other methods.[27] Indeed it has become the norm in NSW.[28]

Default or suitable process?

In certain jurisdictions, concurrent evidence is the 'default' evidentiary process. This applies in the Supreme Court's Common Law Division[29] and Professional Negligence Lists,[30] and in the Land and Environment Court.[31] In other courts and tribunals concurrent evidence is used if 'suitable'[32] or 'appropriate,'[33] although the practice notes convey a clear preference for the model.[34] This applies to equity cases in the Supreme Court, to civil cases in the District Court, and to Federal Court and Administrative Appeals Tribunal proceedings.

Our interviews suggest that orders for conclaves in civil trials are highly likely to occur or a near certainty.

All of this begs the question as to what are the criteria upon which a case is deemed to be suitable or unsuitable for concurrent evidence? Some practice notes provide useful guidance.[35] Considerations weighing in favour of concurrent evidence include: the centrality of expert evidence to the case, an overlap on the subject matters on which experts express opinion, complexity in the contest between experts, experts possessing comparable disciplines and expertise, the parties being sufficiently resourced to justify the up-front additional costs of the conclave process, and there being sufficient prospects that the method will reduce the hearing's length. Although there has been earlier authority that a 'clear, firm and considered divergence of opinion between experts'[36] weighed against the utility of conclaves, there is now a recognition that the mere existence of such divergence does not preclude the utility of the model, because of the capacity of the conclave both to facilitate convergence

and to clarify the nature and basis for disagreement.[37]

In the Federal Court, concurrent evidence is used 'in appropriate circumstances' and parties should expect the Court to 'give careful consideration to whether concurrent evidence is appropriate.'[38] Similar considerations apply in the District Court.[39] Our interviews suggest that orders for conclaves[40] in civil trials are highly likely to occur or a near certainty. Weinstein SC says that in PNL matters the orders are essentially 'inevitable.' Preston CJ LEC gave a similar response regarding LEC cases. In Middleton J's cases, which are ordinarily large and well-resourced federal matters (IP and competition), his Honour has never ordered conclaves not to proceed. His Honour says that, because of cultural changes, lawyers do not now resist the order before him.[41]

C. Pre-trial phase - The conclave

Preparation

The issue of concurrent evidence should be raised by the parties as early as possible in a proceeding - such as at the first appropriate case management hearing - so that orders can be made in advance. This consideration is incorporated into the practice notes.[42] In jurisdictions where concurrent evidence is not 'default', parties should confer as early as practicable to try to reach agreement on the method's suitability and incorporation into the timetable for a hearing's preparation.

Justice Middleton emphasised the importance of having a joint report completed well before the trial, so that any deficiencies with a report can be addressed well before a hearing. Further, the early conduct of the conclave facilitates there being sufficient time for post-conclave settlement discussions, taking advantage of any narrowing of issues that flow from the conclave.[43]

In preparing for the conclave, the parties should agree on who will attend, the questions which will be answered, and the materials to be placed before the experts.[44] In any event the Court may make directions on these matters. The questions to be addressed should be those specified by the Court or those agreed to by the parties (this issue is discussed further below).

The experts need to be provided with copies of applicable Codes of Conduct and practice notes, relevant individual and/or joint statements of assumptions to be made by the experts, and copies of expert opinions which the parties intend to rely on. Other materials such as agreed chronologies may be helpful.[45]

Timing of conclaves

In terms of the timing of conclaves,[46] the Court can choose to direct that a conclave be held before or after any individual expert reports have been written.[47] Our interviews suggest that the usual practice is that courts direct that conclaves take place after the parties' experts have completed their initial individual reports.[48] There are recognised disadvantages of moving straight to conclave without prior individual reports: 1) excluding lawyers from the process of preparing the initial individual expert report may frustrate the precise identification and distillation of the relevant issues, undermining the conclave's efficiency; 2) excluding lawyers from the process of preparing the initial reports generates procedural fairness issues, by frustrating lawyers fulfilling their legitimate role in relation to the testing, substantiation and expression of an expert's initial opinion; 3) without prior exchange of expert reports, moving straight into a conclave risks an expert being unprepared to deal adequately and fairly with unforeseen competing expert views.[49]

Alternatively, some judicial interviewees expressed a practice or occasional preference for directing that experts participate in the conclave before completing their individual reports (or any report). For example, Preston CJ LEC advised that in the LEC the

most common direction is that the experts proceed to conclave and joint report, before being allowed to prepare individual reports. His Honour indicated that this LEC practice may be linked to the presence of many repeat players in that jurisdiction who are familiar with, and skilled at, writing joint reports. In the LEC, parties need to seek directions for experts to, and justify the need to, proceed to individual reports after joint reporting. Similarly, Middleton J says that sometimes he favours having experts first confer before they commit to their individual reports, because this may avoid experts taking positions that they feel compelled to defend. Hon Annabelle Bennett considered that a further advantage of holding a conclave before the provision of individual reports is that it could avoid the substantial delay and cost often associated with individual reports (which are often redundant following the joint report). It was observed that some of the disadvantages of moving straight to conclave could be mitigated by an exchange of pre-conclave precis reports or position papers between the experts (perhaps on condition that they are not be tendered, or the subject of cross-examination, to mitigate the temptation to unduly embellish those precis reports)[50]. It was also recognised that circumstances which may support consideration of bypassing the prior exchange of individual reports might be the clarity of the issues in contest; the forensic experience of the experts (limiting the reasonable need for lawyer involvement in a preliminary report); the need for expedition of trial preparation; and cost concerns.

Number of conclaves and experts

It is not uncommon for concurrent evidence to involve 2 to 8 (or more) experts.[51] Anecdotally, increasing the size of the conclave may increase the logistical difficulties of managing collegiate dialogue, and the risk of 'group think' and blocks of experts 'ganging up' on minority views.[52]

There will frequently be multiple conclaves addressing distinct areas of expertise. When there are partially overlapping areas of expertise, case management issues arise in relation to whether to convene a single large conclave to address all issues, or multiple smaller conclaves to address particular issues (possibly necessitating the attendance of some experts in multiple conclaves).[53] Weighing in favour of smaller issue-specific conclaves include: logistical difficulties associated with convening large conclaves (although some of those difficulties could be mitigated by the appointment of an experienced facilitator);[54] the waste of expert time and costs associated with experts participating in a conclave on issues on which they expressed no opinion; the risk of irrelevant and unqualified opinion being expressed (and recorded in the joint report) if experts participate in a larger conclave on issues on which they lack expertise;[55] logistical difficulties in arranging for the attendance of large numbers of experts in court for concurrent evidence.[56] Weighing in favour of the larger conclaves and concurrent evidence sessions are the following considerations: that 'untested or idiosyncratic differences of opinion might emerge if separate isolated concurrent evidence sessions are permitted' (although that risk could be mitigated by recalling witnesses if necessary);[57] the scope for enhanced problem solving on complex questions by reason of the presence of different perspectives, and the capacity for cross-fertilisation between different expert disciplines.

Although the rules contemplate the possibility of lawyers attending the conclave, there seems to be a general recognition that it is appropriate to exclude lawyers from the process, to avoid the perception and reality of tainting the collegiate and non-partisan dynamic of the conclave.

Stephen Finch SC expressed concern in multi-party litigation about a judicial willingness to permit each party to invite an expert to the conclave and concurrent evidence sessions, in circumstances where a number of parties support a common position leading to an imbalance in the numbers of experts supporting opposing views. He observes, as we have noted above, that the practice potentially exposes experts advocating the minority position to significant pressure to conform to the majority view, and privileges the majority view in concurrent evidence through sheer weight of numbers. He also observes that groups of experts supporting a position often seem more prone to adversarial bias than individual experts. He suggests that conclaves (and concurrent evidence sessions) should generally be convened on the basis that each substantive position is represented by only one expert, regardless of the number of parties supporting that position.[58]

Attendance of lawyers?

Judges may irect that a conclave be held 'with or without the attendance of the parties affected or their legal representatives': UCPR 31.24(2). Although the rules contemplate the possibility of lawyers attending the conclave, there seems to be a general recognition that it is appropriate to exclude lawyers from the process, to avoid the perception and reality of tainting the collegiate and non-partisan dynamic of the conclave.[59]

Without attending the conclave, lawyers may still perform a limited role providing instructions and clarifications to the experts on questions arising during a session, including in relation to procedure, relevance, or providing materials.[60] It may be useful to formulate an agreed protocol for such communications when the conclave is ordered.[61] Any disagreement between the lawyers about communications to the experts should be brought before the judge.

Facilitators

The Court may direct that a conference be held 'with or without the attendance of a facilitator': UCPR 31.24(2)(c). Facilitators[62] are becoming increasingly utilised in conclaves.[63] In jurisdictions such as native title, facilitators (there Registrars) are always used.[64] In some jurisdictions they are rarely used.[65] A facilitator could be a Registrar, Associate Justice, commissioner or an experienced barrister.[66] UCPR 31.24(2)(c) requires only that a facilitator be independent. The person may or may not be an expert on the issues in question.[67] They do however need to be 'suitably qualified.'[68] Hon Anthony Whealy QC observes that there might be disadvantages in using a non-lawyer facilitator with subject matter expertise: i.e., the risk they might consciously or unconsciously convey their own expert view; the risk of undue deference by the conclave participants to that view; the inability to comprehend what form of expression would be comprehensible to lay persons; and the absence of reason to think that subject matter experts are skilled facilitators. The practice notes suggest that a conclave facilitator or chairperson may be appointed by consent or by court order.[69]

The attendance of an experienced facilitator can be extremely useful in managing a conclave and optimising its information product – the joint report. The benefits of a facilitator may include: facilitating a balanced opportunity for participation by all experts in the conclave and preventing power imbalances affecting the outcome; having a disciplining effect on experts' dealings; ensuring the issues are addressed by reference to appropriate assumptions; preventing 'frolics' by experts in the conclave;[70] acting as a secretary and facilitating the accurate articulation and recording of opinions; helping experts to resolve uncertainties concerning their role; and managing the tension between experts' role to the Court and appointing party.[71]

Our interviewees generally support the use of facilitators, at least if resources permit them.[72] Considerations which weigh in

favour of the appointment of a facilitator include the complexity of issues to be addressed; the complexity of the assumptions and information upon which opinion is to be based; the involvement of more than two experts; the conduct of the conclave otherwise than by face-to-face meeting; perceived status imbalance between attending experts; and the absence of forensic experience of the experts. The preferences of the participating experts are also relevant.[73] In smaller cases, or in cases with seasoned experts,[74] facilitators may be unnecessary and result in inefficiency.

The attendance of an experienced facilitator can be extremely useful in managing a conclave.

Transcript writer

Robert Stitt QC and Richard Weinstein SC both emphasise the importance of having a transcript writer in conclaves who will accurately identify the contents of a joint report. This helps to address the frequent argument as to what was said or agreed to in a conclave.[75]

Privilege and confidentiality of conclaves

If directions are made to exclude lawyers from the conclave, the experts should not contact their lawyers, until the joint report is signed. At that time, they may provide the lawyers with a copy of the report and communicate about what transpired at the conclave if they wish.[76] Forrest J has developed useful protocol which deal with the issue of quarantining of lawyers from the concurrent evidence process.[77]

UCPR 31.24(6) provides that 'unless the parties affected agree, the content of the conference between the expert witnesses must not be referred to at any hearing'. The phrase 'must not be referred to' in r 31.24(6) is a broad expression and is not limited to tendering a transcript of a conclave. It would extend to precluding anyone during a hearing of proceedings from making reference to the content of the transcript and from otherwise utilising the transcript as evidentiary material'.[78]

Formulating the questions for the experts

Our interviewees varied in their preferences regarding the framing of questions to be addressed by experts at conclaves. The general preference is for the lawyers to agree on the list of questions/issues to be addressed. Advantages of this may be that, firstly, the lawyers may be best placed to identify and articulate the relevant issues in contest. Secondly, the requirement of consent promotes neutral framing, and militates against the likelihood that questions will be framed in a way which skews the responses in a partisan way.[79] Any controversy between lawyers about formulating the questions can often be resolved by agreement that the experts address the questions on a topic proposed by each party. However, the intervention of the judge may be appropriate and required if the controversy relates to whether the issue arises on the pleadings,[80] bias of the questions, or confusion. In formulating the questions, a balance must be struck between ensuring that there is sufficient precision to ensure legally relevant issues are addressed, but sufficient flexibility to ensure that experts are not unduly fettered in addressing matters they themselves consider relevant to the issue.[81] If there are precise questions included, consideration should be given to the inclusion of open-ended questions to give the experts latitude to expand as they consider appropriate.

Some perceive there are disadvantages to lawyers framing the questions, and consider that the framing of the issues should be left to the experts and/or the judge. The perceived disadvantages of lawyers framing the questions are that: 1) sometimes too much time and costs may be involved in lawyers attempting to reach agreement on precise questions 2) Justice Rares considers that the involvement of lawyers carries an undue risk of framing bias (which the lawyers usually do not intend) in the drafting of the questions.

Questions should be framed to resolve an issue(s) in the proceedings, and, if possible, should be capable of being answered in a Yes/No fashion or by way of a brief response.[82] The issues given to experts to consider in conference should contain non-tendentious language.[83]

Control of information in the conclave

'As a general rule', it is 'preferable that experts have all available material that may be of some relevance or significance prior to conclave'.[84] If there remains doubt or contest in relation factual matters material to the expert opinion, the conclave should be conducted on alternative assumptions to address reasonably foreseeable scenarios.

'It is undoubtedly good practice to ensure that the parties set the rules (with directions from the court) before a conference of experts commences' in relation to the assumptions and information upon which the conclave is to be conducted. 'Any variation' in relation to that agreed arrangement should only take place 'pursuant to further directions of the court'.[85]

Personal attendance by experts

There is a recognition that the conduct of the conclave is assisted by the personal attendance of the experts. However, arrangements are frequently made for the attendance of experts by phone or audio-visual link.[86]

D. The Joint report

Structure of the joint report

In terms of the content of joint reports,[87] these reports should set out in numbered and bullet form the matters upon which there is agreement and disagreement, and reasons as to why the experts disagree. The rules typically provide that no reasons are required in relation to matters on which the experts agree.[88] There is no reason why experts should not cross-reference their earlier reports to identify reasons for their positions on which there is disagreement. Experts should also set out, inter alia, matters in respect of which no opinion could be given and suggest matters which could usefully be submitted to them for their opinion. 'Experts are not to be constrained by the contents of their [individual] reports when participating in a discussion in a joint conference' and preparing their joint report.[89]

With respect to the matters in the joint report on which the experts disagree, the statement of reasoning rule would still apply as a condition of admissibility.

Admissibility of joint report

UCPR 31.26 relevantly provides that a joint report 'may be tendered at the trial as evidence of any matters agreed'. However, this provision has been construed as 'permissive and not mandatory and does not require but merely permits the admission of a joint report'. Consequently, it does not mandate the 'admission of a joint report which does not comply… with the requirements of s 79 of the Evidence Act 1995 (NSW), or where that report or reports is or are liable to exclusion under s 135 of the Evidence Act'.[90]

Reasons. The obligation under the general law to provide reasons for expert opinion is typically abrogated by the court rules which relate to concurrent evidence, in relation to issues in the joint report on which the experts agree.[91] With respect to the matters in the joint report on which the experts disagree, the statement of reasoning rule would still apply as a condition of admissibility. However, the adequacy of the reasoning is assessed against the backdrop of the expert's earlier

individual report.[92]

Expertise. A joint report may be rejected if the expert expresses an opinion in the joint report beyond his expertise.[93]

Discretionary exclusion. Joint reports may be excluded under s 135 of the Evidence Act if their admission would be 'unfairly prejudicial', 'misleading or confusing', or likely to 'cause or result in undue waste of time'.[94] For example, in relation to sections of the joint report on which there is disagreement, the joint report may be excluded if there is a failure to set out the basis for the opinion, and 'it would be unfairly prejudicial to the [opposing party] to require them to cross-examine in order to identify the basis of his opinions …. in a manner which would in effect turn a cross-examination into evidence in chief of those steps' in the expert's reports 'which are not disclosed in his reports'.[95] On the other hand, joint reports will not be excluded under s 135: 1) merely because a concession in the joint report may tend to damage the case of a party;[96] 2) on the basis of a principle extrapolated from administrative law, that the experts took into account 'irrelevant considerations' in the conclave and joint report;[97] 3) merely because there are arguably inconsistencies in the joint report, in circumstances where there is scope to address those inconsistencies during concurrent evidence.[98] Further, in considering whether a joint report is sufficiently 'misleading or confusing' to warrant exclusion under s 135, the following judicial observation is relevant: 'there is something bizarre in submitting to a judge sitting alone that he or she should reject evidence on the ground that it might mislead or confuse him or her. I propose to trust myself';[99] 4) on the grounds of denial of natural justice, merely because the joint report addressed matters 'which were outside the matters contained in' the experts' respective individual reports.[100]

A party against whose interests questions are answered in a joint report pursuant to the rule ought not to expect that they can later search elsewhere for an expert to support themselves and then as a matter of course be granted leave to tender favourable evidence from that expert.

Inconsistent earlier reports. The expert's earlier report might be excluded under s 135, when it is inconsistent with the expert's agreement in the joint report.[101]

Additional reports by other experts post joint report?

A party may not adduce evidence from any other expert witness on the issues dealt with in the joint report 'except by leave of the Court': UCPR 31.26(5)

A party against whose interests questions are answered in a joint report pursuant to the rule ought not to expect that they can later search elsewhere for an expert to support themselves and then as a matter of course be granted leave to tender favourable evidence from that expert at a subsequent trial. This is because of the public interest in the efficient administration of justice.[102] It would 'entirely defeat the purpose of the expert conclave process, including the production of a joint report', if leave to lead contradictory evidence from another expert were readily granted.[103] Consequently, leave to adduce evidence from another expert 'should not be granted lightly and, indeed, a grant of leave should be the exception rather than the rule'.[104]

Exceptional circumstances where leave might be granted to lead expert evidence from another expert may include: 1) where leave is subsequently granted to amend pleadings to introduce a new claim, and the new claim involved complex evidentiary issues not addressed in the conclave and joint report;[105] 2) where an expert could not attend the conclave for health reasons; or 3) where a joint report unforeseeably strayed into a new expert's area of expertise. But, subject to time constraints, it is difficult to see why (even in those circumstances) the conclave should not be reconvened to accommodate the collegiate consideration of those additional expert views.

Testing and resiling from concessions in joint report

There is no controversy as to the legitimacy of privately asking the party's expert the reasons for a concession made and inquiring whether the opinion would be different on different assumptions. Beyond that, controversy emerges. One school of thought is that concessions in a joint report should be beyond challenge (even in private). This reflects: 1) a respect for the capacity of the collegiate conclave process to elucidate correct opinion; 2) a concern that subsequent private testing by counsel might risk partisan interference in the expert's opinion; 3) case-management concerns that permitting a challenge of concessions might unravel an efficient consensus.

However, a competing school of thought is that there should be no greater ethical limits on private testing of concessions by experts than should generally apply to the testing of draft individual expert reports. Considerations which support the ethical propriety of testing concessions made by the party's expert in the joint report include that: 1) although conclaves generally facilitate the elucidation of truth, they do not eliminate the possibility of mistake; 2) even without subject matter expertise, lawyers' capacity for analytical rigour may facilitate identification of error through the testing of a concession; 3) the case-management inefficiency of unravelling consensus should not trump truth-seeking and a party's entitlement to natural justice.[106] If the process of testing leads to the expert genuinely recanting from a concession in the joint report, the Harmonised Code of Conduct requires experts to provide a supplementary report to both parties.

Concurrent evidence is a flexible process which varies somewhat across jurisdictions and among judges.

However, there are typically court rules concerning concurrent evidence which preclude a party from actually adducing 'expert evidence inconsistent with' any matter agreed in a joint report without leave.[107] Whether leave should be granted raises general principles concerning the circumstances in which leave should be granted to a party to withdraw admissions.[108] Nonetheless, if there is adequate explanation as to the reasons for the departure from the joint report, and no suggestion that the expert has been prevailed upon, it is difficult to see the justification for denying leave.[109]

If an expert wishes to withdraw a concession made in the joint report (or qualify a concession by reference to the specific assumptions upon which it was based), we suggest the following procedure: 1) invite the opposing party to inquire of their own expert whether they agree with the change of opinion; 2) if not, suggest to the opposing party that the conclave be reconvened; 3) if the opposing party does not agree to reconvening the conclave, re-list the matter before the judge; 4) formally seek leave to serve a supplementary report, but invite the court to consider the options of either reconvening the conclave, granting leave to file and serve supplementary reports in support of (and opposition to) to the recanted concession, or just dealing with the recanting of the concession during concurrent evidence.

E. Trial phase - 'Concurrent evidence'

Concurrent evidence is a flexible[110] process which varies somewhat across jurisdictions and among judges. We note that, whereas there are some concerns regarding the up-front cost of a pre-trial conclave in say smaller

matters (and depending on how well the process is executed), the trial phase of the process (concurrent evidence) is invariably regarded by users as saving considerable amounts of hearing time (as will many conclaves)[111] and helping participants to better comprehend the matters in dispute.[112]

The trial phase of the concurrent evidence process generally involves some or all of the following elements:[113]

- The experts will be called to give evidence together at the hearing at a convenient time in the proceeding, usually following the lay evidence.[114]
- The experts will be sworn in together and the court will explain its intended procedure and identify, aided by counsel, the topics to be addressed (typically derived from the joint report).
- Each expert may be given an opportunity to make a short opening, and to comment on/question their colleague about their evidence or report.
- Counsel will sequentially conduct cross-examination, with the opportunity of asking questions of their own expert during the process. It is common to allocate segments of the available time to the different counsel present.[115]
- At any stage the judge may intervene and ask questions of experts or chair the discussion, and might allow an expert a final opportunity to enlarge upon any answer.[116]

We now address some core steps and issues which may arise during concurrent evidence.

General structure of concurrent evidence sessions

Opening statements by experts. Our interviewees conveyed that some judges do not invite general openings from experts at the commencement of a concurrent evidence session (or in relation to particular issues), on the basis that they are redundant given the summary of positions conveyed in the joint reports.

By contrast, other judges do invite general openings, involving the experts being invited to provide a general overview of their position and identify key areas of contest. These openings are perceived as useful to set the scene, and to give experts the opportunity to build their confidence and comfort before questioning begins.

Issue by issue analysis. It is typical to sequentially address an agreed list of issues - which usually follows the joint report topics - with the following steps involved with respect to each issue (this notwithstanding, cross-examination need not necessarily be confined by the identified issues, and the process remains subject to the judge's overall control).[117]

Issue based openings. Experts are often, but not invariably, invited to make a short opening statement of their position on each issue. This would ideally succinctly address the expert's relevant expertise, the nature and basis for the expert's position on the issue, the opposing expert's view and why it is wrong.

Sequence of questioning. Following any expert openings, the questioning begins. In the course of concurrent evidence, questions may be asked of experts by the judge, counsel, and other experts. The sequence of questioning by those different categories of participants is a matter of variable judicial preference.

When it comes to counsel questioning, counsel will typically be invited to conduct questioning sequentially. There is no rule as to which counsel should proceed first, and the Court will often invite the parties to elect which counsel proceeds first on each issue. Counsel might be permitted to ask questions of their own expert first. If there has been no opening, counsel might ask their expert to outline their view, the reasons for it, and their view about the opposing expert. Then cross-examination of the opposing expert proceeds. In view of the informality of the process, more than one round of questions might be permitted if the reasonable need for it is demonstrated (and time is available). A judge is required to balance fairness and efficiency considerations.

One concern raised by some interviewees related to the lack of structure or certainty in the process of concurrent evidence. If there is uncertainty about the approach to be adopted by the presiding judge, Garling J suggests that clarification should be sought from the judge at the earliest opportunity.[118]

Another concern expressed was that occasionally the judge did not allocate sufficient time for questions by lawyers in the concurrent evidence sessions. Preston CJ LEC observed that the success of concurrent evidence requires that issues concerning procedural fairness be raised and reasonably addressed at the time. One interviewee suggested that to the extent that it is not already done in a concurrent evidence session, a judge should ask the parties at the end of the session whether they need to make any final cross-examination.

Role of the judge

Most judges will ask questions during the process, but there is a very broad range in the level of judicial intervention in questioning and the timing of those questions.[119] A judge's approach would seem to depend on their personal disposition, their confidence in counsel before them, their level of preparation, the nature and complexity of the issues, and the judge's subject matter expertise.

There are seen to be both substantial advantages and dangers in judicial intervention in questioning. The main advantage is that it facilitates the ultimate objective of the presentation of evidence: ie, to clarify the judge's understanding of the evidence and issues.[120] Hon James Spigelman considers a judge's ability to intervene in the process crucial to concurrent evidence. We note too that judges may also intervene in traditional examination of witnesses. There are other advantages. The line of judicial questioning will also identify to counsel what the judge considers salient, helping to focus their subsequent lines of questioning. If a judge has a presumptive scepticism about particular evidence, some judges reasonably consider that procedural fairness requires them to ask questions which alert the parties to that disposition, so that counsel has a chance to address it. Judges will often bring specialist expertise to a case and be able to ask relevant questions of experts of which counsel may be incapable. The impartial authority with which questions from judges are vested may also assist in stripping away any residual vestige of partisan bias in the expert's response to the questions. Noel Hutley SC observes that he is 'constantly pleasantly surprised by the extent to which questions from a judge can narrow issues and shorten the need for further questioning'.

Most judges will ask questions during the process, but there is a very broad range in the level of judicial intervention in questioning and the timing of those questions.

There are some countervailing dangers in undue judicial intervention.[121] A few barristers observed that the efficacy of a carefully structured cross-examination can be frustrated by judicial intervention in a line of questioning, particularly where the judge might not be as informed as counsel at that point in relation to the nuance of all the evidence. Moreover, there is a substantial risk that experts will be vulnerable to any suggestion implicit in the judicial question. Confrontational questioning might also compromise the appearance of impartiality. Recognising these matters, many judges will limit their questions to more open style questions which invite clarification of the nature and reasons for an expert's expressed opinion, and avoid more robust interrogation, and might defer questions until the conclusion of a line of questioning by counsel.

Role of the expert

Many judges will invite experts to raise comments or ask questions. Although concurrent evidence is a relatively informal and flexible process, judges will require experts to respect the basic procedural rule that only one person speaks at a time, to facilitate both the recording of the transcript and an orderly discussion. Respecting a need for cooperation is essential at all stages of concurrent evidence (including conclaves). The importance of cooperation is emphasised in the practice notes[122].

Although the essence of cross-examination does not change under concurrent evidence, the process is giving rise to some new cross-examination methods.

Unless being asked questions of counsel, experts should only make comments or queries if invited to by the judge. Some judges at the commencement of a session will explain a protocol for experts to intervene in order to ask questions or make comments, such as by raising their hand. Judges differ in how they respond to such requests. Some judges will immediately interrupt counsel's examination and invite questions or comments from the expert. Others defer inviting a response until a topic has been concluded.

Intervention by an expert's question or comment can be disruptive to a carefully prepared line of questioning. To pre-empt that possibility, counsel might consider immediately acknowledging an expert seeking to intervene, stating something like: 'I see you wish to make a comment. With the judge's leave, I will conclude my line of questioning, and then invite you to express your comment'.

Although questions from experts of each other are typically permitted and invited in concurrent evidence, the senior practitioners we interviewed usually strongly oppose counsel encouraging their own witness (either before or during concurrent evidence) to question the opposing witness, for two reasons: first, experts are typically neither trained nor skilled in forensic questioning; second, it could be prejudicial for an expert to potentially compromise the perception of their impartiality by adopting the role of an apparently partisan interrogator.

It is recommended that counsel advise their own expert to take a pen and paper into court, to make a note of aspects of the opponent's witness on which they wish to comment, and, if the matter is not fully addressed by the conclusion of counsel's cross-examination on a topic, then to raise their hand and request the opportunity to make a comment. Be alert to the fact that some experts may be too polite or reserved to feel comfortable in intervening in that matter and may need active encouragement.

Before moving to the next topic, most judges usually give the experts the chance to make any concluding comments on the given topic.

Objections to admissibility on grounds of expertise

Justice Garling suggested during our interview that any objection to the admissibility of expert opinion on the grounds of expertise[123] should be made prior to the conclave, because parties may thereafter be precluded from challenging admissibility on the grounds of expertise, if they have acquiesced in the expert participating in the conclave and the preparation of the joint report. If a party notifies its objection to admissibility on the grounds of expertise before the conclave, it would be open to either party to make an application for a preliminary ruling on admissibility pursuant to s 192A of the Evidence Act.[124] In considering whether to challenge admissibility on the grounds of expertise (before the conclave), relevant considerations might include: 1) the prospects that the opponent would be granted leave to lead further expert evidence, if an expert report was ruled inadmissible on grounds of expertise, and the nature and probative force of the alternative evidence which the opposing party might foreseeably procure; 2) the likely delay associated with the opponent's engagement of a replacement expert, and the strategic significance of that delay; 3) an assessment as to whether submissions as to weight of expert opinion based on deficiencies in expertise are likely to prevail in relation to any critical contest between experts (eliminating the strategic imperative to challenge admissibility).

Questioning opposing expert

General. Although the essence of cross-examination does not change under concurrent evidence, the process is giving rise to some new cross-examination methods. It is generally recognised that concurrent evidence involves less direct confrontation and a more collegiate and respectful dialogue, rendering experts less defensive and more open to reconsideration and modification of their original opinion. Counsel are well advised to take advantage of that dynamic, which weighs against an unduly confrontational approach which might otherwise stultify it. That said, the process still enables effective cross-examination to be undertaken.[125]

Cross-examination typically shorter. Cross-examination is typically significantly shorter under concurrent evidence. This is because the conclave and joint report process have usually reduced the issues in dispute. There is also a perception that the emphasis in the concurrent evidence process on the efficient refinement and resolution of issues (and perhaps the presence of other experts in the process), diminishes judicial tolerance for unduly long cross-examination. Reflecting that, one of Burley J's tips for young counsel is to 'shorten your run-up' and move quickly to your key points.

Concurrent evidence does not impose any greater than normal limitation in the right to conduct general attacks on credit.

Challenges to credit: general. Concurrent evidence does not impose any greater than normal limitation in the right to conduct general attacks on credit (in the sense of challenges to the reliability of the opinion for grounds unrelated to the substance of the reasoning and conclusions: eg, partisanship or bias, prior inconsistent statement, expertise). However, it is generally recognised that aggressive credit attacks are rare in concurrent evidence. Possible explanations for this include: 1) there is a general recognition that aggressive cross-examination does not resonate well with the judge, in the typically collegiate and respectful atmosphere of concurrent evidence; 2) it is likely to produce defensiveness in experts, rendering them less open to co-operative concession during concurrent evidence; 3) a perceived reduction in expert partisanship in light of the Code of Conduct and the collegiality of concurrent evidence; 4) concessions in the joint report or trial phase may render attacks on credit unnecessary.[126]

Challenges to credit: timing. There are differences of opinion as to when any credit challenges should be conducted. A number of interviewees expressed the view that credit challenges should be made after the conclusion of concurrent evidence, without the presence of the expert's colleagues. The reasons for this included: 1) it is unnecessarily disrespectful and demeaning to an expert to subject the expert to attack in the presence of their colleagues; 2) credit cross-examination during concurrent evidence risks polluting the co-operative atmosphere and frustrating the process;[127] 3) an attack on an expert may have the intention (or at least effect) of rattling the expert and compromising their capacity to give evidence during concurrent

evidence; 4) as noted above, credit challenges may be unnecessary, if concessions are made during concurrent evidence. However, others observed that there will be circumstances where it is appropriate for credit challenges to be made during concurrent evidence. For instance: 1) challenges to expertise might raise matters which might usefully be the subject of comment by other experts during concurrent evidence; 2) a credit challenge based on a prior inconsistent statement (from previous cases, publications etc) might be issue-specific, and appropriately addressed in the context of examination of that issue during concurrent evidence. Reflecting these matters, various judges indicated that they had no fixed rules about the case-management of challenges to credit, and so let cross-examination progress more organically.

The boundary-line between leading and cross-examining in concurrent evidence is blurred.

From the perspective of cross-examining counsel, there are strategic dilemmas as to the most advantageous timing for credit challenges. Weighing in favour of early challenge is the advantage of tainting the expert's credit (and perhaps unsettling the expert) before substantive evidence is given. Weighing against early challenge is the likelihood that credit challenges will reduce the prospect of securing subsequent co-operation from the expert during concurrent evidence.

If there is to be a significant and extensive challenge to credit, the appropriate course might be to first discuss with your opponent the case-management of the proposed challenge, and then inform the judge of the proposed agreed protocol 'subject to Her Honour's convenience'. Leave to cross-examine on credit at the end of concurrent evidence may be denied, if no opportunity remains for re-examination.[128]

Firm cross-examination may still be appropriate. Notwithstanding the need for caution in relation to unduly confrontational cross-examination, it may still be entirely appropriate to be firm with a non-cooperating witness.

Traditional cross-examination still appropriate. Notwithstanding the need for caution in relation to unduly long cross-examination, it may still be appropriate to undertake more traditional cross-examination, in which logically sequential propositions are methodically put to the expert through an extended and tightly controlled line of closed questions, calculated to finally extract a critical concession. However, if a long cross-examination of this type is contemplated, and the presence of the other experts would not assist in that cross-examination, John Sheahan QC suggests that it may be appropriate to inform the court of that proposal and suggest that it take place outside of concurrent evidence.[129] Consider submitting the following: '…The challenge has been carefully prepared, and our considered opinion is that it will take # hours, will not be assisted by the presence of other experts, and would best proceed without interruption'. But consider carefully whether the presence of a friendly expert may be of potential assistance in the cross-examination, to assist dealing with 'roadblocks.'

Dealing with roadblocks in cross-examination: If counsel is hitting a roadblock and is unable to extract a concession, concurrent evidence has the benefit of allowing counsel to use the 'check-in' gambit, namely, to turn to a friendly expert and ask: 'You have heard what Professor X has said. Do you have any comment?' This valuable opportunity:[130] gives counsel the instant ability to learn further information which may facilitate a productive new line of questioning; gives counsel time to regather thoughts to plan a new cross-examination strategy; and just might directly prompt the opposing expert to change their view.

Using the group of experts. If several experts are giving concurrent evidence, cross-examining counsel might use the group to their forensic advantage: identify the experts who are more co-operative, seek concessions from them first, seek to build up coalitions of experts in support of a proposition, and only then finally turn to the most recalcitrant expert. Collegiate solidarity against the expert's opinion might cause an expert to resile from their position, or at least expose the expert as an outlier.

Need for flexibility. Given the fluid nature of concurrent evidence, several interviewees emphasised that counsel should be careful not to practice wrote cross-examination. Instead, they advised, it is preferable to focus on what counsel is really trying to achieve to help make counsel alert to the dynamics of the moment.

Questioning party's own expert

Introductory questions. When a counsel commences their turn for questioning, they might be permitted to ask questions of their expert before cross-examining. If there has been no opening by the experts already, counsel might ask their expert for the expert's view, the reasons for it, and the expert's view about the opposing expert. It might be appropriate to clarify an issue of principle with a party's own expert, providing a useful framework for cross-examination to commence.

'Checking in' with your expert. As noted above, there will be valuable opportunities to seek comment from your own expert, when conducting cross-examination.

Traditional limits on leading? The boundary-line between leading and cross-examining in concurrent evidence is blurred. Several senior practitioners observed that the traditional restriction on asking leading questions of your own expert is often not applied in concurrent evidence.[131] Stephen Finch SC takes a robust view that all distinctions between cross-examination and examination in chief should be ignored in concurrent evidence: the logical corollary of treating experts as independent witnesses of the court is that counsel should not be shackled by conventional limitations on the permitted style of questioning, and should be entitled to cross-examine and lead as counsel sees fit, with no formal leave being required. Furthermore, he suggests that it would be a triumph of form over substance, to restrict the 'leading' of a party's own witness but permit the uncontroversial practice of counsel pressing confrontational and leading questions to the opposing expert, and then asking their own witness to 'comment'. In any event, leave may be granted under s 38 of the Evidence Act to 'question the witness, as though the party were cross-examining the witness, about … evidence given by the witness that is unfavourable to the party'. Although there may be a greater tolerance of leading questions in concurrent evidence, leading questions are nonetheless generally best avoided, because they may significantly reduce the weight attached to the responsive opinion.

There was an overwhelming view that the quality of evidence has improved as a result of concurrent evidence, as has the process' efficiency.

Cross-examination on concessions in joint report. There is no prohibition on counsel cross-examining counsel's own witness, in relation to concessions made in the joint report.[132] However, there are strategic dilemmas in doing so. Counsel has presumably 'tested' that concession in private conference with the expert before concurrent evidence. If private testing has not shaken the concession, subsequent cross-examination in concurrent evidence is unlikely to do so, and counsel will merely facilitate counsel's own witness affirming the concessions in open court. A possibly more effective manner to deal with concessions in the joint report made by counsel's own witness, is to direct

the cross-examination to the opposing expert in the hope of winning concession from that expert, and only then for counsel to ask for 'comments' from counsel's own expert (in the hope the expert will recant the expert's joint report concession and agree).

Corroborate an opposing expert's concession? If cross-examination has extracted a critical concession from an opposing expert, the senior practitioners we interviewed typically counselled against seeking corroboration of the concession from counsel's own expert, because of the unnecessary risk that your own expert might undermine the concession: 'just move on'.

F. Conclusion

Although our interviewees possessed different levels of preference for the process (judges being especially enthusiastic), there was an overwhelming view that the quality of evidence has improved as a result of concurrent evidence, as has the process' efficiency – certainly in larger cases. Many lawyers who started as opposed to the process have become converts over time. New skills are being developed and new techniques are emerging.

The success and breadth of this evidentiary tool are a testament to those who were responsible for the method's implementation in this country. They have been responsible for promulgating a procedural method which is having an imprint on jurisdictions well beyond our shores.

We look forward to continuing to consider and explore this important case management technique, and welcome the views of others on any matter raised (or not raised) in this article.

END NOTES

1 See e.g. Steven Rares, Using the 'Hot Tub' – How Concurrent Expert Evidence Aids Understanding Issues, Paper Presented at New South Wales Bar Association Professional Development Seminar (2010); Ian Freckelton & Hugh Selby, Expert Evidence: Law, Practice, Procedure And Advocacy (5th ed., 2013), 391; Adam Butt, Concurrent Expert Evidence in US Toxic Harms Cases and Civil Cases More Generally: Is There a Proper Role for Hot Tubbing, 40 Hous. J. Int'l L. 1 (2017-2018).

2 The authors have interviewed or consulted the following people: Hon Justice Brian Preston (Chief Judge, Land and Environment Court of NSW), Hon Justice John Middleton (President, Australian Competition Tribunal / Federal Court of Australia), Richard Weinstein SC, Robert Stitt QC, Hon Michael McHugh (Ret. High Court of Australia), James Walkley (solicitor), John Sheahan QC, Steven Finch SC, Noel Hutley SC, Adrian Galasso SC Hon Annabelle Bennett (Ret. Federal Court of Australia), Hon Justice Steven Rares (Federal Court of Australia), Hon James Spigelman (Ret. Chief Justice of NSW) David Catterns QC, Hon Raymond Finkelstein (Ret. Federal Court of Australia / Australian Competition Tribunal), Hon Anthony Whealy QC, Hon Justice Peter Garling (Supreme Court of NSW), Commissioner Joanne Gray, Hon Justice Stephen Burley. The authors note that space restrictions meant that many valuable individual opinions are not given individual mention, however all opinions were used in observing trends and assessing competing perspectives. Where general trends have been referred to, this should not be taken as being attributed to any individual person. Where individual opinions have been mentioned, the authors were authorised to use such opinions. We are grateful for all contributions.

3 Although this expression is colloquially used to describe the process, some judges and practitioners consider the term is inappropriate, seeing it is as disrespectful to the process and the participants.

4 Peter McClellan, New Methods with Experts – Concurrent Expert Evidence, 3:1 J. Court Innovation 259, 262–63 (2010).

5 E.g. Federal Court, AAT, NSW LEC, Supreme Courts of NSW, VIC, QLD and ACT, NSW District Court, County Court of Victoria, Australian Competition Tribunal and Queensland Land and Resource Tribunal. See e.g. McClellan, supra note 4, 263; Butt, supra note 1, 9-10; Steven Rares, Using the 'Hot Tub': How Concurrent Expert Evidence Aids Understanding Issues, (Oct. 12, 2013); Gary Edmond, Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure, 72 L. & Contemporary Problems 159, 166 (Winter, 2009).

6 Rachel Pepper, 'Hot Tubbing': The Use of Concurrent Expert Evidence in the Land and Environment Court of New South Wales and Beyond, Paper presented at the 2015 Annual Alaskan Bar Association Conference in Fairbanks, Alaska, United States of America (May 14, 2015), para. 42; see also McClellan, supra note 4, 263–64; Peter Garling, Concurrent Expert Evidence: Reflections and Development (Australian Insurance Law Association Twilight Seminar Series, Aug. 17, 2011), 1.2; see e.g., Practice Note No SC CL 1 — Supreme Court Common Law Division – General [48].

7 Rares, supra note 5; Garry Downes, Concurrent Expert Evidence in the Administrative Appeals: The New South Wales Experience, Paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals, Hobart (Feb. 27, 2004); John Mansfield, Litigation under the Trade Practices Act 1974, Fed. Ct. (May 22, 2008); DVD: Judicial Comm'n of NSW, Concurrent Evidence (2006); see also Freckelton & Selby, supra note 1; Peter Heerey, Expert Evidence: the Australian Experience, Paper delivered to WIPO Asia-Pacific Colloquium, New Delhi (Feb. 6, 2002); Anne Sheehan, From Adversarial to Inquisitorial—the Changing Landscape for Expert Evidence Following the Civil Procedure Act 2010 (Nov. 21, 2014).

8 Rares, supra note 5; see also R v Stanyard [2012] NSWDC 78.

9 John Emmerig et al., Room in American Courts for an Australian Hot Tub? Jones Day (Apr. 2013).

10 Pepper, supra note 6, at para. 44. Concerns about extending hot tubbing to criminal proceedings have been voiced, however, regarding, inter alia, the presumption of innocence and the burden of proof. See Edmond, supra note 5, 178. In addition, Pepper J says that to be used in criminal trials the process would require party consent to avoid infringing a defendant's right to silence. On this, see *Director-General, Department of Environment and Climate Change v Walker Corporation Pty Ltd (No 3)* [2010] NSWLEC 135.

11 For NSW and Federal rules, see e.g., *Uniform Civil Procedure Rules 2005* (NSW) pt 31, div 2; Practice Note SC Gen 11 (NSW); Practice Note SC CL1 (NSW); Practice Note SC CL 7 (NSW); Practice Note No SC Eq 5 (NSW); Practice Note SC Eq 3 (NSW); LEC NSW Conference of Expert Witnesses Policy; LEC NSW Joint Expert Report Policy; Practice Note DC (Civil) No 1 (NSW); *Federal Court Rules 2011* (Cth) rr 23.15, 5.04; Federal Expert Evidence Practice Note (GPN-EXPT); Guideline - Use of Concurrent Evidence in the AAT. See also e.g. *Civil Procedure Act 2010* (VIC) pt 4.6.

12 See e.g., Explanatory Memorandum, *Civil Procedure Amendment Bill 2012* (VIC) 6.

13 E.g. *Civil Procedure Amendment Bill 2012* (VIC), 2nd Reading Speech; Practice Note SC Gen 11 (NSW); *Federal Court of Australia Act 1976* (Cth), ss 37M and 37N; Guideline - Use of Concurrent Evidence in the AAT, provision 1.3.

14 See also Federal Rules, r 5.04 item 18.

15 *UCPR*, rules 31.19, 31.24, 31.35; Federal Rules, r 5.04; AAT Guidelines, provision 2.2.

16 Ibid; see also Pepper, supra note 6, at paras 43-44.

17 It has been noted that initial resistance from uninitiated counsel is common, but once they participate in the model the resistance tends to fade away. Experts, however, tend to enjoy the process from the outset. See e.g., Rares, supra note 5, [22]; Peter McClellan, 'Concurrent Expert Evidence', Medicine and Law Conference, LIV 29 November 2007, 16; Report 109 (2005) - Expert Witnesses - NSW Law Reform Commission, June 2005, [6.58].

18 As Pepper J has remarked: 'without the Code concurrent evidence would not work as well as it does. The Code, in theory and in large part in practice, ensures that . . . the experts do try to agree on that which can be agreed and must explain that which they don't agree to. The Code helps to refine those issues.' Cited in Butt, supra note 1, p 43. See also Rares supra note 5 p 17; Garling supra note 6, p 4; MC Livesey QC, 'The Effectiveness of Expert Evidence', Australian Bar Association Conference 2017, 14.

19 See e.g. McClellan, supra note 4 and Expert Evidence: Aces Up Your Sleeve?, Address at the Industrial Relations Commission of New South Wales Annual Conference (Oct. 20, 2006). See also Rares supra note 5; Garry Downes, Problems with Expert Evidence: Are Single or Court-Appointed Experts the Answer?, 15 J. Jud. Admin. 185, 188 (2006); Butt supra note 1, 16-17, 24-25; Garling supra note 6; Strong Wise Ltd v Esso Australia Resources Pty Ltd (2010) 267 ALR 259, [94]-[96].

20 *Willett v United Concrete Pty Ltd* [2009] NSWSC 957, [55].

21 *Willett v United Concrete Pty Ltd* [2009] NSWSC 957, [55].

22 See e.g. *Wilson v St Vincent's Hospital Sydney (No 2)* [2015] NSWSC 406, [17] ('Often when experts who disagree get together and discuss the issues, it is surprising how much agreement can be hammered out in the… conclave'); *Landtwo Pty Ltd v Coffey Geosciences Pty Ltd* [2014] NSWSC 625, at [8] (Even if the conclave 'does not produce any measure of agreement, it will nonetheless… enable the court to understand more clearly what are the differences between the experts'). Pepper J has said she 'has never had a case where the experts did not agree on something, irrespective of initial claims.' Cited in Butt, supra note 1, fn 93. 'It is the Court's experience overwhelmingly that by making orders with respect to them holding a joint conclave, preparing a joint report and then giving their evidence concurrently, considerable time and expense will be saved' (Younes v Parvin [2018] NSWSC 159, [8]; see also *Tinnock v Murrumbidgee Local Health District* [2015] NSWSC 151, [9]).

23 *Gunnersen v Henwood* [2011] VSC 440.

24 Rachel Pepper, Expert Evidence in the Land and Environment Court, 20, Jan. 21, 2013 (citing Justice Davies); see also Peter McClellan, Expert Witnesses: The Experience of the Land & Environment Court of NSW, Paper presented at the XIX Biennial LAWASIA Conference of 2005 (Mar. 2005), at 19; Edmond, supra note 5, 159–61, 164; Peter Heerey, Recent Australian Developments, 23 Civ. Just. Q. 386, 391 (2004); Downes, supra note 19; cf. UCPR, 31.23, Schedule 7; Federal Expert Evidence Practice Note (GPN-EXPT), Annexure A (Harmonised Expert Witness Code of Conduct).

25 John Temple-Cole & Samantha Farthing, Some Like It Hot! Expert

Views on Judicial Orders to Be Heard Concurrently, Hearsay (Sept. 2017); cf. Edmond, supra note 5, 164.

26 See e.g. McClellan, supra note 24.

27 See for example Ian Freckelton & Hugh Selby, supra note 1, 398, citing an AAT survey of AAT members and expert witnesses who use the method, reporting satisfaction levels at 94.9% and giving reasons as to why the method is helpful, namely helping experts to fulfil their role as independent advisers, promoting settlement of cases, reducing hearing times, and helping judges to write up decisions.

28 See e.g. Butt supra note, 1, pp 10 and 19.

29 Practice Note SC CL 1, [48].

30 Practice Note SC CL 7, [34]-[35].

31 Practice Note Class 1 Development Appeals at [65], Practice Note Class 1 Residential Development Appeals at [62], Practice Note Classes 1, 2 and 3 Miscellaneous Appeals at [61], Practice Note Class 4 Proceedings at [69], Practice Note Class 3 Compensation Claims at [57] and Practice Note Class 3 Valuation Objections at [48].

32 See e.g. Practice Note SC Eq 3, [54]; Practice Note DC (Civil) No. 1, Schedule 1 – Standard Orders for Hearings, [7]; AAT Guidelines, Use of Concurrent Evidence in the AAT, section 2.

33 See e.g. Federal Court Expert Evidence Practice Note (GPN-EXPT), Annexure B, Concurrent Evidence Guidelines, at [2] and [6].

34 E.g. Practice Note SC Eq 3, [55].

35 See e.g. AAT Guidelines, at 1.4, 2.2–2.3, and see below at notes 38 and 39.

36 *Booth v Di Francesco* [2002] NSWSC 154, [27]-[30]; *Spasovic v Sydney Adventist Hospital* [2002] NSWSC 164, [32]; *Habelrih v Szirt* [2004] NSWSC 54, [25].

37 See supra, note 22.

38 See Federal Court Expert Evidence Practice Note (GPN-EXPT), Annexure B, Concurrent Expert Evidence Guidelines, (Federal Court Guidelines), at paragraphs 2 and 6. The Court assesses the desirability of using the method by reference to similar suitability factors. Federal Court Guidelines [6] says that: 'Whether experts should give evidence concurrently is a matter for the Court, and will depend on the circumstances of each individual case, including the character of the proceeding, the nature of the expert evidence, and the views of the parties.'

39 Practice Note DC (Civil) No. 1, Schedule 1 (Standard Orders for Hearings) indicates that in the District Court's general list – 'Where more than one expert has been required to give oral evidence, if the experts' field of expertise is the same or substantially the same, arrangements should be made by the parties for the experts to give their evidence concurrently' at [6].

40 See e.g. UCPR 31.24.

41 Similarly, Preston CJ LEC indicates that the method's popularity has seen parties pushing to use concurrent evidence in areas in which it has not traditionally been used, such as judicial proceedings.

42 Federal Court Expert Evidence Practice Note (GPN-EXPT) [6.1], [7.3]; Federal Court Guidelines, [7], Practice Note SC Eq 3, [54]; Practice Note SC CL 1 – General, [49]; Practice Note DC (Civil) No. 1, Schedule 1, [7]; Land and Environment Court Practice Notes, for example, Practice Note: Class 1 Development Appeals, [65]

43 *Liesfield v Spi Electricity Pty Ltd (Ruling No 2)* [2014] VSC 98, [37].

44 E.g. Practice Note No SC Gen 11, [6]; Federal Court Expert Evidence Practice Note (GPN-EXPT) [7.3]; LEC NSW Conference of Expert Witnesses Policy, [6].

45 Practice Note SC Gen 11, [10]; Federal Court Expert Evidence Practice Note (GPN-EXPT) [3.3]; [4.4]; [7.1]; cf LEC NSW Conference of Expert Witnesses Policy, [12]. See further, Garling, supra note 6, section 4.

46 See e.g. UCPR 31.24.

47 For instance, the breadth of timing considerations is inherent in Federal Court Expert Evidence Practice Note (GPN-EXPT), [7.5].

48 In this regard, for example, the standard orders in the District Court presume that experts who are to give evidence will, prior to conferring to produce a joint report, be provided with the other experts' individual reports: Practice Note DC (Civil) No. 1, Schedule 1, [8]-[9].

49 Admittedly, these disadvantages may be mitigated by an exchange of precis reports (or pre-conclave position papers) between the experts (perhaps on condition that they are not be tendered, or the subject of cross-examination, to mitigate the temptation to unduly embellish those precis reports); and leave might be provided for the preparation of more detailed individual reports after the conclave on identified matters of contest.

50 An idea floated as a possibility by Hon Annabelle Bennett.

51 See e.g. *Ironhill Pty Ltd v. Transgrid* [2004] NSWLEC 700; *Attorney-General (NSW) v. Winters* [2007] NSWSC 1071 (8 witnesses). *King v Western Sydney Local Health Network* [2011] NSWSC 1025 (6 witnesses). Hon Peter McClellan refers to a case with 12 experts which settled, supra note 4, at 267.

52 These sorts of difficulties may be alleviated by the use of a facilitator, which is discussed further below.

53 For an example of how this matter was managed in the context of the Kilmore East Bushfires class action, see Butt, supra note 1, 27-30 (discussing *Matthews v SPI Electricity and SPI Electricity Pty Ltd v Utility Services Corporation Ltd Ruling No 10*, [2012] VSC 379). See also for example *Stevenson v A/Prof Morgan* [2015] NSWSC 1230; *Avery v Flood* [2013] NSWSC 996, [9]-[12].

54 *Wilson v St Vincent's Hospital Sydney* (No 2) [2015] NSWSC 406, [14].

55 *Avery v Flood* [2013] 2013 NSWSC 996, [12].

56 *Porter v Le* [2016] NSWSC 849, at [5].

57 *Porter v Le* [2016] NSWSC 849, at [8].

58 There is some support for this position: *Matthews v SPI Electricity and SPI Electricity Pty Ltd v Utility Services Corporation Ltd, Ruling No 10*, [2012] VSC 379, at [21].

59 In the conclaves held in the Kilmore East Bushfires class action (*Matthews v SPI Electricity Pty Ltd & Ors*, [2013] VSC 630 [19]–[20]), Forrest J generally ordered that experts be 'quarantined' from communicating with lawyers during the concurrent evidence process (including conclaves), to avoid 'contamination' of the process. His Honour's protocol allowed the lawyers to speak to the experts about what had happened during the conclaves after the conclaves ended, which the barristers in the matter deemed to be adequate to satisfy their interests. See e.g. Butt, supra note 1, 29, 67; Simon McKenzie, Expert Conferences in the Kilmore East Bushfire Proceeding, VICSCLRS 3 (2016). See also Federal Expert Evidence Practice Note (GPN-EXPT), [7.4] and [7.6.]; *Thomas v Powercor Australia Ltd* (No 7) [2011] VSC 502, [15]. Cf Middleton J noted that one potential advantage of having lawyers present in conclaves is to help to ensure that discussions and joint reports remain focused on the legal issues, but His Honour also noted that this role can be carried out by facilitators.

60 See e.g. Practice Note SC Gen 11, [30]-[32]; LEC NSW Conference of Expert Witnesses Policy, [35]-[37].

61 See e.g. Federal Court Practice Note (GPN-EXPT), [7.6].

62 Facilitators may also be referred to as 'moderators' or 'chairpersons.'

63 See Richard Weinstein SC, The Mysterious Joint Conference of Expert Witnesses, Personal Injury & Common Law Conference, 3 March 2018, [5].

64 On use of concurrent evidence in native title in particular, see Vance Hughston SC & Tina Jowett, In the Native Title 'Hot Tub': Expert Conferences and Concurrent Expert Evidence in Native Title, 6(1) Land, Rights, Laws: Issues of Native Title (Aug. 2014).

65 They are mostly not used in the LEC, given there are a lot of repeat player experts who know the terrain well.

66 In *Coffey v Murrumbidgee Local Health District* [2017] NSWSC 1441, [9], Campbell J praised the use of barristers as facilitators: 'It has been my experience that the involvement particularly of a member of the bar in that role can be invaluable, and the involvement of a person in those roles however designated in the given case assists in the administration of justice, and in the provision of the joint report by the experts, which is likely to be provided in proper form. This is of assistance to the parties as well as the Court in the resolution of the case.' See also *Wilson v St Vincent's Hospital Sydney (No 2)* [2015] NSWSC 406, [14].

67 Weinstein SC notes that he has acted as a facilitator in personal injury cases albeit he is not an expert on the medical matters in dispute. Supra note 63, [12].

68 Federal Expert Evidence Practice Note (GPN-EXPT), [7.2].

69 See Practice Note SC Gen 11, [21]; Federal Expert Evidence Practice Note (GPN-EXPT), [7.2].

70 This view was particularly espoused by Middleton J.

71 See generally, Butt supra note 1, 28-29; McKenzie, supra note 59, 19-24; Federal Expert Evidence Practice Note (GPN-EXPT), section 7.

72 There is some debate as to whether facilitators in fact save parties money or not, and we expect it may depend. Experienced facilitators are likely to save parties money and time, and there would likely be savings where complex individual reports are synthesised into a joint report clearly demarcating areas of agreement and disagreement. In some smaller cases, it is conceivable that facilitators may add unnecessary expense.

73 *Matthews v SPI Electricity* and *SPI Electricity Pty Ltd v Utility Services Corporation Ltd (Ruling No 10)* [2012] VSC379, [15].

74 For example, Preston CJ LEC indicated that facilitators are generally not used in the LEC, because the lawyers and experts are often repeat players who are so experienced with the process.

75 The practice notes highlight that secretarial assistance should be provided if requested by the experts: Practice note SC Gen 11 [22], [23].

76 Practice note SC Gen 11 [27].

77 See *Matthews v SPI Electricity Pty Ltd & Ors*, [2013] VSC 630 [19]-[20]; see also *Thomas v Powercor Australia Ltd (No 7)* [2011] VSC 502; cf Butt supra note 1, 20-21, 28.

78 *Campton v Centennial Newstan Pty Ltd (No 1)* [2014] NSWSC 304, [176].

79 We note in any event that practice notes emphasise the importance of articulating issues for the experts in non-tendentious language: Federal Expert Evidence Practice Note (GPN-EXPT), [7.7].

80 See *Voxson Pty Ltd v Telstra Corp Ltd (No 9)* [2018] FCA 227, [5], [12].

81 *Reid v Wright T/as D M Wright & Associates Solicitors* [2016] NSWSC 466; *Herridge and Plaintiffs Listed in Schedule 1 to Writ of Summons v Electricity Networks Corp (t/as Western Power [No 3])* [2017] WASC 299, [2].

82 E.g. Practice Note SC Gen 11, [6]-[10].

83 Federal Court Expert Evidence Practice Note (GPN-EXPT), [7.7].

84 *Buksh v South Western Sydney Local Health Network* [2016] NSWSC 603. [12].

85 *Chaina v Alvaro Homes Pty Ltd* [2008] NSWCA 353, [70].

86 *Wilson v St Vincent's Hospital Sydney (No 2)* [2015] NSWSC 406, [15].

87 See further: UCPR 31.26; Practice note SC Gen 11 [25]-[29]; Federal Court Guidelines, ss 5,7; Harmonised Code of Conduct; LEC's Conference of Expert Witness Policy; LEC's Joint Expert Report Policy.

88 *Gillett v Robinson* [2011] NSWSC 1143, [45]; *Campton v Centennial Newstan Pty Ltd (No 1)* [2014] NSWSC 304, [163].

89 *X v Sydney Children's Hospitals Specialty Network (No 5)* [2011] NSWSC 1351, [41]; *X v Sydney Children's Hospitals Specialty Network (No 6)* [2011] NSWSC 1353; *Campton v Centennial Newstan Pty Ltd (No 1)* [2014] NSWSC 304, [88].

90 *Barescape Pty Ltd v Bacchus Holdings Pty Ltd* [2011] NSWSC 1002, [3]; *X v Sydney Children's Hospitals Specialty Network (No 5)* [2011] NSWSC 1351, [50].

91 Eg, UCPR r 31.24(1)(c) and r 31.26(2). See *Campton v Centennial Newstan Pty Ltd (No 1)* [2014] NSWSC 304, [163]; *Barescape Pty Ltd v Bacchus Holdings Pty Ltd* [2011] NSWSC 1002; *X v Sydney Children's Hospitals Specialty Network (No 5)* [2011] NSWSC 1351, [35], [56].

92 *Campton v Centennial Newstan Pty Ltd (No 1)* [2014] NSWSC 304, [85]; *X v Sydney Children's Hospitals Specialty Network (No 5)* [2011] NSWSC 1351, [56].

93 *X v Sydney Children's Hospitals Specialty Network (No 5)* [2011] NSWSC 1351, [50]. However, see the view of Garling J at fn 124

94 *Campton v Centennial Newstan Pty Ltd (No 1)* [2014] NSWSC 304; *Barescape Pty Ltd v Bacchus Holdings Pty Ltd* [2011] NSWSC 1002, [7]; *X v Sydney Children's Hospitals Specialty Network (No 5)* [2011] NSWSC 1351.

95 *Barescape Pty Ltd v Bacchus Holdings Pty Ltd* [2011] NSWSC 1002, [7].

96 *Ainsworth v Burden* [2005] NSWCA 174; *Campton v Centennial Newstan Pty Ltd (No 1)* [2014] NSWSC 304, [96].

97 *Campton v Centennial Newstan Pty Ltd (No 1)* [2014] NSWSC 304, [165].

98 *X v Sydney Children's Hospitals Specialty Network (No 5)* [2011]

NSWSC 1351, [59].

99 Re GHI (a Protected Person) [2005] NSWCA 466, [8]; *Campton v Centennial Newstan Pty Ltd (No 1)* [2014] NSWSC 304, [165].

100 *X v Sydney Children's Hospitals Specialty Network (No 5)* [2011] NSWSC 1351, [41].

101 *X v Sydney Children's Hospitals Specialty Network (No 5)* [2011] NSWSC 1351, [65].

102 *Tabet Bht Sheiban v Mansour and Ors* [2006] NSWSC 754, [11].

103 *Lucantonio v Kleinert* [2009] NSWSC 929, [6].

104 *Tabet Bht Sheiban v Mansour and Ors* [2006] NSWSC 754, [11]; See also *Lucantonio v Kleinert* [2009] NSWSC 929, [6]; *Marvoe Management Pty Ltd T/as Sweetlife (No 1)* [2016] NSWSC 1272, at [20]; Hamilton, Lindsay, Morahan and Webster, New South Wales Civil Procedure Handbook 2018, p 762.

105 See *Tabet Bht Sheiban v Mansour and Ors* [2006] NSWSC 754.

106 Other relevant considerations may include that: the 'testing' of a witness' evidence is expressly permitted under Regulation 70 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015*, and the testing of concessions in joint report is not prohibited in court rules, practice notes or caselaw; the risk that private testing of concessions in the joint report will corrupt the independence of expert opinion through the operation of conscious or unconscious adversarial bias, is mitigated by the prior reinforcement of expert independence through the conclave process, and the inevitable resistance to the modification of opinion flowing from the public pronouncement of that opinion in the joint report.

107 Eg. UCPR 31.25(7).

108 *Schmierer v Keong* [2005] NSWSC 1081, at [11]; *Rainbow Shores Pty Ltd v Gympie Regional Council* [2012] QPELR 407.

109 See e.g. *Schmierer v Keong* [2005] NSWSC 1081.

110 Practice Note SC Gen 11, [20].

111 On this, Preston CJ LEC indicated that in the LEC at least, conclaves will usually save money given that in almost every case there will be agreement on some things by experts. See also e.g. Butt supra note 1, 22-23, 35-36; Weinstein supra note 63, [43].

112 See generally McClellan, supra note 17; see also Garling, supra note 6, and Rares, supra note 5 (regarding *Ironhill Pty Ltd v Transgrid* [2004] NSWLEC 700); Butt, supra note 1, 22-23, 36-37. In our interviews, it was commonly accepted that hot tubbing results in major efficiencies. Middleton J for instance says it makes cross examination 'much quicker'.

113 See generally Butt, supra note 1, 14-16; McClellan, supra note 4, 262–63 (2010). Pepper, supra note 6; Lisa Wood, Experts in the Tub, 21 Antitrust 3, 95 (Summer 2007); Hughston & Jowett, supra note 64; Temple-Cole & Farthing, supra note 25; New South Wales Law Reform Commission Report, Report 109 (2005); UCPR 31.35; Federal Court Guidelines. Nb - the process is often relatively fluid, and will not necessarily follow a rigid structure, being directed by the judge; see *Strong Wise Ltd v Esso Australia Resources Pty Ltd (2010)* 267 ALR 259, [93] for overview of procedure adopted by Rares J.

114 See UCPR 31.35; Federal Rules, 5.04, 23.15; Federal Court Guidelines, [12].

115 An approach of this type was undertaken by Hon Raymond Finkelstein in *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, including time allocated to questions by the judge.

116 E.g. AAT Guidelines, [4.6].

117 See Federal Court Guidelines, [15].

118 Garling, supra note 6, [3.3].

119 Some judges generally prefer to ask their questions before the lawyers do (e.g. Garling J, Hon James Spigelman, and Hon Raymond Finkelstein), whereas others typically prefer to wait until counsel has completed their questioning and come in with residual questions at that point (e.g. Preston CJ LEC, Commissioner Joanne Gray). Others again preferred to take an in-between approach (e.g. Middleton J).

120 This process (and the related transcript) also helps lawyers and parties improve their understanding of the matters in dispute.

121 On this, Hon Michael McHugh emphasised the traditional need for judges to exercise caution to avoid being too interventionist, and to bear in mind the issue of their own influence. See e.g. Jones v National Coal Board [1957] 2 QB 55; *Vakauta v Kelly* [1989] HCA 44.

122 See e.g. Federal Court Guidelines, [5].

123 including an application under section 192A of the Evidence Act for a ruling that the opinion is inadmissible.

124 It would seem unlikely that a party could be precluded from later challenging admissibility on the grounds of expertise, if the party notifies its objection to admissibility before the conclave, and the opponent elects not to seek a preliminary ruling on the objection.

125 For an example of effective cross-examination in a hot tubbing context undertaken by Vance Hughston SC in a native title matter, see Butt supra note 1, 39.

126 See e.g. Garling, supra note 6, [3.4]-[3.5]. Further, in his interview, Garling J notes that a clumsy attack on credit may mark the flailing counsel, who is unable to challenge an expert on the substance of their opinion.

127 This view was expressed by judges including Hon Annabelle Bennett and Garling J. On this, Garling J has written that issues of credit can be dealt with in a conventional manner, by organising the concurrent evidence session so that credit issues can be individually dealt with at the session's conclusion: supra note 6 [3.5].

128 *X v Sydney Children's Hospitals Specialty Network (No 5)* [2011] NSWSC 1351, [10].

129 We note this is catered for in the Federal Court Guidelines, [16], although our interviews suggest that this practice is relatively uncommon.

130 The judges also commented that 'check-ins' can be helpful on the transcript for aiding comprehension of the matters in dispute.

131 This included Stephen Finch SC, John Sheahan QC, and David Catterns QC.

132 See e.g. *Barescape Pty Ltd v Bacchus Holdings Pty Ltd* [2011] NSWSC 1002, [4].

Cross-examination of expert witnesses

By Victoria Brigden

The late Hon. WAN Wells AO QC observed that cross-examining an expert witness is like playing the violin: 'if it is well done it is magnificent; if it is badly done it is excruciating'.[1]

There is a wealth of material written by barristers and judges on the specific topic of cross-examination of 'that most difficult and elusive creature',[2] the expert witness. This article considers the central themes of the available material and sets out suggested guidelines derived from that material for barristers to follow when cross-examining expert witnesses.

The usual techniques of cross-examination apply

Cross-examination of expert witnesses has been described as a special aspect of a general skill.[3] While cross-examination of expert witnesses requires certain specific considerations, the same basic rules of cross-examination apply in respect of expert witnesses as they do for lay witnesses.

Geoffrey Miller QC (later Justice Miller of the Supreme Court of Western Australia) observed:[4]

> The successful cross-examiner is one who can obtain the best forensic benefits from cross-examination in all aspects of litigation, of which the cross-examination of experts is but one area. No doubt the increasing complexity of litigation, evidence particularly in the area of criminal law with the advent of complicated white-collar fraud trials, has put the focus upon cross-examination of expert witnesses, but in broad terms it remains the case that the basic rules of cross-examination are applicable to the cross-examination of any witness, whether he be expert or non-expert.

Thus, the usual techniques used in cross-examination such as generally asking leading questions, framing questions clearly, closing the gates, listening to the answers given, endeavouring to retain control over the witness, and retaining flexibility as well as rules such as the rule in *Browne v Dunn* (1893) 6 R 67 are just as apposite to cross-examination of expert witnesses as they are to cross-examination of lay witnesses. The rule in *Browne v Dunn* will necessitate putting any additional facts

or alternative hypotheses sought to be relied upon in the cross-examiner's client's case to the expert witness.

The cross-examiner must understand the case and the relevance of the witness' evidence to that case

Before embarking on a cross-examination it is vital to appreciate the issues in the case, the competing cases advanced by the parties, and how the particular witness' evidence bears upon those issues. Undertaking this process will lead to an assessment of what evidence from the witness is damaging to the cross-examiner's client's case, how much of the evidence can be ignored or admitted without challenge and how much can be of assistance.

In a study conducted in 1999 by Dr Ian Freckelton SC and others on behalf of the Australian Institute of Judicial Administration Inc,[5] judges were asked what they considered to be the most significant reasons for inadequate cross-examination of expert witnesses. The reasons the judges gave included inadequate preparation by the cross-examiner; lack of skill by the cross-examiner; confusion in use of terminology by the advocate; not having their own experts present when other expert witnesses gave their evidence; and a propensity on the part of the advocate to allow witnesses to go beyond the limits of the expert's expertise.[6] An analysis of the issues in the case and the place of the witness' evidence in that case will assist cross-examiners to avoid at least the first of these recognised errors.

The cross-examiner must establish the objectives of the cross-examination

After analysing the issues and evidence, the cross-examiner will be in a position to determine the objectives of the cross-examination. Robert Stitt QC has stated that his objectives are always determined by his instructions, which are the opinions of his client's expert witnesses where they are opposed to or contradict the opinions of the expert witnesses he is cross-examining.[7] James Glissan QC has also noted the importance of obtaining assistance from one's own expert witnesses, after first obtaining a thorough knowledge of the brief and the facts.[8]

Destructive objectives may be to attack any or all of the witness' premise, the conclusion, or the process of reasoning by which the witness moved from the premise to the conclusion.[9]

Cross-examination of expert witnesses may also have the aim of lessening the overall impact of the expert's evidence, essentially implementing a form of damage control without all-out destruction. This may be achieved by exploring with the witness the possibility for alternative inferences or conclusions to be drawn from the facts available,[10] so laying the groundwork for a submission that one possibility should be preferred over another possibility, or that the other party has not discharged the onus of proving the particular possibility.[11] The cross-examiner may aim to commit the witness to specifics which another expert who is equally or better-qualified will later refute.[12]

Objectives of cross-examination of expert witnesses may also be constructive rather than destructive, for example to obtain corroboration or indirect support for the opinions of the cross-examiner's own expert.[13] Determining the appropriate objective will be a matter of judgment in each case.

Other aspects of preparation for cross-examination

The major divergence in the available literature on cross-examination of expert witnesses concerns the degree to which the cross-examiner should attempt to master the area of expertise. This divergence may, in part, be attributed to different understandings of what is meant by mastering the area of expertise and the purpose behind that mastery. It may also depend upon the nature of the particular area of expertise, as some areas of expertise are more readily understandable by a non-expert than others, and the degree to which the

barrister develops a particular specialty and so becomes familiar with a particular area of expertise.

One school of thought is that cross-examiners should at least attempt to master the area of expertise. Geoffrey Watson SC has suggested that cross-examination of an expert will undoubtedly fail unless the cross-examiner makes some effort to master the area of expertise.[14] Wells QC encouraged cross-examiners as follows:

> You must strive to be, for the time being and within the limits of the subject matter, as much an expert as the expert; it is almost hopeless for you, as an uninformed layman, to cross-examine successfully.[15]

Nothing can be more dangerous than for a counsel to attempt to master, usually in a short space of time, an area of expertise in the forlorn expectation that this will equip him or her better to cross-examine the expert witness.

The alternative school of thought is that it is impossible for barrister to master in a short space of time the area of expertise to which an expert has devoted much of his or her professional life in the hope of matching the expert in any debate on the subject. Stitt QC has counselled against such attempts.[16] He cited the American attorney Francis Wellman's work entitled 'The Art of Cross-Examination'[17], which stated:

> As a general thing, it is unwise for the cross-examiner to attempt to cope with a specialist in his own field of enquiry. Lengthy cross-examinations along the lines of the expert's theory are usually disastrous and should rarely be attempted.

Stitt QC said of this:[18]

> That warning applies today with as much force as it did in 1904. Too often you will see cross-examining counsel make the mistake of believing that before they can successfully cross-examine an expert they themselves must be fully proficient in the field of expertise in which the expert is qualified. Nothing can be more dangerous than for a counsel to attempt to master, usually in a short space of time, an area of expertise in the forlorn expectation that this will equip him or her better to cross-examine the expert witness.

Miller QC also agreed with Wellman's admonition and added:[19]

> I have seen examples of counsel retiring at the close of a day's hearing with a gaggle of expert witnesses, hoping to learn in a few hours the elements of a particular disciple which it has taken an expert witness years of graduate and post-graduate study to master. The results are usually catastrophic…

Justice Michael Pembroke has encouraged cross-examiners to learn and understand, to a considerable degree, the intellectual discipline in question.[20] Having seen a draft of this article, Justice Pembroke added to those observations that the areas of expertise he had in mind included those in relation to which brokers, auditors, loss assessors, underwriters and company directors might give expert evidence. His Honour noted that such areas do not require years of study, and it is possible for barristers to understand those areas reasonably quickly, in contrast to areas of scientific and technical expertise such as fields of engineering, science and medicine.

A suggested middle-ground between the divergent approaches is that the cross-examiner should attempt to understand the area of expertise, assisted by the expert witnesses briefed in the cross-examiner's client's case, with a view to cross-examining based upon instructions obtained from that assistance, but without attempting to challenge the witness' theory based on the cross-examiner's own understanding of it.

Cross-examiners should include as part of their preparation research in relation to the expert witness to establish what standing the witness has among his or her peers, what publications the witness has authored and the like.[21] This can be done by making enquiries of industry colleagues of the witness as well as issuing subpoenas and notices to produce.

Google searches and LinkedIn pages can also unearth a quantity of information. An expert witness' *curriculum vitae* should be studied carefully and each item checked in order to ascertain whether the witness is qualified to give evidence on the specific matter in issue, and the papers authored by the witness and judgments in which the expert has given evidence referred to therein reviewed.

The expert's report should be carefully analysed to establish what the expert has not said, and to see whether there is material or additional facts which might be put to the expert. As part of this process, the expert's notes or work papers which he or she has prepared or used to record results or tests should be examined, as such an examination may help to establish what has been left out of the report.[22]

Where a dispute arises between expert witnesses because of an absence in agreement in the scientific source material, cross-examiners should read the textbooks or articles concerned.[23] Watson SC has cited as a benefit of this exercise the fact that witnesses commonly misquote the literature, or take statements out of context, which can provide useful fodder for cross-examination.[24]

While there is a school of thought that good cross-examiners do not write out their questions beforehand, it can be generally useful to write out in chambers propositions sought to be established and some of the questions, particularly in difficult or highly technical areas.[25]

The expert's report should be carefully analysed to establish what the expert has not said, and to see whether there is material or additional facts which might be put to the expert.

Manner of cross-examination

The instruction not to argue with, or bully, a witness applies with equal force to any witness, whether lay or expert, but it has been particularly restated with respect to expert witnesses.[26] Sir David Napley said in an oft-cited passage in *The Technique of Persuasion*:[27]

> Expert witnesses are a much maligned body of men. It is true that some of them may be charlatans, but for the most part they are men who are concerned to give help to the court upon the basis of a life-time's experience and training, and moreover, training within a particular field. Nothing is to be gained by endeavouring to bully them (or, for that matter, any other witness). Although your object may often be to show that the extent of their knowledge and experience is less than the expert whom you propose to call, this needs to be done with a degree of tact and judgment. You occupy a powerful position in court in relation to an expert. To make him look silly (if you are able); to cause him to be the centre of your ridicule (if you are competent to do so) are not only unkind and unnecessary pursuits

> but may damage him in the pursuit of his own profession by destroying his reputation. Experts for the most part are dealing with matters which can be the subject of differing opinions. If the subject matter of their evidence is something of scientific exactitude, then you are unlikely to get very far with cross-examination in any event.

Every statement of fact in an expert report should be analysed to see how it rests on other underlying facts or on assumptions to see if they can be attacked or shaken, in order to attack the conclusions.

This principle was stated more bluntly by another commentator: 'You never get into a wrestling match with a hog because you both come up covered with manure, and the hog kinds of likes it'.[28]

Justice Pembroke's advice to junior barristers when cross-examining experts was to be even more polite than usual, to be respectful of the expert witness, at least initially, not to be high-handed, condescending or rude and not engage in unnecessary aggression. His Honour warned that the danger of acting otherwise was in getting the judge offside, as the judge's starting premise would be that the expert knows more than the barrister, which in Justice Pembroke's view, was nearly always the case.[29]

It appears to be generally agreed that a cross-examiner should start the cross-examination in a non-confrontational manner, endeavouring to obtain from the witness concessions helpful to the cross-examiner's case.[30] If the witness proves uncooperative, the cross-examiner can then take a harder line.[31] If the cross-examiner wants to gain something positive from the witness there is no merit in attacking the witness in an attempt to destroy the witness' credibility at the outset. If part of the evidence needs to be attacked, the attack should be delayed until positive evidence has been established.[32]

It is worth remembering that experts are human beings, and, as Wells QC observed, sometimes unworldly, and may find it difficult to stand up for themselves in court.[33] Unnecessarily hostile cross-examinations may engender sympathy for the expert and contempt for the cross-examiner. One environmental engineer who had given evidence as an expert in the United States of America described his experience of being cross-examined (in the United States) in this way:[34]

> How does it feel to be boiled in your own blood? That is one of the many emotions I have felt during the cross examination of the expert witness. The opposing attorney has the opportunity to question the validity of your opinions expressed during direct examination. He will also question the veracity of the witness – you. It is the opportunity the opposing attorney has been waiting for. The strategy is to impeach your testimony and destroy your credibility.

There are, of course, instances where experts have been cross-examined in a highly destructive fashion to great effect. A brilliant but rare example was recounted by Justice Pembroke concerning Tom Hughes AO QC:[35]

> Tom Hughes was (and still is) an extraordinarily powerful cross-examiner who could literally frighten a weak or timorous witness into recanting. This will never happen to you, but in a case in Melbourne in the early 1990s, Tom forced the witness to concede that he was a 'worthless expert witness whose opinion was not worth the paper it was written on' and that he was 'ashamed of ever venturing an opinion on the issue in dispute'.

A well-known example of the success of cross-examination of expert witnesses as materially bearing upon the final result of the trial is that of the expert evidence in the *R v Chamberlain* trial. Miller QC contended, in respect of this, that the success of the prosecutor's cross-examination of expert witnesses called by the defence was a powerful factor, not only in influencing the jury verdict, but in the subsequent appeal proceedings. Gibbs CJ and Mason J recorded in the High Court decision that two of the defence's expert witnesses had exhibited an "unbecoming arrogance" (in the words of Bowen CJ and Forster J in the Full Federal Court) and one had not fared well in cross-examination.[36]

Suggested techniques in cross-examination

In addition to following the same general rules of cross-examination set out above, there are some generally-accepted techniques particularly relevant to expert witnesses.

If the objective is to attack the factual assumptions underlying the expert opinion (rather than findings of fact observed by the expert witness, for example, in the case of a doctor expressing a medical opinion based on his own clinical examination), the assumptions themselves should not be attacked through the expert, as the expert's evidence does not prove them.[37] Rather the cross-examination in this regard should focus on establishing that the expert's opinion rests on the existence of a particular fact or facts that the cross-examiner intends to otherwise prove to be incorrect.

Every statement of fact in an expert report should be analysed to see how it rests on other underlying facts or on assumptions to see if they can be attacked or shaken, in order to attack the conclusions.[38] Stitt QC has said that his practice is to cross-examine the expert witness so as to establish each of the following:[39]

a. the precise facts in the report which are essential to the process of reasoning;

b. that that particular process of reasoning leads directly to the conclusion or opinion;

c. that if any or all of those facts are either erroneous or do not apply, that the process of reasoning must be changed;

d. that it therefore follows that if the facts do not apply or are erroneous then the opinion or conclusion should also be altered.

It is then for the cross-examiner to establish at the appropriate time that one or more of those essential facts were different, so as to ground a submission that the expert's opinion should not be accepted or does not apply.[40] Alternatively, further facts may be put to the expert to suggest that the opinion was prematurely reached and in light of the availability of further information, should be qualified.

Attacking the process of reasoning may involve attacks on the strength of the techniques or theories chosen, which may lead the expert to qualify the opinion previously given. Understanding one's own client's expert's opinion will provide a basis for attacking the opinion of the expert being cross-examined. For example, to the extent that the difference between the two experts is as to the relevant theory or technique to be applied, one could obtain instructions that the theory or technique propounded by the opposing expert has limitations, and then cross-examine on those limitations. Published articles may also be used in cross-examination to demonstrate the witness' lack of knowledge, if necessary.[41]

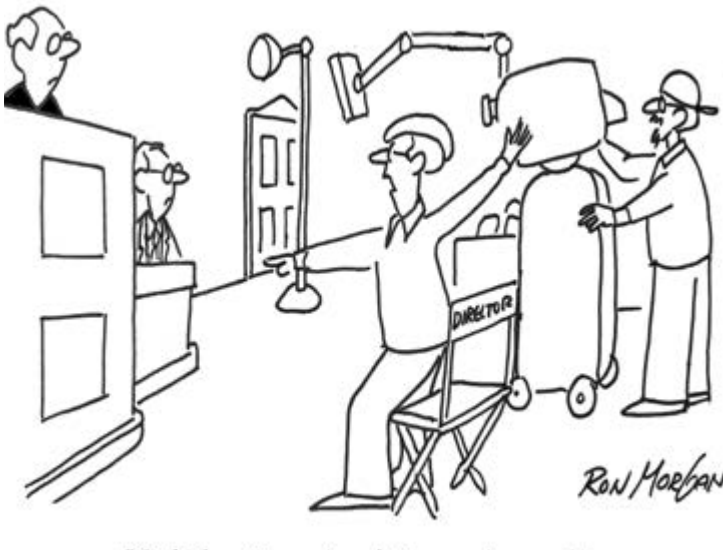
Watson SC has stated:[42]

> I have seen many great cross-examiners and they have all followed the same technique in cross-examining experts: they start with some very general propositions with which the expert cannot disagree; they will then refine the generality of the questions, sometimes only slightly, so to narrow it to a now more specific proposition with which

the expert should agree; they will work through this pattern until they achieve a refined question – which is often the genuine question on the issue – with which the expert may feel compelled to agree.

Framing questions so that the answer should be yes is a desirable technique as it plays upon the expert's wish to look knowledgeable and reasonable to the Court, while also assisting the cross-examiner to retain control over the expert.[43]

Wells QC opined that for the most part, progress in cross-examining an expert is made by asking questions that are the product of probing and insinuating techniques in combination, and that it is only rarely that it is practicable to confront or undermine an expert, unless his opinions are in conflict with other evidence already given or to be given, with standard textbooks, with authoritative articles in his field, or with evidence he has given or statements made on other occasions.[44]



"Cut! The witness hasn't even rehearsed."

Cross-examination as to credibility

Under s 103 of the Evidence Act, cross-examination of a witness as to credibility is admissible as an exception to the credibility rule if the evidence could substantially affect the assessment of the credibility of the witness.

As regards expert witnesses, such evidence may go to issues such as bias, the truthfulness of the opinion (if, for example, there were evidence of an expert giving an opinion previously contrary to the opinion in the report in question), or the honesty of the expert, which could arise if an expert is deliberately overlooking literature or distorting its meaning.[45]

Glissan QC has warned that an attack on credit based on bias is dangerous, as it will usually drive the expert to adopt a stance which is far more trenchant than otherwise. Instead, he recommended a subtler, more sophisticated approach whereby the witness is cross-examined as to his instructions – was the expert properly briefed? Did the expert have the full facts when giving the opinion? Are there other possibilities to be drawn from the facts? How would other factors affect the conclusions?[46]

The credibility of a witness who has academic credentials, but no day-to-day practical experience in the relevant field, can be attacked on the basis that the witness does not possess practical expertise and has never had to put his or her theoretical knowledge or hypothesis to the test in the real world, a distinction remarked upon in *Chamberlain v R* (No 2) (1984) 153 CLR 521 at 558.[47]

Another suggested basis for attack of the qualifications of expert witnesses is as to the listing of membership of a professional association as a qualification of a witness.[48] Often such memberships are procured by payment of a fee, and exposure of this fact can demonstrate that the witness has "puffed up" his or her resume to make it appear more credible. The witness can be cross-examined so as to concede that nothing about the membership indicates any qualifications or experience, yet the witness nevertheless deemed it appropriate to list it in the context of his/ her qualifications.

Glissan QC considered that attacking the qualifications of an expert is at best a 'chancy business' and that the best approach is to attack the expert's qualifications to give evidence on the particular matter at issue, rather than mounting a general attack on the witness' qualifications.[49] The importance of the witness' *curriculum vitae* comes to the fore here, as Glissan QC warned that all too often, one will find that the expert is not specifically qualified on the particular matter at issue. He instructs: 'Attack this more reasonable, if more limited, objective. Seek to wring concessions. Ask detailed questions about areas both at the heart of the issue and all around it.'

As expert witnesses are required to abide by Expert Witness Codes of Conduct[50] requiring them to set out matters including their qualifications, the assumptions and material facts on which each opinion in the report is based, their reasons for their opinion, any literature or other materials used in support of the opinion, together with many other matters, it is vital that compliance with each aspect of the relevant code is checked by the cross-examiner.

Issues going to admissibility of the expert's opinion

While credibility issues may arise from a question of the qualifications of the witness to give evidence as to the particular issue,[51] the issues of whether a witness' claimed area of expertise is a recognised field of specialist knowledge and whether the witness has the training, qualifications or experience necessary to give the relevant opinion go to admissibility. These issues should not, therefore, be left to cross-examination of the expert in the hearing after the report has been admitted, and should instead be the subject of a *voir dire*. However, even if a judge rules that a witness is qualified as an expert, the expert's qualifications may be vulnerable to further cross-examination once the evidence has been admitted.[52]

Pursuant to s 79 of the *Evidence Act 1995*, in order for the evidence of the witness' opinion to be admissible, the witness must have specialised knowledge based on his or her training, study or experience. The opinion expressed by the witness must be wholly or substantially based on that specialised knowledge. Cross-examiners should be vigilant to ensure that expert opinions are not advanced based merely on the training or experience of the witness rather than on the witness' specialised knowledge.[53]

A failure to demonstrate that an opinion expressed by a witness is based on the witness' specialised knowledge based on training, study or experience is a matter which goes to the admissibility of the evidence, not its weight: *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 (*Dasreef*) at [42] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. Because it is an explicit precondition of admissibility, it must be established by the party tendering the evidence in examination in chief (either during the trial or *voir dire*) not in cross-examination or in non-evidentiary documents required by rules of court for other purposes: Dasreef at [98] per Heydon J (dissenting); *Ocean Marine Mutual Insurance Assn (Europe) OV v Jetopay Pty Ltd* (2000) 120 FCR 146 at 151; *Adler v ASIC* (2003) 179 FLR 1 at 138.

The reasoning process used by the expert witness must also be disclosed in the expert report in order for the evidence to be admissible: *Rolleston v Insurance Australia Ltd* [2017] NSWCA 168 at [32] to [34].

Furthermore, an expert whose opinion is sought to be tendered should differentiate between the assumed facts upon which the opinion is based, and the opinion in question.[54]

Cross-examination where evidence is given concurrently or by single experts

In recent years, courts have increasingly encouraged the retainer of single experts jointly retained by the parties, and where multiple experts are retained, the giving of evidence by the experts concurrently (usually following a conclave of experts and the production of a joint expert report, without the involvement of lawyers). This necessarily changes the procedure for cross-examination.

An early recorded use of concurrent expert evidence in Australia occurred in the Trade Practices Tribunal when Justice Lockhart was the President. In *Re Queensland Independent Wholesalers Ltd* (1995) 132 ALR 225 the Tribunal set out in its reasons for judgment the procedure taken in that case with respect to expert witnesses, which included the following in respect of cross-examination:[55]

> Counsel then cross-examined the experts, being at liberty to cross-examine on the basis (a) that questions could be put to each expert in the customary fashion (ie one after the other, completing the cross-examination of one before proceeding to the next), or (b) that questions could be put to all or any of the experts, one after the other, in respect of a particular subject, then proceeding to the next subject. Re-examination was conducted on the same basis.

This general procedure of cross-examination of experts concurrently has been followed in cases where orders for concurrent expert evidence have been made, with appropriate flexibility and modification to suit the circumstances of the particular case. In the Equity Division of the NSW Supreme Court, Practice Note No. SC Eq 5 provides that where evidence is given concurrently, using the procedure set out in UCPR rule 31.35(c) to (h), the judge will examine the expert witnesses in chief as witnesses of the Court and that cross-examination will take place of all witnesses jointly, with the order of cross-examination being either agreed by counsel or determined by the judge.

In the Federal Court, where expert evidence is given concurrently, the Concurrent Expert Evidence Guidelines contemplate a procedure where expert witnesses are asked questions by the judge, counsel and each other on an 'issue-by-issue' basis, although the process of cross-examination remains subject to the overall control of the judge.[56] The Guidelines distinguish between 'traditional cross-examination' and the concurrent session, describing the latter as 'a sensible and orderly series of exchanges between expert and expert, and between expert and lawyer.'[57] The Guidelines state: 'Where appropriate, the judge may allow for more traditional cross-examination to be pursued by a legal representative on a particular issue exclusively with one expert. Where that occurs, other experts may be asked to comment on the evidence given.'[58]

While some judges and barristers have described the concurrent evidence process as a 'discussion' and have extended that description to the cross-examination process, it is clear that there is still room for traditional cross-examination within the concurrent evidence procedure.

While some judges and barristers have described the concurrent evidence process as a 'discussion' and have extended that description to the cross-examination process,[59] it is clear that there is still room for traditional cross-examination within the concurrent evidence procedure. Justice Pepper of the NSW Land and Environment Court stated:[60]

> It may be that in respect of some issues, the traditional method of cross-examination of each expert separately, or consecutively, is more appropriate, but this is not constrained under the concurrent evidence model, and in my opinion the Court greatly benefits from having the other expert in the room to clarify the point of disagreement.

The guidelines set out in this paper in relation to cross-examination of expert witnesses should generally apply to cross-examination of experts concurrently. However, comments from practitioners consulted in relation to this article have included that it is very difficult to challenge the expertise, reasoning, methodology and facts and assumptions of an expert report when witnesses are being cross-examined concurrently. Careful thought should be given to the pre-trial directions to be sought in relation to the procedure to be adopted in the lead-up to the trial, including as to objections to expert reports and as to issues for cross-examination. Cross-examination as to some issues, for example, qualifications and credit, may need to take place separately from the concurrent session. Justice Garling has commented that while the conduct of cross-examination as to credit is very difficult in a concurrent session, he does not see that as a disadvantage of the concurrent evidence process, as by the time a joint conference has taken place and a joint report prepared with careful adherence to the Code of Conduct, issues of credit rarely arise. His Honour considered that if issues of credit do arise, they can be dealt with in an entirely conventional manner by organising the concurrent expert evidence session so that those issues are not dealt with during the concurrent session but at the conclusion of the session, on an individual basis.[61]

Comments from practitioners have included that the concurrent evidence process lacks a uniform structure, and that it is desirable for courts to lay down such a structure, including as to issues such as the appropriate procedure and timing for challenging the expertise of an opponent's expert (including whether such a challenge is taken prior or after the joint conference of experts, whether it is taken prior to the hearing, and if it is not heard by the trial judge, what the consequence is if the trial judge takes a different view on the expertise of the expert).

Where directions are made for single expert witnesses, or court-appointed expert witnesses in NSW courts, those witnesses may be cross-examined by any party.[62] Practitioners have commented that difficulties in respect of the appointment of court-appointed expert witnesses include attempting to reach agreement with one's opponent as to the questions to be answered by the expert, the fact that the report generated is often in an inadmissible form, and that a party is unable to speak to the expert outside court and give instructions to the expert (absent the consent of the opponent) and therefore cannot obtain assistance in the same way as a party can when parties have retained their own experts.

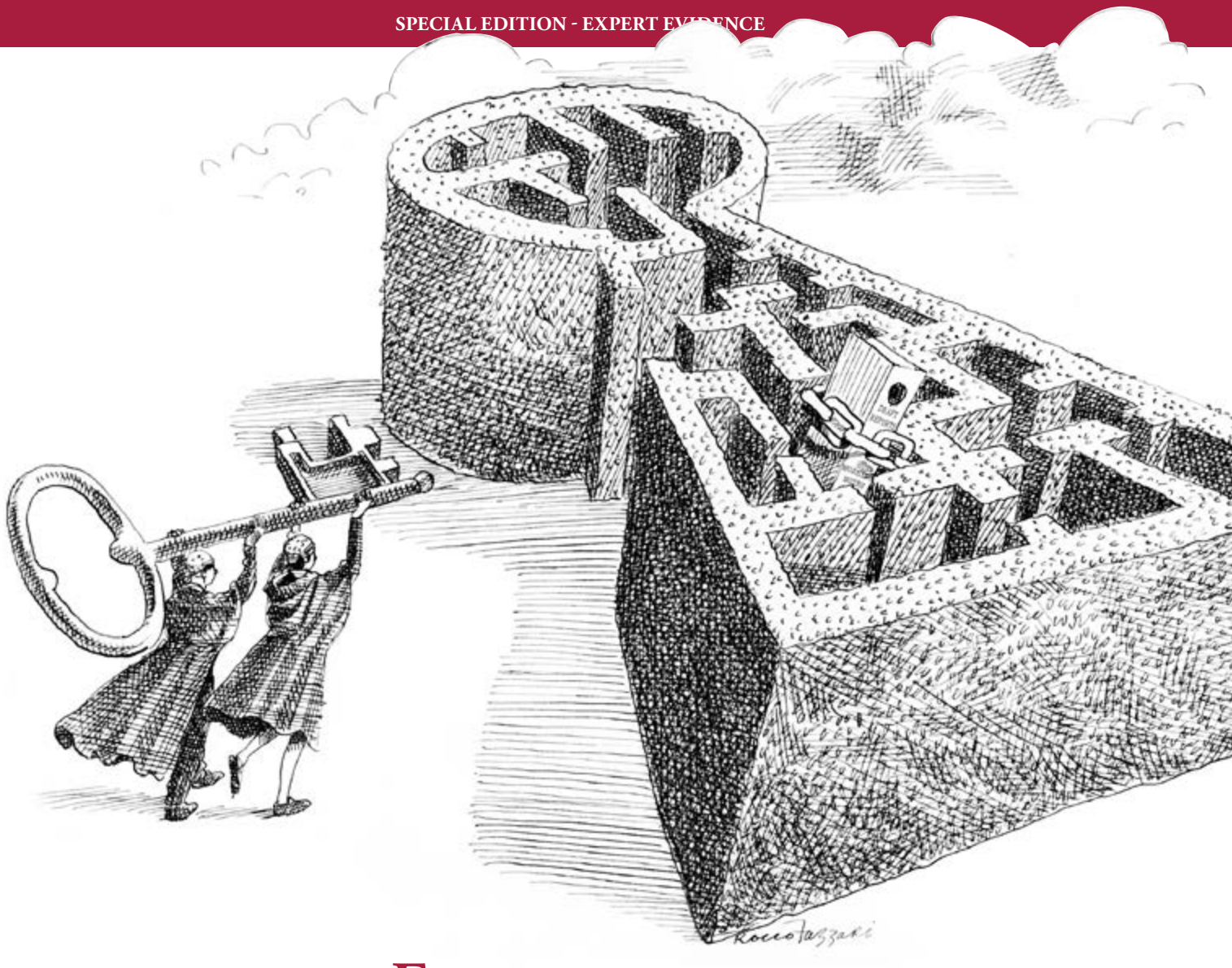
Conclusion

To effectively cross-examine expert witnesses, a barrister must possess both a command of the essential general skills of cross-examination and the insight to adapt and apply those skills in aid of the specific end of cross-examining expert witnesses.

Readers who wish to read more about cross-examination of expert witnesses are referred to the many helpful articles and texts written on the topic contained in the references to this article.

END NOTES

1 W A N Wells, *Evidence and Advocacy* (Sydney: Butterworths, 1988), 187.
2 Robert Stitt QC, *Cross-examination of expert witnesses: A practical approach via a personal excursion* (2005) 26 Australian Bar Review 219 at 236.
3 Geoffrey Watson SC, *Cross Examining Experts*, CPD seminar delivered at the NSW Bar Association, 9 July 2007.
4 *Cross-examination of Experts* (1987) 61 ALJ 622.
5 Ian Freckelton, Prasuna Reddy and Hugh Selby, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study*, Australian Institute of Judicial Administration Inc, Carlton, Vic, 1999.
6 Stitt QC, *Cross-examination of expert witnesses*, 235.
7 Stitt QC, *Cross-examination of expert witnesses*, 223.
8 J L Glissan, *Advocacy in Practice*, (6th ed), (Chatswood: LexisNexis Butterworths, 2015), [5.43].
9 Stitt QC, *Cross-examination of expert witnesses*, 223.
10 Ian Freckelton and Hugh Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy*, (5th ed), (Sydney: Lawbook Co., 2013), [7.10.10].
11 P H Greenwood SC, *Expert Evidence*, NSW Bar Practice Course paper, revised March 2009.
12 See Freckelton and Selby, *Expert Evidence*, [7.10.10].
13 Stitt QC, *Cross-examination of expert witnesses*, 231; Watson, *Cross Examining Experts*, 2.
14 Watson SC, *Cross Examining Experts*, 4.
15 W A N Wells, *Evidence and Advocacy*, 187.
16 Stitt QC, *Cross-examination of expert witnesses*, 222.
17 (New York: Simon & Schuster, 1904), 74.
18 Stitt QC, *Cross-examination of expert witnesses*, 222.
19 G Miller QC, *Cross-examination of Experts* (1987) 61 ALJ 622 at 623.
20 Justice M Pembroke, *Cross Examination of Experts*, CPD paper delivered for the NSW Bar Association New Barristers Committee on 29 June 2010, 2.
21 Justice Pembroke, *Cross Examination of Experts*, 3.
22 Stitt QC, *Cross-examination of expert witnesses*, 231-232.
23 Watson SC, *Cross Examining Experts*, 4.
24 Watson SC, *Cross Examining Experts*, 4.
25 Stitt QC, *Cross-examination of expert witnesses*, 230.
26 See Stitt QC, *Cross-examination of expert witnesses*, 232-233; Miller QC, *Cross-examination of Experts*, 622.
27 Sir David Napley, *The technique of persuasion*, (3rd ed), (London: Sweet & Maxwell, 1983), 142.
28 J M Davis, "Self-control: The Forgotten Rule of Cross-examination" (1989) 25 Trial 64, in Freckelton and Selby, *Expert Evidence*, [7.10.140].
29 Justice Pembroke, *Cross Examination of Experts*, 1; see also Professor the Hon George Hampel AM QC, Elizabeth Brimer and Randall Kune, *Advocacy Manual: The Complete Guide to Persuasive Advocacy*, (Melbourne: Australian Advocacy Institute, 2008), 121.
30 W A N Wells, *Evidence and Advocacy*, 187.
31 Greenwood SC, *Expert Evidence*; Watson, *Cross Examining Experts*, 8.
32 Stitt QC, *Cross-examination of expert witnesses*, 223; Watson, *Cross Examining Experts*, 8.
33 W A N Wells, *Evidence and Advocacy*, 189.
34 J. Matson, *Effective Expert Witnessing*, (3rd ed) (Boca Raton FL: CRC Press, 1999), 96, in Deirdre Dwyer, *The Judicial Assessment of Expert Evidence*, (Oxford: Cambridge University Press, 2008), 304-5.
35 Justice Pembroke, *Cross Examination of Experts*, 3.
36 *Chamberlain v The Queen* (No 2) (1984) 153 CLR 521 at 558-559.
37 Justice Pembroke, *Cross Examination of Experts*, 2.
38 Stitt QC, *Cross-examination of expert witnesses*, 228.
39 Stitt QC, *Cross-examination of expert witnesses*, 228 – 229.
40 See Freckelton and Selby, *Expert Evidence*, [7.10.10].
41 Greenwood SC, *Expert Evidence*.
42 Watson SC, *Cross Examining Experts*, 6.
43 Watson SC, *Cross Examining Experts*, 7.
44 W A N Wells, *Evidence and Advocacy*, 189.
45 Watson SC, *Cross Examining Experts*, 8-9.
46 Glissan, *Advocacy in Practice*, [5.43].
47 Stitt QC, *Cross-examination of expert witnesses*, 224, W A N Wells, *Evidence and Advocacy*, 188.
48 Freckelton and Selby, *Expert Evidence*, [7.10.10].
49 Glissan, *Advocacy in Practice*, [5.43].
50 For example, in NSW courts, the Expert Witness Code of Conduct in Schedule 7 of the *Uniform Civil Procedure Rules 2005*, and in the Federal Court, the Harmonised Expert Witness Code of Conduct at Annexure A to the Expert Evidence Practice Note.
51 Watson SC, *Cross Examining Experts*, 8-9.
52 W A N Wells, *Evidence and Advocacy*, 188.
53 See G Edmond, K Martire, R Kemp, D Hamer, B Hibbert, A Ligertwood, G Porter, M San Roque, R Searston, J Tangan, M Thompson and D White, *How to cross-examine forensic scientists: A guide for lawyers* (2014) 39 Aust Bar Rev 174 at 176, 179.
54 *Ramsay v Watson* (1961) 108 CLR 642; *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313 at 347-348; *HG v The Queen* (1999) 197 CLR 414 at 427.
55 At 232.
56 Federal Court of Australia, Expert Evidence Practice Note (GPN-EXPT), Annexure B, Concurrent Expert Evidence Guidelines (*Guidelines*) at [14(f)].
57 Guidelines at [16].
58 Guidelines at [16].
59 Justice Peter McClellan, *New Method with Experts – Concurrent Evidence*, (2010) 3:1 Journal of Court Innovation 260 at 264; Justice Stephen Rares, *Using the 'Hot Tub': How Concurrent Expert Evidence Aids Understanding Issues*, speech delivered on 12 October 2013, <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20131012>.
60 Justice Rachel Pepper, '*Hot-Tubbing': The Use of Concurrent Expert Evidence in the Land and Environment Court of New South Wales and Beyond*, paper presented at the 2015 Annual Alaskan Bar Association Conference on 14 May 2015, <http://www.lec.justice.nsw.gov.au/Documents/Speeches%20and%20Papers/PepperJ/PepperJ%20Alaska%20Bar%20Convention%20-%20Hot-tubbing%20or%20Concurrent%20Evidence%20paper(Final)%20140515.pdf>, [61].
61 Justice Peter Garling, *Concurrent Expert Evidence – Reflections and Development*, paper presented at the Australian Insurance Law Association Twilight Series on 17 August 2011.
62 For example, see NSW Supreme Court Practice Note SC Gen 10, UCPR 31.51.



Expert reports: reconsidering waiver of privilege

By Hugh Stowe, 5 Wentworth

Introduction

This article addresses the following vexed questions concerning expert reports: in relation to the documentary materials generated during the production of expert reports in legal proceedings, when does privilege arise and when is it waived? These materials may include instructions, source materials, other confidential communications with lawyers, drafts, and internally generated working documents ('**Associated Materials**').

The article updates an analysis undertaken 10 years ago in this journal.[1] Back then, I stated: 'Regrettably, a crisp answer to the questions cannot be given. Privilege may arise, and privilege may be waived on service or tender of the report. However, the scope of privilege and waiver are uncertain'. That conclusion remains apt, but there have been significant developments and clarifications in this field since then.

This article sketches an overview of the law of legal professional privilege, briefly reviews the authorities and principles relevant to the application of privilege to Associated Materials, tentatively outlines a summary of prevailing principles, raises proposals for the further evolution of principles, and outlines possible strategies to minimise the prospect and prejudice of waiver. These are large and significant topics which bristle with controversies and uncertainties. The thorough analysis which these topics merit is beyond the scope of this brief article.

Which body of evidence law applies?

In the Federal Court, questions of legal professional privilege are governed by the common law in pre-trial proceedings,[2] and by the *Evidence Act 1995* (CW) at trial. In NSW question of privilege are (subject to one exception) governed by the *Evidence Act 1995* (NSW) in all stages of proceedings, including pre-trial procedures by operation of UCPR r 1.9 and section 131A of the Evidence Act.[3] The exception is that the common law still applies to claims of privilege made by parties other than the party producing the document.[4]

It is doubtful whether there is significant difference in the operation of the statutory and common law principles.[5]

Purpose of legal professional privilege: the policy tension

The scope of privilege represents the resolution of a fundamental policy tension: 'A person should be entitled to seek and obtain legal advice in the conduct of his or her affairs, and legal assistance in and for the purposes of the conduct of actual or anticipated litigation, without the apprehension of being prejudiced by subsequent disclosure of the communica-

tion. The obvious tension between this policy and the desirability, in the interests of justice, of obtaining the fullest possible access to the facts relevant to the issues in a case lies at the heart of the problem of the scope of the privilege. Where the privilege applies, it inhibits or prevents access to potentially relevant information….. For the law, in the interests of the administration of justice, to deny access to relevant information, involves a balancing of competing considerations'.[6]

The scope of privilege represents the resolution of a fundamental policy tension.

Privilege and waiver under the common law

The question as to the scope of privilege under the common law is 'more easily asked than answered, despite all that is to be found in the decided cases and all that has been said in the learned articles'.[7] Nevertheless, the following general traditional categories can be identified:[8]

- 'advice privilege': protects from disclosure confidential communications between a client and lawyers, made for the dominant purpose of seeking or providing legal advice;
- 'litigation privilege': protects from disclosure confidential communications between clients and lawyers, and lawyers or clients (on the on hand) and third parties (on the other hand), for the dominant purpose of pending or reasonably contemplated legal proceedings.

It has been said that the doctrine of privilege itself reflects the final resolution of the policy tension described above,[9] and that 'no further balancing exercise is required' in the application of privilege.[10] However, the doctrine of privilege is 'subject to defined qualifications and exceptions'.[11] These act as 'the common law's safety valve',[12] when the operation of privilege places undue pressure on the search for truth. In other words, within the recognised 'qualifications and exceptions' to privilege, there remains embedded the scope for the further balancing of the conflicting policies which underpin the operation of privilege. The doctrine of 'waiver of privilege' is one of those safety valves. Waiver of privilege may be 'express' or 'implied'.

Express waiver arises when a party 'deliberately and intentionally discloses protected material'.[13]

Implied waiver arises under the common law when there has been an 'intentional act' which was 'inconsistent with the maintenance of … confidentiality. What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large'.[14]

'Fairness' is thereby identified as relevant to (but not determinative of) the matter. 'Fairness presupposes a balancing of interests between parties who are in dispute'.[15] The 'question of 'fairness' involves an inquiry as to whether the facts supply sufficient reason for depriving the client of the form of protection which the law confers upon communications between solicitor and client'.[16]

An assessment of 'inconsistency' 'is to be made in the context and circumstances of the case, and in the light of any considerations of fairness arising from that context or those circumstances'.[17] Although a full exploration of the relevant principles is beyond the scope of this paper, a recognised category of case is 'associated material waiver', which arises when it is deemed 'unfair or misleading to allow a party to refer to or use material and yet assert that that material, or material associated with it, is privileged from production'.[18] By way of example, waiver will arise 'where the privilege holder has put the contents of the otherwise privileged communication in issue' in proceedings.[19] It has been observed that implied waiver extends to associated materials which are 'necessary to a proper understanding' of the primary privileged materials which have been referred to or used.[20]

'Fairness presupposes a balancing of interests between parties who are in dispute'.

The difficulty with the concepts of 'inconsistency' and 'unfairness' is that they reflect a policy conclusion on specific facts that the law will override privilege, but leave unarticulated the precise basis for that conclusion. Although the operation of implied waiver is well settled in many areas, there are not (and maybe cannot be) generally settled universal criteria relevant to resolving the underlying policy balance. I suggest that the (unarticulated) reality is that the application of implied waiver involves the court re-opening and re-striking the balance between the fundamentally irreconcilable policy objectives which underpin the law of privilege (referred to above). Those policy objectives are incommensurable, and where the balance is struck reflects an inherently contestable weighting of those objectives. There can be settled answers, but no objectively 'right' answers.

Privilege and waiver under the Evidence Act

Sections 118 and 119 substantially mirror the 'advice' and 'litigation' privileges of the common law.

Implied waiver of privilege in relation to Associated Materials potentially arises under section 126 and section 122.

Section 126 provides that privilege is lost in relation to documents which are 'reasonably necessary for a proper understanding' of other documents in respect of which privilege has been lost. By operation of section 126, 'if a privileged document is voluntarily disclosed for forensic purposes, and a thorough apprehension or appreciation of the character, significance or implications of that document requires disclosure of source documents, otherwise protected by client legal privilege, ordinarily the test laid down by s 126 of the Evidence Act will be satisfied.'[21]

Section 122(2) provides that: 'Subject to subsection (5), this Division does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party' claiming privilege. The section incorporates the common law test for implied waiver.[22]

Underpinning policy considerations

As noted above, the formulation of rules in relation to implied waiver involves striking a balance with respect to incommensurable policy considerations. In addition to the general policy tensions described above, there are a number of specific policy matters that are relevant to the 'balance' in the context of the scope of implied waiver in Associated Materials, following service or tender of an expert report.

The following matters have been identified as weighing in favour of implied waiver in relation to Associated Materials (following service or tender of the report).

Firstly, 'the important principle that there is no property in a witness means that an adverse party may subpoena an expert retained by the original party and require that expert to give all relevant information in his possession, including an expression of his opinion, to the court'.[23]

Secondly, the fact that in the 'field of expert evidence it is difficult to sever an opinion from the information and process upon which it is based. It would seriously jeopardise the proper testing of such witnesses if privilege were extended to documents' upon which the opinion is based.[24]

Thirdly, although not specifically referred to in the authorities, waiver of privilege in relation to Associated Materials reduces and addresses the risk of adversarial bias in the preparation of expert evidence. 'For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend … to espouse the cause of those instructing them to a greater or lesser extent'.[25] That is a reflection of pervasive 'adversarial bias': ie, a 'bias that stems from the

fact that the expert is giving evidence for one party to the litigation'.[26] The process is insidious and may be conscious or unconscious. Irrespective of the integrity of expert and lawyer, there is an ever present risk that the expert's opinion will be influenced and biased by signals communicated by lawyers. The influence of an expert's opinion 'by undisclosed facts and reasoning processes' may go to the 'weight' of the opinion,[27] and may properly be the subject of testing through cross-examination.[28] These considerations arguably support waiver of privilege in relation to Associated Materials, to facilitate the opposing party testing for adversarial bias (or any other undisclosed matter which might have influenced the opinion).[29] Sunlight is the best disinfectant. It has been recognised that it would 'be both unfair to the applicant, and contrary to the interests of justice, to insulate the [experts] from a full examination of all of the information which they took into account and the various influences to which they were exposed in the preparation of their evidence'.[30] (Waiver in relation to Associated Materials to permit such testing would be directly analogous to another recognised category of implied waiver: when there has been a partial disclosure of a privileged document, there is an implied waiver in relation to the 'whole of the material relevant to the same subject matter',[31] because the 'opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question'.[32]) The added advantage of recognising pervasive waiver of Associated Materials in the context of expert evidence, is that the prospect of waiver will impose a chastening discipline on lawyers in their dealings with experts.

Waiver of privilege in relation to Associated Materials reduces and addresses the risk adversarial bias in the preparation of expert evidence.

Fourthly, 'opinion evidence is a special kind of evidence, and courts have traditionally encouraged experts who are qualified to give such evidence to be objective…an expert's duty to the court is more important than the duty to a client'.[33]

Conversely, there are a number of policy considerations recognised as weighing against waiver in relation to Associated Materials.

Firstly, the waiver of privilege with respect to drafts would inhibit the expert from changing his opinion. 'An expert is surely permitted, indeed to be encouraged, to change his or her mind, if a change of mind is warranted….. [E]xperts should not be inhibited by fear of exposure of a draft from changing their minds when such change is warranted by the material then before the expert'.[34]

Secondly, the risk of waiver in relation to Associated Materials may deter a party from vigorously searching for evidence. 'The efficacy of the adjudicative process depends on the readiness and ability to each party to vigorously search for evidence. A party might be discouraged from making anything but the most cursory enquiries were he to be required to hand over unfavourable evidence to the adversary.'[35]

Thirdly, the spectre of waiver in relation to Associated Materials is likely to compromise the process of the formulation and articulation of expert opinion.[36] In complex matters, the diligent preparation of an expert report may demand the generation of extensive work notes, drafts and correspondence which facilitate the progressive refinement of the opinion. However, if waiver operates widely in relation to Associated Materials, prudent litigation management may dictate that working documents not be generated. Further, a possible corollary of the broad application of waiver to written Associated Materials is that privilege would also be waived in relation to oral communications between the expert and lawyers, which might deter lawyers from conferring with experts and thereby further compromise the process of report and case preparation).

Fourthly, the widespread application of waiver in relation to drafts (and other Associated Materials) would likely generate a miscellany of collateral inquiries in cross-examination, directed to exploring and challenging the reasons for the evolution of the opinions expressed in the final expert report. In some cases that may be a forensically important process. However, in many cases that will be a time-consuming distraction from the essential task of testing expert evidence.[37] This is particularly salient, when regard is had to the essential purpose of expert opinion evidence to 'enable [the judge] to form his own independent judgment by applying the criteria furnished to the facts proved'.[38] The test for admissibility is that the 'expert identify the facts and reasoning process which the expert asserts to be an adequate basis for his or her opinion'.[39] 'The fact that the expert's opinion was at one time - or even still is - reinforced by undisclosed facts and reasoning processes is irrelevant to the admissibility of the opinion'.[40] Furthermore, although the fact that an expert's opinion is or was 'reinforced by undisclosed facts and reasoning processes' may go to the 'weight' of the opinion in some circumstances,[41] the weight of expert opinion will substantially turn on the court's independent evaluation of the asserted justification for the expert opinion, in respect of which the process of the evolution of the opinion is substantially irrelevant.[42] Further, if Associated Materials are taken out of context, there is scope for skilful cross-examination to cause unwarranted damage to the credit of the expert.

Fifthly, the relevance to waiver of the expert's supervening duty to the court should not be exaggerated. 'Assistance to the court must be the witness's dominant purpose in providing an opinion for use in the proceedings. But the purpose of communications between the party's legal representatives and the witness is nonetheless predominantly to assist the party.…..The fact that the witness is constrained to assist the court and to be impartial does not displace that purpose'. The argument that the special role of an expert militates against privilege 'fails to recognise the adversarial nature of the proceedings.…..The witness's evidence must be impartial, but communications with a view to securing and facilitating the provision of such evidence are entered into for the purpose of assisting the party, not for the purpose of assisting the court'.[43]

Sixthly, and 'a rule that privilege is waived if material is submitted to an expert for use in connection with an expert report, would be a very substantial intrusion on legal professional privilege'.[44] 'Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity'.[45]

Privilege & expert reports – a framework of analysis

Any privilege in relation to expert reports and Associated Materials in the context of legal proceedings arises as an application of the 'litigation privilege'.

Any loss of privilege in relation to a final expert report which is served or tendered, will arise (if at all) by operation of 'express waiver'.[46]

Any loss of privilege in relation to Associated Materials will arise (if at all) by operation of 'implied waiver'. As noted above, implied waiver is triggered by some conduct of the privilege holder. If implied waiver is to operate in relation to Associated Material, the 'triggering conduct' will typically be the service (or tender) of the expert report. Any such implied waiver can generally be classified as an example of 'associated material' waiver.[47]

When access is sought to Associated Material, 'there are typically two questions: The first is whether the documents in question are entitled to litigation privilege….and the second is whether that privilege has been waived by service of the report'.[48]

A starting point – ASIC v Southcorp

The most cited case addressing privilege in the context of expert reports is probably *Australian Securities & Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438, in which Lindgren J summarised the relevant principles as follows:[49]

1 Ordinarily the confidential briefing or instructing by a prospective litigant's lawyers of an expert to provide a report of his or her opinion to be used in the anticipated litigation attracts client legal privilege.

2 Copies of documents, whether the originals are privileged or not, where the copies were made for the purpose of forming part of confidential communications between the client's lawyers and the expert witness, ordinarily attract the privilege.

3 Documents generated unilaterally by the expert witness, such as working notes, field notes, and the witness's own drafts of his or her report, do not attract privilege because they are not in the nature of, and would not expose, communications.

4 Ordinarily disclosure of the expert's report for the purpose of reliance on it in the litigation will result in an implied waiver of the privilege in respect of the brief or instructions or documents referred to in (1) and (2) above, at least if the appropriate inference to be drawn is that they were used in a way that could be said to influence the content of the report, because, in these circumstances, it would be unfair for the client to rely on the report without disclosure of the brief, instructions or documents.

5 Similarly, privilege cannot be maintained in respect of documents used by an expert to form an opinion or write a report, regardless of how the expert came by the documents.

The case has been widely approved[50] ('**Southcorp Line of Authority**'). 'The principles stated by Lindgren J provide the context for more recent judgments concerning the Act'.[51] However, the case was decided under the common law, and 'the principles….must be modified in cases governed by the Evidence Act and in the light of the analysis in *Mann v Carnell*'.[52] The required modifications are substantial. I seek to summarise below the prevailing position in relation to the categories of documentation identified in Southcorp.

First Issue: does privilege originally arise (subject to waiver)?

Categories 1-2 of Southcorp. There is no controversy that these categories of documents are prima facie privileged.

Category 3 of Southcorp: 'Documents generated unilaterally'. There are numerous authorities (consistent with Southcorp) which affirm that working documents (including draft reports) generated unilaterally by the expert to assist in the preparation of the expert report are typically not privileged.[53] There are 2 alternative reasons stated for that proposition: they do not have the requisite confidentiality, and they are typically not the subject of communication.[54]

The prevailing view under the common law, is that privilege will apply to documents generated unilaterally by the expert (including drafts), in a range of alternative situations which generate exceptions to the general rule identified in *Southcorp* (subject to the documents having the requisite degree of confidentiality[55]). *Firstly*, even if the document was not communicated, privilege will attach if the document was 'prepared with the dominant purpose of being used as a communication', which would include draft reports prepared for the dominant purpose of being communicated to lawyers for comment.[56] (To ensure privilege attaches to drafts, experts should be instructed to prepare drafts for the dominant purpose of communicating the draft to the lawyers for review and comment). *Secondly*, the better view is that confidential documents are privileged if they are brought into existence to facilitate a subsequent privileged communication,[57] which will extend privilege to working notes prepared for the dominant purpose of preparing draft reports. *Thirdly*, privilege may extend to internal working papers which evidence otherwise privileged communications,[58] which will include marked up comments and edits by lawyers on a draft.[59]

"If you don't believe me, Google it."

Under the Evidence Act, section 119 now provides that the litigation privilege extends to 'the contents of a confidential document (*whether delivered or not*) that was prepared' for 'the dominant purpose of the client being provided with professional legal services etc'. By application of section 119,' if an expert prepares a draft report, or notes for the report, with the dominant purpose of a draft report (whether the precise draft then prepared by the expert or an intended later draft) being furnished for comment or advice by the lawyer, then it is privileged'.[60]

However, by way of significant qualification, White J held in the same case that 'if they were brought into existence for the dominant purpose of the expert forming his or her opinions to be expressed in *the final report*, then it could be arguable that they were not made for the dominant purpose of the plaintiffs being provided with professional legal services relating to the proceedings', and would therefore not be privileged.[61] That qualification is consistent with the prevailing view that finalised affidavits and reports (as opposed to drafts) are not privileged because they were prepared for the dominant purpose of being disseminated to the opposing party and tendered (rather than being submitted to legal advisers for advice), and also lacked the requisite confidentiality.[62] Justice White has observed 'It will be a question of fact, to which the expert may be required to put his or her oath, as to whether any draft reports prepared and kept by him, and working notes prepared by him or his staff, were brought into existence for the dominant purpose….of a draft report being submitted for advice or comment by the plaintiffs' lawyers…. [rather than]….the expert forming his or her opinions to be expressed in the final report',[63] and 'the issue may not be an easy one to determine'.[64](This highlights the strategic significance of initially instructing the expert only to produce draft reports for the purpose of submission to lawyers for review and comment, and on the basis that confidentiality is preserved).

Second Issue: waiver of privilege

Southcorp affirms that 'ordinarily' service of the expert report will result in the implied waiver of the 'brief or instructions' if it can be inferred that they 'influenced the content' of the report (Principle 4); and of any other document 'used by an expert to form an opinion' (Principle 5).

There has subsequently been significant refinement of the trigger for implied waiver, which has significantly limited its scope.

In relation to the operation of implied waiver under the common law and section 122, the leading modern statement of principle by White J in *New Cap Reinsurance Corporation Ltd (in liq) v Renaissance Reinsurance Ltd* [65] is that: 'The question is not merely whether it could be said that the privileged materials were used in such a way that they could be said to influence the content of the report, but whether it could be said that they influenced the content of the report in such a way that the use or service of the report would be inconsistent with maintaining the privilege in those materials'.[66] (The capacity of Associated Materials to 'influence

the content of the report' is thereby recast as necessary, but not sufficient, to trigger waiver). However, consistent with the *Southcorp* Line of Authority, other authorities have formulated the test for waiver in a manner which implies that the capacity to 'influence' the content of the expert report is sufficient of itself to generate the requisite 'inconsistency' and waiver. An example of such a broader formulation is: 'there is a sufficient level of inconsistency with the maintenance of privilege if there has been reliance on the privileged information as a basis or foundation of the opinion, or incorporation of it so as to make it part of the issue'.[67]

In relation to the operation of implied waiver under section 126 of the Evidence Act, the prevailing view is a 'proper understanding' of the primary document under section 126 does not involve 'an appreciation of the manner in which the opinions contained in the document have been formed over time, or the iterations and evolutions through which they have passed. The test is concerned with the comprehensibility of the primary communication or document: if it can be completely or thoroughly understood without more, then access to the related communications or documents is not reasonably necessary'.[68] (Whatever view is taken of the appropriateness of that principle to strike the policy balance encapsulated by waiver under section 126, it should be recognised that it reflects a contestable and restrictive construction of the expression 'proper understanding'. Without semantic injustice, 'proper understanding' could have been more broadly construed to extend to documents which are relevant to assessing the probative strength of the primary document. That broader construction would have caused waiver under section 126 to cut more deeply into Associated Materials).

'The question is not merely whether it could be said that the privileged materials were used in such a way that they could be said to influence the content of the report, but whether it could be said that they influenced the content of the report in such a way that the use or service of the report would be inconsistent with maintaining the privilege in those materials'.

In light of those general principles, I tentatively outline the present operation of waiver in relation to various categories of Associated Materials.

Waiver: draft reports (and confidential communications about them)

If privileged communication concerning draft reports (or the draft reports themselves) only influenced the 'form' of the report, and not 'the substantive opinion', the prevailing view is that there is no inconsistency in serving the reports and retaining privilege, and therefore no waiver in relation to those documents.[69] This reflects the recognition that it 'is proper for the parties' lawyers to influence the content of an expert's report by seeking to have the report produced in a form in which it will be admissible and by providing the expert with assumptions or documents that may well influence the content of the report'.[70]

If privileged communication concerning draft reports (or the draft reports themselves) influenced the actual 'substantive opinion' in the final expert report, some authority supports the operation of waiver when the report is served or tendered.[71] However, a recent statement by *Ball J in Traderight (NSW) Pty Ltd v Bank of Queensland Ltd* [72] affirms that mere influence of the 'substance' of opinion is not of itself sufficient, and that waiver depends upon a further finding either that the stated final opinions of the expert are 'not her own or based on material other than the material disclosed in the report',[73] or that lawyers have failed to discharge their ethical obligations concerning the preparation of expert evidence. In declining to order waiver over drafts and confidential communications with lawyers, Ball J held: 'It is common for a party's legal advisors to communicate with an expert retained by the party for the purpose of giving instructions and commenting on the form of the expert's report. In some cases, those advisors may test tentative conclusions that the expert has reached and in doing so may cause the expert to reconsider his or her opinion'; and there was nothing before the court which indicated that 'legal advisors have failed to discharge' their obligation to 'ensure that any opinion expressed by an expert is an opinion the expert holds for the reasons that the expert gives and that the expert otherwise complies with the Expert Witness Code of Conduct'.[74]

There are other decisions which have simply rejected that service or tender of an expert report necessarily waives privilege in relation to any previous drafts, without reference to the principles to which Ball J refers.[75]

Waiver: letters of instruction (including communication of assumptions)

The prevailing view is that there is no automatic waiver in relation to any letter of instructions when the report is served or tendered.[76] This is for a variety of alternative reasons: (a) there may be no basis to infer that the substance of the expert report has been influenced by the letter of instructions;[77] (b) 'it is proper for the parties lawyers' to influence the content of an expert's report by… providing the expert with assumptions or documents that may well influence the content of the report';[78] (c) the disclosure of the communications which provided assumptions (or instructions generally) is typically not reasonably necessary to comprehend the report, because the expert's report is 'required to state what material and assumptions are relied on';[79] and/or (d) there is typically no risk of unfairness because 'if the assumptions which he has made in his draft report are not established, the views expressed in that report would not be of any significance'.[80]

However, privilege over letters of instruction may be waived if: (a) the expert report 'responds to questions which are not themselves restated'[81] (reflecting the application of the general principle that at waiver of instructions are reasonably necessary for a proper understanding of the report)[82]; or (b) if the expert report purports expressly to summarise the letter of instructions (reflecting the application of a general principle of implied waiver that privilege is waived by the 'laying open of the confidential communication to necessary scrutiny…by expressly or impliedly making an assertion about the contents of the communication'[83]); or (c) possibly if the expert fails to state assumptions, at least in circumstances where the absence of assumptions frustrates a 'true understanding of what is being asserted'[84] in the expert report (such that waiver of letters of instruction are reasonably necessary for a proper understanding of the report).

In the Federal Court the issue of waiver in relation to instructions is immaterial, because the Expert Evidence Practice Note mandates the disclosure of the instructions given to the expert. There is no equivalent provision in the Uniform Civil Procedure Rules, but I suggest that letters of instructions should invariably be prepared with the understanding and intention that they be disclosed.

Waiver: 'Source Materials'.

This section addresses confidential communications between lawyers and experts conveying information or documentation to the expert relating to the subject matter of opinion ('**Source Materials**').

There is no significant doubt that waiver in relation to Source Materials will operate when: (a) the expert report contains 'a summary or excerpt' from the privileged source materials;[85] or (b) the expert expressly refers to or relied on the substance of the privileged material for the purpose of 'bolstering' the expert's opinion.[86]

Consistent with the *Southcorp* line of authority, the better view is that it is also sufficient for waiver to apply to Source Materials (without more), if those materials 'influenced the content' of the expert report, in the sense of the substance of the opinion.[87] (Unlike drafts, and communications about drafts,

there is no countervailing policy consideration that justifies further limiting the scope of waiver in relation to Source Materials which influence the content of an expert report).

Waiver can be avoided, if the expert structures his or her report so that opinions are based on precisely identified assumptions (rather than identified privileged Source Materials),[88] but it will be incumbent on the party to prove those assumptions through admissible evidence.

In the Federal Court, fine distinctions about what Source Materials 'influenced the content' of the expert report are irrelevant, because the Expert Evidence Practice Note mandates that the expert must attach or exhibit 'documents and other materials that the expert been instructed to consider'.

Scope of waiver

If the conditions for waiver are established, the question then arises as to the scope of the implied waiver over Associated Materials. Some authorities support the proposition that the scope of waiver in relation to Associated Materials can be limited to the particular portions of privileged documents that relevantly influenced the final report, if the expert specifies with particularity the discreet portions of the document which relevantly influenced the report (and did not thereby create any inaccurate perception of the privileged material).[89] Other authorities affirm that waiver should extend to the whole of the privileged document which relevantly influenced the final report, or even all other Associated Materials that related to the relevant issue.[90]

A useful 'test applied to determine the scope of any waiver of associated material is whether the material that the party has chosen to release from privilege represents the whole of the material relevant to the same issue or subject matter'.[91] However, the application of that test begs the contestable questions as to the proper characterisation of the 'issue' or 'subject matter', and the degree of relevance required.

Establishing the conditions for waiver.

It may be difficult to establish whether the relevant 'inconsistency' has been established.[92] The conditions for waiver are 'questions of fact' to be resolved by reference to the 'testimony of [the deponent] and the inferences properly to be drawn from the documents in dispute themselves'.[93] The question of whether there has been a waiver can be re-assessed in light of the conduct of a trial, and the cross-examination of the expert.[94] The courts have shown a willingness to inspect the documents, to assess whether the requisite influence is established.[95] 'There are limits to whether this is a useful exercise. It would be impossible, as a matter of practice, and inappropriate, as a matter of principle, for a judge to approach that question in the same way as a party might wish to do so if preparing a cross-examination of the expert'.[96] Sometimes the Court rejects an application for waiver in the absence of inspection, on the grounds that there is 'nothing to point to' the requisite influence, reflecting that there may need to be demonstrated a threshold possibility of the requisite influence, before the Court is prepared to inspect.[97]

When is waiver triggered?

Southcorp provides that it is the service of the expert report (as distinct from its tender) which triggers the operation of waiver (if the grounds for waiver otherwise exist). Other authorities (consistent with *Southcorp*) assert that position without explanation.[98]

However, this is a matter of significant controversy. Some authorities affirm that that privilege is not lost until the report is tendered,[99] relying on 2 alternative principles in support of that position. *Firstly*, under an earlier enactment of the Evidence Act, section 122(2) provided that there was waiver if a party 'knowingly and voluntarily disclosed to another person the substance of the evidence', unless the disclosure was made 'under compulsion of law'; and the prevailing view has been that service of expert reports pursuant to court directions was 'under compulsion of law', by reason of which service did not give rise to waiver.[100] *Secondly*, other authorities held there can be 'no unfairness' in maintaining privilege, unless and until the expert report is tendered and the expert called.[101]

Should there otherwise be grounds for the operation of waiver, the deferral of its operation until tender of the expert reports means that potentially relevant documents over which waiver might operate will not be available for pre-trial preparation. This gives rise to obvious risks of trial disruption when the expert is finally called and waiver operates. These consequences are 'most impractical from the perspective of the efficient running of the litigation, including the proper and efficient preparation for trial and the taking of evidence at the trial. Those consequences do not fit comfortably with modern case-management practices, and in particular the 'just, quick and cheap' principle to which litigation is subject in this court'.[102]

For the following reasons, there is strong basis for distinguishing earlier authority and finding that service of expert reports is sufficient to trigger waiver (if the grounds for waiver otherwise exist). *Firstly*, as a matter of general principle, the possibility of waiver arises when privileged material is deployed for a forensic purpose through which the party derives a forensic advantage.[103] It is now recognized that the forensic purpose of expert reports is not confined to the tender of the reports as formal evidence, but extends to reliance for forensic advantage in the course of settlement discussions, mediation and the expert conclave.[104] Such advantage can arise on service (and prior to tender). *Secondly*, there have been significant legislative changes, which calls into question the line of authority which holds service is insufficient to trigger waiver. The first is that section 122 has been amended, and now provides that there is no 'inconsistency' giving rise to waiver 'merely' because 'the substance of the evidence has been disclosed…under compulsion of law'. It is arguable that the requisite 'inconsistency' arises not 'merely' from compulsory service of expert reports, but by reason also of the pre-trial forensic advantage thereby derived.[105] The second is that Section 131A (which came into force on 1 January 2009 in NSW, but not federally) 'effectively requires the court to determine a pre-trial claim for privilege as though the claim was made in the course of adducing evidence at trial'.[106] *Thirdly*, there is some contest as to whether the service of expert reports should be characterised as 'under compulsion'.[107]

A tentative proposal

Consistent with what I described above as the prevailing view, I tentatively suggest that the following principles regulate when service of an expert report would be 'inconsistent with' the maintenance of privilege over Associated Materials (under section 122(2) of the Act and the general law), so as to give rise to a waiver of privilege in relation to those materials:

- With respect to all Associated Materials, the expert has 'laid open' communications in the Associated Materials 'to necessary scrutiny… by expressly or impliedly making an assertion about the contents of the communication' in the expert report;[108]

- With respect to all Associated Materials, the

substance of stated opinion in the expert report (as distinct from the evolution of the opinion, the reasons for the opinion, or the weight of the opinion) is not reasonably comprehensible without reference to the Associated Materials;[109]

- With respect to Source Materials, if those materials 'influenced the content' of the expert report, in the sense of the substance of the opinion;[110]

- With respect to draft reports (and communications between experts and lawyers concerning preparation of drafts), there is demonstrated to be an undue risk of adversarial bias, subject to the proviso that the mere fact of ethical dealings between expert and lawyers is insufficient of itself to establish the requisite risk. (This principle is elaborated below).

In view of the relatively narrow manner in which the scope of section 126 has been construed,[111] section 126 is unlikely to further extend the scope of waiver.

'Undue risk of adversarial bias, subject to the proviso….'

Justification for the principle

To reiterate, 'adversarial bias' is a conscious or unconscious bias 'that stems from the fact that the expert is giving evidence for one party to the litigation'.[112] The recognition of the principle that waiver will operate when there is demonstrated an undue risk of adversarial bias (subject to the proviso that the mere fact of ethical dealings between expert and lawyers is insufficient of itself to establish the requisite risk) is supported by the following considerations.

First, it is generally consistent with the recent line of authorities based on *Newcap* and *Traderight*. These cases affirm that the mere fact that privileged communications actually influence the form and even the substance of expert opinion is not sufficient to trigger waiver. Something further is required, being grounds to infer either that the expressed opinions of experts 'are not their own', or that the lawyers have failed to discharge their obligations in relation to the preparation of the expert evidence. However, these cases also recognise 'safe harbours', in the sense of ethically endorsed methods of expert witness preparation which are recognized as insufficient in themselves to trigger waiver: eg 'legal advisors may suggest wording to be included in the report which expresses in admissible form an opinion stated by the expert in an inadmissible form', and 'advisors may test tentative conclusions that the expert has reached and in doing so may cause the expert to reconsider his or her opinion'.[113] Those principles can arguably be collectively encapsulated in the overarching principle which I suggest.

Secondly, the recognition of undue risk of adversarial bias as a trigger is consistent with the recognition in the context of implied waiver that "fairness' has not been treated as requiring that the other party should have all the information available to the party claiming privilege, but as requiring that that party *should not abuse privilege* so as to disadvantage the other party forensically'.[114] The requirement of a demonstrated risk of adversarial bias is consistent with the requirement that there is a demonstrated risk that the privileged relationship between expert and lawyer has been compromised (by reason of which the entitlement to the privilege should be qualified to allow testing for the presence and effect of that adversarial bias on the evolution of the opinion).

Thirdly, although *Traderight* implies that a trigger for waiver is the indication that the expert's views 'are not her own',[115] I propose that the trigger be defined more broadly by reference to the indication of 'adversarial bias'. This is because adversarial bias might cause not merely the dishonest expression of partisan opinion, but also the unconscious moulding of honest opinion to the partisan cause. The opinion may be the expert's 'own', but still the product of unconscious adversarial bias. Undue risk of both conscious and unconscious adversarial bias should trigger waiver to facilitate testing as to the presence and effect of such bias.

Fourthly, it is important that the principle be qualified by the requirement that the risk of adversarial bias be an 'undue' risk. That is because the risk of adversarial bias is unavoidable and pervasive. The requirement that the risk be 'undue' reflects the need to identify something in the factual mix which materially and unacceptably exacerbates the inherent universal risk of adversarial bias. In the absence of the qualification that the risk of adversarial bias be 'undue', waiver would be universal and the protection of privilege would be illusory. This is addressed further below.

Fifthly, I respectfully suggest that the principle reflects an appropriate balance of the competing policy objectives in relation to waiver of privilege in connection with the expert reports:

- the default position that privilege over drafts and privileged communications between experts and lawyers should be preserved, reflects a presumptive respect for the maintenance of privilege; the typically limited relevance of the manner in which an expert report evolved to the admissibility and probative value of the report;[116] the desirability of not compromising the process of the evolution of expert opinion and the preparation of expert reports by a pervasive threat of waiver;[117] and avoiding distracting and irrelevant collateral inquiries involved in the cross-examination as to the evolution of expert opinion (when that is not material to the probative value of the opinion);

- on the other hand, the recognition that waiver will nevertheless be triggered when there is a demonstrated undue risk of adversarial bias, reflects the insidious prevalence of adversarial bias; the capacity of adversarial bias to compromise the fact-finding process; the capacity of waiver to facilitate the testing of the presence and effect of adversarial bias; and the fact that the privilege should reasonably be forfeited when there is a demonstrated undue risk that the relationship of privilege has compromised the preparation of expert evidence;

- the further recognition that there should be a 'safe harbor' for witness preparation, by operation of which 'ethical dealings' between expert and lawyers should not of itself trigger waiver, is supported by two considerations. *Firstly*, the establishment of a safe harbor is desirable to create a degree of certainty in relation to the application of waiver to expert reports, both to generate confidence during the evidence preparation phase, and to avoid encouraging speculative applications for waiver. *Secondly*, defining the scope of the safe harbor by reference to 'ethical dealings' is desirable, because the judicial refinement of 'ethical dealings' will permit an explicit recognition and resolution of the policy tension between permitting the advancement of partisan client interests within an adversarial system, and ensuring that truth-seeking is not unduly frustrated by particular methods of such advancement. This tension (and proposals for its resolution) are addressed in another article in this edition of *Bar News*.[118]

Sixthly, although there may appear to be uncertainty in the application of an ostensibly broad and vague standard, it would in fact provide a relatively certain 'safe harbor' for the preservation of the privilege. On the criteria set out below, if the dealings between expert and lawyers are ethically appropriate, and the expert comprehensively sets out the assumptions and reasoning upon which the expert's opinion is based, it is difficult to conceive how a waiver on the grounds of 'undue risk of adversarial bias' could arise. Although the concept of 'ethically appropriate' dealings with experts is presently uncertain, it would inevitably be refined and clarified by the judicial application of this proposed standard.

Criteria for assessing 'undue risk' of adversarial bias

I respectfully suggest that there are 4 general categories of factual circumstances which might be relevant to demonstrating an 'undue risk of adversarial bias'.

Firstly, circumstances supporting a positive inference of the possible operation of conscious or unconscious adversarial bias, which might include the following:

- deficiencies in the comprehensive and coherent statement of the assumptions and reasoning which justify the opinion. This is consistent with the possible operation of adversarial bias, because the need to coherently justify an opinion (with assumptions and reasoning) places practical limits on the extent to which opinion can be swayed (consciously or unconsciously) by adversarial bias. Although by no means conclusive of adversarial bias tainting opinion, the untethering of opinion from assumptions and reasoning circumvents those practical limits, and renders the formulation and articulation of opinion more vulnerable to the operation of conscious and unconscious adversarial bias. Further, in view of the expert's duty under the expert codes and the general law[119] to set out an adequate statement of assumptions and reasons, and the fact that lawyers are relied on by the courts to ensure experts' fulful that duty,[120] the expert's failure adequately to set out reasons and assumptions reflects that the relationship of privilege has been compromised, and reasonably weakens the entitlement to maintain privilege. Corroborating the relevance of this consideration, it has been recognized that 'uncertainty or ambiguity or confusion in the body of the report' might weigh in favour of waiver;[121] and that it is 'unlikely' that waiver would operate in relation Associated Materials if an expert complies with the expert's duty to set out assumptions and reasoning.[122] Decisions discounting the relevance of coherent reasoning to waiver can be distinguished on the grounds that they did not apply the principles under section 122(2).[123] This consideration of the adequacy of reasoning and assumptions obviously overlaps with tests for admissibility under section 79 of the Evidence Act. However, it is open to the Court to make findings of deficiencies in the statement of reasoning and assumptions, without addressing or determining whether the deficiencies are sufficient to render the opinion strictly inadmissible. In any event, a party might make the strategic decision not to challenge admissibility on grounds of inadequacy of reasoning, but still rely on deficiencies in reasoning to support waiver.

- concessions by the expert in cross-examination which are consistent with the possible operation of adversarial bias. Such concessions might include: that the report does not reflect the expert's actual opinion in some material respect; that the report fails to include a material qualification to the stated opinion; that the report does not include reference to all material assumptions and reasoning; that the expert's opinion has changed during the course of preparing the report (and the change is not reasonably explicable in a manner which reasonably excludes the operation of conscious or unconscious adversarial bias);[124] that lawyers have engaged in unethical witness preparation practices (which is addressed below).

Secondly, I suggest it is material to take account of the vulnerability of particular categories of expert opinion to adversarial bias. In particular, the risk of adversarial bias (and the risk it will compromise fact finding) is accentuated when the subject matter of the opinion substantially precludes the court from independently evaluating the stated justification for the opinion. As to this:

- Although the objective of expert evidence is to 'furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions', an expert 'frequently draws on an entire body of experience which is not articulated and, is indeed so fundamental to his or her professionalism, *that it is not able to be articulated*':[125] eg, in a medical negligence case, addressing the point at which a reasonable medical practitioner would have medically intervened in a complex and unusual case. Further, there will be cases where the subject matter for expert opinion relates to an very open-textured standard, in respect of which there is inherently a broad spectrum of ostensibly reasonable expert judgment: eg, in patent law, whether there is demonstrated an 'inventive step'; and the 'discount rate' by which projected cashflows are discounted when quantifying damages for a lost business opportunity;

- In such cases, the report will likely be incapable of providing an entirely self-sufficient justification for the opinion, which can readily be independently evaluated by the court. There will remain an irreducible 'judgment call' by the expert;

- To the extent that critical aspects of the expert's reasoning process cannot be fully articulated and exposed, the court is effectively being invited to accept the opinion on the basis that it is proffered by the expert (rather than because of the court's independent evaluation of the cogency of the stated justification for the opinion). In such cases, investigations of the factors which might have influenced the formulation of the stated opinion are arguably more relevant to an assessment of the weight of that opinion (than would be the case if the stated justification could be independently assessed). Associated Materials may be relevant to such investigations. This conclusion is reinforced by the fact that open-textured expert opinion is inherently more vulnerable to adversarial bias: to the extent that the subject matter of the opinion necessitates irreducible 'judgment calls', it logically follows that there is scope for experts plausibly to justify a range of different opinions on given assumptions. This creates greater scope for an expert's opinion to sway in a partisan way. However, although this factor could reasonably provide some support a finding of waiver by reason of 'undue risk of adversarial bias', I suggest that this factor alone should not be sufficient to justify waiver.

Thirdly, evidence of unethical dealings between the expert and lawyers, which increase the risk of adversarial bias (by directly or indirectly suggesting to the expert what evidence the expert should give). Evidence of such dealings is likely only to emerge from the Court's inspection of privileged communications, or perhaps also from the cross-examination of the expert. This obviously begs the question of the ethical limits of expert witness preparation. This is not a matter which has been considered comprehensively by the courts, but is addressed in another article in this edition of *Bar News*.[126] One of the collateral benefits of this overarching principle, is that it would inevitably lead to the judicial clarification of the ethical scope of expert preparation.

Fourthly, it would be appropriate to have regard to the materiality of testing the expert on the evolution of the expert's opinion, to the resolution of the issues in dispute.

It is critical to note that (under my proposal) a finding of undue risk of adversarial bias does not depend upon a finding of bad faith on the part of either the expert or lawyer, because adversarial bias may arise without intent or awareness. It also does not depend upon a finding on the balance of probabilities that adversarial bias has in fact operated, let alone operated to corrupt the integrity and probative value of the opinion. It is sufficient merely that circumstances support an 'undue risk' of the operation of adversarial bias on the facts, which warrant further investigation and testing through waiver. Indeed, it would be very important that judges do not make any preliminary finding in an application for waiver, which risk causing an apprehension of prejudgment or bias against an expert. No such finding is necessary in the application of this proposed test.

Process of applying for waiver

As noted earlier, the courts have been prepared to inspect the Associated Materials in assessing whether privilege has been waived.[127]

I suggest that the appropriate process for claiming waiver on the ground of undue risk of adversarial bias might involve 2 steps. *Firstly*, the applicant for waiver adducing evidence and making submissions in support of the demonstrated risk of adversarial bias in the circumstances. *Secondly*, the Court inspecting the Associated Materials to determine whether they disclose dealings which (together with all other circumstances) support a finding that there is sufficient risk of adversarial bias to warrant waiver for the purpose of allowing the applicant for waiver to test for the presence and effect of adversarial bias.

Any application for waiver would obviously be potentially assisted by the Court trawling through the Associated Materials, for signs of inappropriate dealings with lawyers. However, I respectfully suggest that the Court should only do so, if the applicant for waiver has satisfied the Court that there are otherwise sufficient circumstances to support the positive inference that the report is possibly tainted by adversarial bias. This is consistent with the court's recognition that a party has no right to require the Court to inspect documents to support a privilege claim, in circumstances where the party has not itself adduced appropriate evidence to support that claim.[128]

Strategies

Experts should be engaged on the assumption that privilege may be waived in relation to all Associated Materials. The following strategies maximise the scope of privilege, and may minimise the prospect (and prejudicial impact) of waiver.

1 Ensure the witness complied fully with the Expert Code, including in relation to statement of assumptions and material facts on which opinion is based, the comprehensive and coherent statement of reasons for the expert's opinion.

2 Ensure that instructions (in the sense of directions as to the required scope and substance of the report and assumptions) are not recorded in the same document which also records other forms of prima facie privileged communications to the expert, over which the lawyer wants to retain privilege.

3 Where reasonably possible, avoid briefing an expert with privileged source materials (such as draft statements). In the alternative, brief the expert with explicit assumptions upon which the report is to be based, and instruct the expert to base his opinion on those assumptions.

4 If privileged source materials have nevertheless been provided to the expert, instruct the expert to identify with precision in the expert's report the aspects of the materials on which the expert did (and did not) rely in the formation of the expert's opinion.

5 Until the drafting process is complete, limit instructions to the expert to the preparation of draft reports only, and instruct the expert to prepare the draft reports for the exclusive purpose of provision to the lawyers for review. Instruct the expert to prepare working notes for the exclusive purpose of facilitating the preparation of such drafts.

6 Instruct the expert on the basis that all communications with the lawyers, working notes and draft reports, are to be kept confidential.

7 Advise the expert that all internal working documents may be exposed to waiver, and that the expert should therefore confine the generation of such documents to those which are reasonably necessary for the preparation of the draft reports.

8 Do not advise the expert to destroy internal working documents (or acquiesce in such conduct). Destruction might be contempt of a discovery obligations, and any involvement by lawyers in that process might constitute professional misconduct. At the very least, destruction may give rise to an adverse inference.[129]

I am interested in exploring this topic further, and welcome comments.[130]

END NOTES

1 Hugh Stowe, "Preparing expert witnesses – a search for ethical boundaries", *Bar News*, Summer 2006/7, page 44
2 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; *Commissioner of Taxation v Rio Tinto Ltd* [2006] FCAFC 86 ('*Rio Tinto*'), per the Court at 43.
3 *Tavcol Pty Ltd v Valbeet Pty Ltd* [2016] NSWSC 1002
4 ibid
5 eg, *Morony v Reschke* [2014] NSWSC 359, per Black J at [45]
6 Esso, supra fn 1, at [35].
7 *Grant v Downs* (1976) 135 CLR 674, at 682.
8 See discussion in *Desiatnik*, 'Legal Professional Privilege in Australia' (2005), at 24
9 See text at fn 3.
10 *Waterford v Commonwealth* (1987) 163 CLR 54, at 65.
11 *A-G for the Northern Territory v Maurice* (1986) 161 CLR 475 ('**Maurice**'), at 488, 490.
12 *Desiatnik*, supra fn 6, at 131.
13 *Goldberg v Ng* (1994) 33 NSWLR 639, per Clarke JA at 670.
14 *Mann v Carnell* (1999) 201 CLR 1, per Gleeson CJ, Gaudron, Gummow and CallinanJJ at [29].
15 *AWB v Cole* [2006] FCA 1234 ('*AWB*'), per Young J, at [132].
16 *Goldberg v Ng* (1995) 185 CLR 83 ('*Goldberg*'), at 120-121.
17 *Osland v Secretary, Department of Justice* (2008) 234 CLR 2 ('**Osland**'), at [45]; *Goldberg*, ibid, at 96.
18 *Maurice*, supra fn 11, per Gibbs CJ at 481
19 *Rio Tinto*, supra fn 2, at [52]
20 *British American Tobaco Australia Services Ltd v Cowell* (2002) 7 VR 524, per Phillips, Bat and Buchanan JJA at 664.
21 *Towney v Minister for Land & Water Conservation for the State of New South Wales* (1997) 147 ALR 402 ('**Towney**'), per Sackville J at 414; quoted with approval *Sugden v Sugden* (2007) 70 NSWLR 301, at [54].
22 *Hastie Group Ltd (in liq) v Moore* [2016] NSWCA 305 ('**Hastie**'), per Beazley & McFarlan JJA, at [42]
23 *Interchase Corporation Ltd (in liq) v Grosvenot Hill (Queensland) Pty Ltd (No1)* [1999] 1 Qd R 141 ('**Interchase**'), per Thomas J at 160; but compare Re Forsyth; *Re Cordova v Philips Roxane Laboratories Inc* [1984] 2 NSWLR 327, at 334-7 .
24 *Interchase*, ibid, per Thomas J at 161-2.
25 *Abbey National Mortgages Plc v Key Surveyors Nationwide Limited and Others* [1996] 3 All ER 184; see also *Fox v Percy* (2003) 214 CLR 118, per Callinan J at [151]
26 NSW Law Reform Commission, Report 109, 'Expert Witnesses', page 70
27 *ASIC v Rich* [2005] NSWCA 152, at [136]; see also at [167]
28 *ASIC v Rich*, supra fn 27, at [167], [170]
29 That principle has been applied to justify waiver of all associated materials relating to an expert report: *Rhiannon Rigby v Shellharbour City Council & Anor* [2003] NSWSC 906, at [11]-[12]; *Westgem Investments Pty Ltd v CBA* [No 2] [2018] WASC 71. at [25]; *Roads Corporation v Love* [2010] VSC 253 Vickery J ('**Love**'), at [26]; see also *Clough v Tameside and Glossop Health Authority* [1998] 2 All ER 971 ('**Clough**')
30 *Roads Corporation v Love*, supra fn 29, [26]; see also *Clough*
31 *AWB*, supra fn 15, at [164]
32 ibid
33 *Interchase*, supra, fn 23, per Thomas J at 161-2.
34 *Linter Group Ltd v Price Waterhouse (a firm)* [1999] VSC 245 ('**Linter**'), [16]; *New Cap Reinsurance Corporation Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258 ('**Newcap**'), [52].
35 *NJ Williams*, (1980) 58 Canadian Bar Review 1; quoted with approval in *Southern Equities Corporation v West Australian Government Holdings Ltd* (1993) 10 WAR 1, per the Full Court at 21; see also *Mendelow*, 'Expert Evidence: Legal Professional Privilege and Experts' Reports' (2001) 75 ALJR 258, at 271.
36 *Cole v Dyer and the Nominal Defendant* [1999] SASC 272 ('**Cole**'), at [56].
37 See Woolf, 'Access to Justice – Final Report' (1996), [31], where the Lord Chancellor cited this matter as weighing against the waiver of privilege in drafts.
38 *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, at [79]; quoted with approval in *ASIC v Rich*, supra fn 27, at [106]
39 *ASIC v Rich*, supra fn 27, at [92], [134]-[136]
40 *ASIC v Rich*, supra fn 27, at [136]
41 *ASIC v Rich*, supra fn 27 at [136]; see also at [167]
42 see *ASIC v Rich*, supra fn 27, at [170]
43 *Roach & Ors v Page & Ors (No 17)* [2003] NSWSC 973, at [7]-[11].
44 *Cole*, supra fn 36
45 *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543, at [11]
46 This question is not examined in this article.
47 See text at footnote 18.
48 *ML Ubase Holdings Co Ltd v Trigem Computer Inc* (2007) 69 NSWLR 577 ('**ML Ubase**'), per Brereton J at [25]
49 at [21].
50 *Federal Court*: eg, *TJ (on behalf of Yindjibarndi People) v State of Western Australia (No 4)* [2016] FCA 231, at [18]; *Clifford v Vegas Enterprises Pty Ltd (No 3)* [2010] FCA 287 at [8]; *IO Group Inc v Prestige Club Australasia Pty Ltd (No 2)* [2008] FCA 1237 ('**IO Group**'), at [8]; *Temwell Pty ltd v DKGR Holdings Pty Ltd* (in liq) (No 7) [2003] FCA 985, at [3]; *AWB*, supra fn 15 [168]; *New South Wales: Baron v Gilmore* [2018] NSWSC 439, at [7]; *Shoal Bay Developments Pty Ltd v Port Stephens Council* [2018] NSWSC 286, per Parker J at [13]; *Traderight (NSW) Pty Ltd v Bank of Queensland Ltd (No 14)* [2013] NSWSC 211 ('**Traderight**'), per Ball J at [15]; *Gate Gourmet Australia Pty Ltd (in liq) v Gate Gourmet Holding AG* [2004] NSWSC 768, [28]; *R v Ronen & Ors* [2004] NSWSC 1305, at [18]; *Thomas v State of New South Wales* [2006] NSWSC 380, [16] ('**Thomas**')
51 *Traderight*, supra, fn 50, [15]
52 *Shea v TruEnergy Services Pty Ltd (No 5)* [2013] FCA 937 ('**Shea**'); *Traderight*, supra fn 50, at [15]
53 *Interchase*, supra fn 22, at 162, 156; *Temwell*, supra fn 43, at [10]; *Rhiannon*, supra fn 29, [11]; *Ryder v Frohlich* [2005] NSWSC 1342, [12]; *IO Group*, supra fn 50, at [12] (drafts).

54 *Interchase*, supra fn 23, at 152; Tavcol, supra fn 3, [17]; *Optiver Australia Pty Ltd v Tibra Trading Pty Ltd (No 5)* [2012] FCA 1226 ('**Optiver No 5**'), per Rares J; *IO Group*, supra fn 50, at [12].

55 *New Cap*, supra fn 34, at [22]

56 *New Cap*, supra fn 34, at [22]; *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122 ('**Pratt**'), at [19]; *Optiver No 5*, supra fn 54, [13]; *Shea*, supra fn 52, at [31]

57 *Pratt*, supra fn 56, [19] (in an analogous but slightly different context); *Optiver No 5*, supra fn 54, [10-[11]; *Optiver Australia Pty Ltd v Tibra Trading Pty Ltd (No 6)* [2012] FCA 1503 ('**Optiver No 6**'), at [8]-[10]; *Bristol-Myers Squibb Co v Apotex Pty Ltd (No 3)* [2012] FCA 1310 ('**Bristol- Myers Squibb**'), per Yates J at [25]

58 *Propend*, supra fn 35, 569; *Pratt*, supra fn 56, [20], [88]-[89]; *AWB*, supra fn 15, [46]; *R v P* (2001) 53 NSWLR 664, [49].

59 *Australian Securities & Investments Commission v Southcorp Ltd* [2003] FCA 804 ('**Southcorp**'), per Lindgren J at [31]

60 *New Cap*, supra fn 34, [20]

61 *New Cap*, supra fn 34, [20], [30,[34]; *Shea*, supra fn 52, [46]

62 *Anthony John Michael Perish v R* [2015] NSWCCA 98, at [40]-[52]; *Morony*, supra fn 5, at [36]-[55]; *Maurice*, supre fn 11, at 480

63 *New Cap*, supra fn 34, at [30]

64 *New Cap*, supra fn 34, at [35]

65 [2007] NSWSC 258, at [53]

66 *New Cap*, supra fn 34, at [53]. This decision has been widely approved: eg, *R v Ian Robert Turnbull (No 3)* [2016] NSWSC 686, per Johnson J at [41]; *Traderight*, supra fn 50; *Gillies v Downer EDI Ltd* [2010] NSWSC 1323 ('*Gillies*'), at [49]; *Shea*, supra fn 52, [60]

67 *Kentish Council v Bellenjuc Pty Ltd* [2011] TASSC 58 ('**Kentish Council**'), at [36]

68 *ML Ubase*, supra fn 48, at [45]

69 *New Cap*, supra fn 34, [53]

70 *D'Apice v Gutkovich — Estate of Abraham (No 1)* [2010] NSWSC 1336 ('**D'Apice**'), per White J, at [24

71 By implication, *New Cap*, supra fn 34, at [53]; *Sprayworx Pty Ltd v Homag Pty Ltd* [2014] NSWSC 833 ('**Sprayworx**'), [43]-[51]

72 *Traderight*, supra fn 50, [23]

73 *Traderight*, supra fn 50, [23]; *Shea*, supra fn 52, [52]

74 *Traderight*, supra fn 50, [23]

75 *Linter Group*, supra fn 34, [16]; *Filipowski v Island Maritime Ltd & Anor* [2002] NSWLEC 177, [23]; *ASIC v Vines* [2003] NSWSC 1005, [15]; *Ray Fitzpatrick Pty Ltd (In Members Voluntary Liquidation) v Minister for Planning* [2007] NSWLEC 833, at [11];.

76 *D'Apice*, supra fn 70, [24]; Limit (No 3) Ltd v Ace Insurance Ltd (No 3) [2009] NSWSC 1061, per Rein J at ; New Cap, at [53]

77 In *Collins Debden Pty Ltd v Cumberland Stationery Co Pty Ltd* [2005] FCA 1194, [9]

78 *D'Apice*, supra fn 70, [24]

79 *New Cap*, [53]

80 *Limit (No 3) Ltd v Ace Insurance Ltd (No 3)* [2009] NSWSC 1061, per Rein J; see also *New Cap*, supra fn 34, [53]

81 *ML Ubase*, supra fn 48, [45]

82 Evidence Act, section 126; *British American Tobacco*, supra fn 20, [121],

83 *DSE (Holdings) Pty Ltd v Intertan Inc* [2003] FCA 384 ('**DSE**'), at [61]; quoted with approval in Hastie, supra fn 22,at [49]

84 *Kentish Council*, supra fn 67,[55]-57]

85 *ML Ubase*, supra fn 48, [47]

86 *Gillies*, supra fn 66, [61]

87 *Thomas*, supra fn 50, [17]; quoted with approval in *New Cap*, at [49]. However, there is some tension with Newcap, at [53]

88 *Cole*, supra fn 36, [57]; *Lampson & 2 Ors v McKendry & Anor* [2001] NSWSC 373, [35]; *Mackinnon v BHP Steel (Ais) P/L and Anor* [2004] NSWSC 459, [24]; *Mackinnon v BHP Steel (Ais) Pty Ltd and Anor* [2004] NSWSC 1027, [20].

89 *Towney*, supra fn 21, 414; quoted with approval in *Director-General, Department of Community Services v D* [2006] NSWSC 827, [34]; see also *Karen Ann Baulch v Lyndoch Warrnambool* [2008] VSC 421, at [11].

90 *Henderson v Low* [2000] QSC 417, [16], *Bryce v Anderson and Anor* [2005] QSC 216, [8]-[13]; *Minister for Finance v C & I Rogers Pty Ltd* [2004] VSC 370, [9]

91 *AWB*, supra fn 15, [164]

92 *Shoal Bay Developments Pty Ltd v Port Stephens Council* [2018] NSWSC 286, per Parker J at [36]; *Southcorp* at [21]

93 *Southcorp*, supra fn 59 [17].

94 *Spassked Pty Ltd v Commissioner of Taxation (No 4)* [2002] FCA 491, at [21]

95 *Sprayworx*, supra fn 71 [49]; *D'Apice*, supra fn 70, [25]; *Ingot Capital v Macquarie Equity* [2008] NSWSC 25, per Campbell J at [34]; *New Cap*, supra fn 34 at [51]; *R v Ronen & Ors* [2004] NSWSC 1305, per Whealy J at [63]

96 *New Cap*, supra fn 34, [51]

97 *Traderight*, supra fn 50, at [23]

98 *Director-General, Department of Community Services v D*, supra fn 89 at [32]

99 *Cole*, supra fn 36, [56]; *Mackinnon*, supra fn 37, [18]; *Sevic v Roarty*, supra fn 50, 308; *New Cap Reinsurance Corp Ltd (In Liq) v G S Christensen and Ors* [2008] NSWSC 93, per Hamilton J at [15] (no waiver before tender, not addressing whether waiver after tender); *Protec Pacific Pty Ltd v Brian Cherry* [2008] VSC 76, at [56] (no waiver before tender, but leaving open the question of waiver after tender).

100 *Buzzle Operations v Apple Computer Australia* (2009) 74 NSWLR 469 per White J at [30] (and the cases there referred to); but compare *Liberty Funding Pty Ltd v Phoenix Capital Ltd* [2005] FCAFC 3

101 *Mackinnon v BHP Steel (Ais) Pty Ltd and Anor* [2004] NSWSC 1027, [18]; *Sevic v Roarty* (1998) 44 NSWLR 287, per Powell JA at 308

102 *Gillies*, supra fn 66

103 *Goldberg v Ng* & Ors (1995) 185 CLR 83, per Toohey J at 109-110.

104 *Prince Removal & Storage Pty Ltd v Roads Corporation* [2012] VSC 245, per Emerton J

105 *Gillies*, supra fn 66, [46]

106 *Gillies* supra fn 66, [46

107 *Gillies*, supra fn 66, [44]-[47]; *Kentish Council*, supra fn 67, [51]

108 *DSE*, supra fn 83, [61]; quoted with approval in Hastie, supra fn 22, [49].

109 This is consistent with the prevailing view of the scope of section 126, see fn 68. It is also consistent with implied waiver under the general law and section 122(2): eg, *British American Tobaco*, supra fn 20, 664

110 see text at fn 67 above.

111 see text at fn 68 above.

112 NSW Law Reform Commission, Report 109, 'Expert Witnesses', page 70

113 *Traderight*, supra fn 50, at [23]

114 *Watkins v State of Queensland* [2007] QCA 430, per Keane JA at [57], and [55]; see also *Kentish Council v Bellenjuc Pty Ltd* [2011] TASSC 58. at [25], [55]; see also *Maurice*, supra fn 11, at 488; *Interchase*, supra fn 50, 160; *D'Apice*, supra fn 70, [25]

115 *Traderight*, supra fn 50, [23]

116 see text at fn 42

117 see text at fn 36

118 Stowe, 'Preparing expert witnesses – a (continuing) search for ethical boundaries'

119 *In the Matter of Idylic Solutions Pty Ltd and Ors — Australian Securities and Investments Commission v Hobbs* [2012] NSWSC 73, at [37]-[38]

120 *Traderight*, supra fn 50, [23]

121 *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 7)* [2008] FCA 323, per Heerey J, at [7]

122 *Kentish Council*, supra fn 67, at [39]

123 *ML Ubase*, supra fn 48, at [47]

124 eg, *Cobram Laundry Services Pty Ltd v Murray Goulburn Cooperative Co Ltd* [2000] VSC 353, [58]. However, the mere fact of change of opinion does not support a waiver: *Melrose Cranes and Rigging Pty Ltd v Manitowoc Crane Group Australia Pty Ltd* [2012] NSWSC 904, per Campbell J at [50

125 *ASIC v Rich*, supra fn 27, at [170]

126 Stowe, supra, fn 118

127 see text at fn 95.

128 *Hancock v Rinehart (Privilege)* [2016] NSWSC 12, per Brereton J at [6]

129 Eg, *British American Tobacco*, supra fn 20, [173]-[175]

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'Preparing expert witnesses – a (continuing) search for ethical boundaries'

By Hugh Stowe, 5 Wentworth

'Even though witness preparation occurs in practically every lawsuit, it is almost never taught in law school, not directly regulated, seldom discussed in scholarly literature, and rarely litigated. Witness preparation is treated as one of the dark secrets of the legal profession. The resulting lack of rules, guidelines, and scholarship has created significant uncertainty about the permissible types and methods of witness preparation.[1]'

That was the opening paragraph of my article published in Bar News 10 years ago.[2] This present article reviews the developments since then, with respect to case-law, professional rules, academic writing, and practice.[3] Not much has changed.

Expert witness preparation remains a source of ethical angst for many lawyers. The exhortation to act ethically with respect to witness preparation merely begs the question as to the nature of the ethical duty. This article does not purport to provide an authoritative statement of the ethical boundaries of expert witness preparation. Like its predecessor, the ambitions of this article are limited to highlighting issues, and raising tentative suggestions, most of which remain the same 10 years later. Those suggestions are offered with an acknowledgment that they are unquestionably contestable, and with a (continuing) hope of triggering further debate. That debate is (still) needed. As noted in the original article, there is a stunning divergence in both practice and attitudes with respect to the limits of lawyer involvement in the preparation of expert evidence. This subject matter remains too important to be left in its state of ethical uncertainty.

For the purpose of this article, 'witness preparation' is used neutrally to mean 'any communication between a lawyer and a prospective witness - … that is intended to

improve the substance or presentation of testimony to be offered at a trial or other hearing.[4]'

Inherent importance of witness preparation

Under Regulation 35 of the Uniform Conduct (Barristers) Rules: 'A barrister must promote and protect fearlessly and by all proper and lawful means the client's best interests to the best of the barrister's skill and diligence'.

Consultation with (and preparation of) experts is an important part of the discharge of that ethical duty. It may be necessary to test whether the expert has appropriate expertise; to ensure that any expressed opinion is within the scope of that expertise; to ensure that the assumptions upon which any opinion is based are appropriate; to exclude irrelevant material from a report; to ensure that the opinion is expressed in admissible form; to test the soundness of the reasoning process upon which an opinion is based; to test whether any unfavourable expressions of opinion are reasonably grounded; to facilitate the persuasive articulation and presentation of opinion evidence in support of a party's case; to understand fully the expert issues, for the purpose of cross-examination of opponents' experts, re-examination the party's expert, and submission; to limit the likelihood that cross-examination will unfairly diminish the probative force of the expert testimony; to assess the court's likely perception of the strength of the expert evidence, in light of the personal presentation and demeanour of the witness; and to assess the prospects of success in light of the strength of the expert evidence.

The ethical importance of witness preparation is reinforced by a consideration of the adversarial nature of our justice system. In an adversarial system it is presupposed 'that the truth will best be found by the clash of two or more versions of reality before a neutral tribunal'.[5] 'The very foundation of the adversarial process is the belief that the presence of partisan lawyers will sharpen the presentation of the issues for judicial resolution.'[6] Witness preparation is an integral aspect of the partisan case development upon which adversarial justice depends, because at least some degree of witness preparation is 'essential to a coherent and reasonably accurate factual presentation'.[7] The modern embrace of concurrent expert evidence does not change that.

Barristers should not be shy about their potential significance in facilitating the formulation of sound expert opinion, even with respect to the substance of that opinion. While barristers my lack subject matter expertise, they potentially bring to the preparation of expert evidence both analytical rigour and experience in the efficient absorption and application of complex information. In the preparation of a party's expert evidence, barristers potentially have the capacity greatly to assist in the development and testing of lines of expert inquiry, and the identification of error. The question is: should they be ethically permitted to exercise that capacity.

Witness preparation is an integral aspect of the partisan case development upon which adversarial justice depends, because at least some degree of witness preparation is "essential to a coherent and reasonably accurate factual presentation".

Inherent dangers of witness preparation

'For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend … to espouse the cause of those instructing them to a greater or lesser extent'.[8]

That is a reflection of 'adversarial bias': ie, a 'bias that stems from the fact that the expert is giving evidence for one party to the litigation'.[9] That bias may arise from 'selection bias' (being the phenomenon that a party will only present an expert whose opinions are advantageous to the party's case), 'deliberate partisanship' (where an expert deliberately tailors evidence to support the client), or 'unconscious partisanship' (where an expert unintentionally moulds his or her opinion to fit the case). The NSW Law Reform Commission recently observed that: 'Although it is not possible to quantify the extent of the problem, in the Commission's view it is safe to conclude that adversarial bias is a significant problem'.[10]

There is a fundamental ethical tension in this area. Witness preparation is both an essential tool for the elucidation of truth in an adversarial system, but also a possible tool of truth's distortion.

Aspects of witness preparation unquestionably have the capacity to facilitate 'deliberate partisanship' and exacerbate the insidious process of 'unconscious partisanship'. Signals as to what opinion would assist the case will be communicated by the barrister, will be absorbed by the expert, and may influence the expert's stated opinion. Those processes of communication, absorption and influence may be entirely unintended on both sides. Regardless of intention, the signals may generate 'subtle pressures to join the team – to shade one's views, to conceal doubt, to overstate nuance, to downplay weak aspects of the case that one has been hired to bolster'.[11] The difficulty of detection of adversarial bias exacerbates the insidious nature of the problem.

However, there are a number of considerations which limit the likely extent that witness preparation of experts will contribute to adversarial bias. *Firstly*, pursuant to the *Makita* rules for the admissibility of expert evidence[12], an expert is required to set out the assumptions and reasoning process upon which the opinion is based. Consequently, an expert cannot be swayed by suggestion beyond a position which can be coherently justified. *Secondly*, the introduction of the expert codes into court rules unquestionably counteracts the process of adversarial bias, by emphasising the expert's duty of neutrality. For example, section 2 of the Supreme Court expert code mandates: 'an expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the court impartially on matters relevant to the area of expertise of the witness'. *Thirdly*, the detachment of experts from the potentially corrupting partisan clutches of their instructing lawyers is reinforced by the exclusion of lawyers from the conclave and joint report process. *Fourthly*, the inevitability of cross-examination, the possibility of adverse judicial comment, and (perhaps most significantly) collegiate judgment in the context of conclaves and concurrent evidence all further constrain an expert from deviating beyond that which can be reasonably justified. There is a general recognition that the prevalence of partisanship has substantially reduced in the era of conclaves and concurrent evidence

Tension between conflicting policy objectives

There is a fundamental ethical tension in this area. Witness preparation is both an essential tool for the elucidation of truth in an adversarial system, but also a possible tool of truth's distortion. 'Witness preparation presents lawyers with difficult ethical problems because it straddles the deeper tension within the adversary system between truth seeking and partisan representation'[13]. It is an acute example of the fundamental tension generally underlying professional regulation of barristers: 'barristers owe their paramount duty to the administration of justice';[14] but a barrister must also 'promote and protect

fearlessly and by all proper and lawful means the client's best interests'.[15]

Ideally, any framework for defining the ethical boundaries in expert witness preparation should:

- reflect (and balance) the tension between the possibly conflicting objectives of facilitating the presentation of advantageous opinion evidence, and preventing the corruption of opinion evidence through adversarial bias; and
- embody sufficient certainty to provide practical guidance; and
- retain sufficient flexibility to reflect the reality that the 'ethical balance' in this area will be crucially context-sensitive.

Legal Profession Uniform Conduct (Barristers) Rules 2015

Regulation 69 now provides: 'A barrister must not: (a) *advise or suggest* to a witness that *false or misleading evidence* should be given nor condone another person doing so, or (b) *coach* a witness *by advising* what answers the *witness should give* to questions which might be asked'.

Regulation 70 provides: 'A barrister does not breach rule 69 by expressing a general admonition to tell the truth, or by *questioning and testing* in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to *inconsistencies or other difficulties with the evidence*, but must *not encourage* the witness to give evidence *different from the evidence which the witness believes to be true*.

The regulations appear (on first blush) to create substantial latitude in witness preparation, in that there is a 'safe harbour' for witness preparation in relation to 'questioning and testing' a version of evidence in conference (including drawing witness's attention to 'inconsistencies or other difficulties'), subject only to the proviso that the barrister does not 'encourage the witness to give evidence different from the evidence which the witness believes to be true'.

But the rules are somewhat confusingly structured, providing a general prohibition in Regulation 69, a safe harbour from that prohibition in Regulation 70 ('questioning and testing'), and a qualification to the safe harbour (but 'must not encourage' etc); and the regulations use a series of ambiguous expressions ('suggest', 'coach', 'test', 'encourage') without articulating overarching principles which facilitate the resolution of those ambiguities. Some of uncertainties are:

- What is meant by 'coach a witness by advising what answers the witness should give' under Regulation 70? Is 'advising' limited to explicit communication, or does it extend to the implicit and indirect message that is thereby conveyed?
- What constitutes 'questioning and testing' under Regulation 70. 'Testing' semantically covers a vast spectrum of conduct, from gentle and open-ended queries, to aggressive challenge, to raising and advocating contrary propositions;
- What is meant by 'encourage' the witness 'to give evidence *different from* the evidence the witness believes to be true' under Regulation 70. Is 'encouragement' assessed by reference to the objective meaning of the words, the barrister's subjective intention, or the objective effect on the witness? If the barrister successfully 'encourages' the expert to change their genuine view, does it follow that the barrister's conduct logically falls outside the prohibition of encouraging the witness to give evidence 'different from the evidence which the witness believes to be true'?

These uncertainties reflect a failing of the rules effectively to grapple with the insidious risk of unconscious adversarial bias (through which conduct might cause the expert unwittingly to mould the expert's opinion to a party's partisan cause, without intention on either side); and to balance that risk against the legitimate interest in witness preparation. Although a large range of meaning is open on the wording of the regulations, it is possibly to construe them in a manner which prohibits conduct which creates an undue risk of adversarial bias.

I suggest that the words in Regulation 69 'coach a witness by advising what answers the witness should give to questions which might be asked', should be construed as conduct which (expressly or by implication) conveys the 'answers the witness should give' in a manner which creates an undue risk that evidence will be corrupted by adversarial bias. The following considerations support that construction. 'Advise' is sufficiently broad to be construed as communications which convey (both expressly but also by implication) the 'answers the witness should give'. 'Coach' is sufficiently broad to be construed as conduct which objectively creates an undue risk that evidence will be corrupted by adversarial bias, regardless of whether there was a deliberate intention to suggest to the expert 'what answers the witness should give'. That construction is supported by the following considerations. *Firstly*, the expression 'coaching' is used to describe conduct which causes the risk of deliberate or unwitting contamination of evidence such that the evidence of the witness 'may no longer be their own';[16] and is assessed by reference to the impact on the witness and not merely by the subjective intention of the 'coach';[17] and is recognised as being 'inevitably a matter of degree, and is dependent on the facts'.[18] *Secondly*, that construction facilitates the explicit articulation and balancing of the competing policy considerations underlying witness preparation, which is inherent in the notion of *'undue risk'*. On that construction, the safe harbour of 'testing' in Regulation 70 should be construed so as not to permit conduct which would constitute 'coaching' under Regulation 69.

The advantage of that construction is that it permits flexibility, and an explicit consideration of policy considerations relevant to the proscription of conduct. The disadvantage is that it reduces the capacity of the rules to provide firm guidance.

I suggest that the assessment of 'undue risk' requires a balance between the conflicting policy objectives referred to above. Factors relevant to that balance might include:

1. The inherent capacity of the conduct to facilitate the formulation and presentation of expert opinion advantageous to the party's case;
2. The inherent capacity of the conduct to corrupt expert opinion through the operation of adversarial bias;
3. The extent to which the legitimate objectives of facilitating the formulation and presentation of advantageous opinion can be achieved through strategies with less inherent capacity to corrupt expert opinion;
4. Specific contextual considerations relevant to the extent of the risk of corruption of opinion through adversarial bias. These may include:
    - The experience and stature of the expert, within the expert's discipline and relative to the barrister;[19]
    - Whether the course of dealing with the expert has demonstrated a willingness or tendency of the expert to be unduly swayed by suggestion;
    - Whether the subject matter of the opinion is one in which there is significant scope for open-textured 'judgment calls', such that modified opinions can be plausibly rationalised;
    - The nature and extent of any incentives for the expert positively to assist the instructing party.[20]

The caselaw.

A 2013 article in Bar News by Garth Blake SC and Phillippe Doyle Gray provided a comprehensive and valuable summary of caselaw relating to the ethical limits of

witness preparation.[21] The learned authors perform a heroic task of seeking to extract a coherent body of principles from the caselaw. However, there are starkly inconsistent lines of authority (as the authors identify), there is no Supreme Court of NSW authority providing comprehensive binding guidance,[22] the only High Court authority comprises an obiter dicta by a single justice (Callinan J), and there is no other judicial statement which purports to provide a comprehensive statement of the principles regulating the ethical limits preparation of expert reports. The authors of that article provide the following summary of what they endorse and justify as the preferred 'Federal line of authority':[23]

(a) Counsel may and should identify and direct the expert witness to the real issues.

(b) Counsel may and should suggest to the expert witness that an opinion does not address the real issues when counsel holds that view.

(c) Counsel may and should, when counsel holds the view, suggest to the expert witness that an opinion does not adequately: (1) illuminate the reasoning leading to the opinion arrived at, or (2) distinguish between the assumed facts on which an opinion is based and the opinion itself, or (3) explain how the opinion proffered is one substantially based on his specialised knowledge.

(d) Counsel may suggest to the witness that his opinion is either wrong or deficient in some way, with a view to the witness changing his opinion, provided that such suggestion stems from counsel's view after an analysis of the facts and law and is in furtherance of counsel's duty to the proper administration of justice, and not merely a desire to change an unfavourable opinion into a favourable opinion.

(e) Counsel may alter the format of an expert report so as to make it comprehensible, legible, and so as to comply with UCPR 4.3 and 4.7.

I respectfully agree with that crisp summary, except for paragraph (d). As to paragraph (d):

- the first decision cited in support of that principle is the judgment of *Callinan J Boland v Yates Property Corporation*,[24] in which His Honour stated: 'I do not doubt that counsel and solicitors have a proper role to perform in advising or suggesting, not only which legal principles apply, but also that a different form of expression might appropriately or more accurately state the propositions that the expert would advance, and *which particular method of valuation might be more likely to appeal to a tribunal or court*, so long as no attempt is made to invite the expert to distort or misstate facts or give other than honest opinions': [279]. The context of that observation was proceedings in which a barrister was accused of negligence, with respect to the alleged failure to advance a particular valuation methodology on behalf of the party in a resumption compensation case, in circumstances where the party's own valuers had not advanced that methodology. The High Court unanimously upheld the appeal, thereby dismissing the negligence claim. Callinan J held that the Full Federal Court had 'failed to recognise the different roles of the valuers and [counsel] and treated [counsel] as if they were almost exclusively or exclusively the final arbiters of the way in which the property should be valued': [279]. Callinan J noted that 'valuation practice…cannot be an exact science' [277] and 'questions of law, fact and opinion do not always readily and neatly divide themselves into discrete matters in valuation cases and practice': [276]. Notwithstanding His Honour's finding that 'the lawyers are not a valuer's or indeed any experts' keepers' [279], and that counsel were not responsible for the valuation methodology adopted in the case, Callinan J nonetheless did observe that counsel has a 'proper role to perform' in suggesting 'which particular method of valuation might be more likely to appeal to a tribunal'.

- His Honour was there dealing with a particular issue (valuation methodology) in respect of which His Honour observed that 'questions of law, fact and opinion' do not neatly divide themselves, implying that the subject matter in question was possibly properly characterised as a matter of law. In those circumstances, it is not clear that Callinan J's statement can be generalised into a broad principle that counsel can make suggestions as to the substance of any expert opinion, subject only to the proviso that 'no attempt is made to invite the expert to….give other than honest opinion'. In any event, this was an obiter judgment by a single judge;

- I respectfully suggest that the other authorities apparently relied upon in support of the broad principle in paragraph (d) authorising 'suggestion' as to the substance of expert opinion, in fact weigh against the principle. In *Harrington-Smith*,[25] Lindgren J held 'Lawyers should be involved in the writing of reports by experts: *not, of course, in relation to the substances of the reports*' [19], and referred to the distinction between 'permissible guidance as to form and as to the requirements of ss 56 and 79 of the Evidence Act on the one hand, and *impermissible influence as to the content of a report* on the other hand': [27]. In *Doogan*,[26] the Full Court of the ACT held that 'the mere fact that some editing' of the expert reports 'does not demonstrate any impropriety' because legal representatives had 'the duty to ensure that the reports conveyed the author's opinions in a comprehensible manner, that the basis for those opinions was properly disclosed and that irrelevant matters were excluded': [119]. However, in finding no impropriety, the Court noted that 'It has not been established that any of the lawyers… *sought to change passages in the reports* conveying relevant opinions or information': [119]. The other cases merely affirmed *Harrington-Smith*.[27]

- since the 2013 article, a Full Court of the Industrial Court of NSW noted with approval the article and its summary of principles,[28] but the ultimate statements of principle endorsed in that case did not expressly endorse a general liberty to make suggestions as to the substance of expert opinion.[29] Justice Davies has also provided obiter support for the article and its summary.[30] Justice Ball has also recognised that 'advisors may test tentative conclusions that the expert has reached and in doing so may cause the expert to reconsider his or her opinion'.[31] However, the limited judicial commentary on expert witness preparation is typically hostile to any influence by counsel in relation to the substance of expert opinion.[32]

In the absence of a settled position in the caselaw concerning the ethical involvement of counsel in relation to the substance (as opposed to the form and articulation of reasoning) of expert opinion, we are thrown back to the (uncertain) Uniform Conduct (Barristers) Rules, and left to ponder what the rules should be.

In the circumstances, I respectfully submit that the case-law does not support the broad principle that it is ethically permissible for barristers to suggest to the expert that 'his opinion is either wrong or deficient', merely

because that view stems from the barrister's genuine view. In the absence of a settled position in the caselaw concerning the ethical involvement of counsel in relation to the substance (as opposed to the form and articulation of reasoning) of expert opinion, we are thrown back to the (uncertain) Uniform Conduct (Barristers) Rules, and left to ponder what the rules should be.

The strategic dimension

Strategic considerations may overlay ethical considerations when considering the appropriate limits of expert witness preparation.

Notwithstanding that particular strategies of witness preparation might satisfy a theoretical test for ethical propriety, the strategies may be strategically imprudent if they *appear* to compromise impartiality.

Three considerations provide particular reason to give careful consideration to the prudent strategic limits of witness preparation (in addition to ethical limits). *Firstly*, there is a significant risk of privilege being impliedly waived in relation to all dealings with an expert: ie, a significant risk that the details of witness preparation will be exposed.[33] *Secondly*, cross-examination and submissions by a skilful opponent may cause even ethically legitimate witness preparation strategies to be (unfairly) ethically tainted, and the perceived impartiality and credit of the expert to be (unfairly) compromised. *Thirdly*, there is significant judicial sensitivity about the appearance and substance of expert partisanship, and an expert report may be excluded (or the weight attached to it severely diminished) if witness preparation is deemed to 'cross' the sometimes blurry line.[34]

Consequently, there is a strategic advantage in minimising the role of lawyers in the process of witness preparation (and thereby protecting the appearance of impartiality). This needs to be balanced against the countervailing strategic advantage that may be generated by implementing various witness preparation strategies. That balance will be context-specific. Before implementing any strategy of witness preparation, a barrister should ask: *'Firstly*, is it ethically appropriate? *Secondly*, does the potential strategic advantage of the strategy outweigh any risk of strategic disadvantage that might arise if the conduct is disclosed and becomes the subject of cross-examination?'

Practical questions

Set out below is a consideration of some ethical and strategic considerations relevant to some selected aspects of witness preparation.

'Expert assistance' v 'Expert evidence'

'A practice has grown up, certainly in Sydney, perhaps elsewhere, in commercial matters, for each party to arm itself with what might be described as litigation support expert evidence' to provide assistance in 'analysing and preparing the case and in marshalling and formulating arguments'.[35] 'That is the legitimate, accepted and well known role of expert *assistance* for a party preparing and running a case'.[36]

By contrast, 'expert *evidence* in which a relevant opinion is given to the Court drawing on a witness' relevant expertise is quite another thing'.[37]

The better view is that there is no ethical problem in using the same expert to provide both 'assistance' and 'advice', 'as long as that person and the legal advisers understand and recognise the difference between the two tasks, and keep them separate'.[38] However, there are significant strategic considerations which militate against using the same expert for both roles.

Firstly, the nature and extent of involvement by the expert in the partisan process of case formulation and development might be the subject of cross-examination,[39] and may tend to diminish the expert's apparent impartiality. While an inference of partiality should not render the opinion inadmissible on the grounds of bias,[40] the 'bias, actual, potential or perceived, of any witness is undoubtedly a factor which the Court must take into account when deciding issues between the parties'.[41] The degree to which perceptions of partiality affect the weight of an opinion 'must, however, depend on the force of the evidence which the expert has given to the effect that, by applying a certain process of reasoning to certain specific facts, a particular conclusion should be drawn'.[42]

Secondly, there remains a risk that the evidence of the expert will be excluded in the exercise of the court's discretion, if the court considers that the probative force of the opinion has been sufficiently weakened by reason of the expert being exposed to (and unconsciously influenced by) inadmissible evidence in the course of the expert's immersed involvement in case preparation.[43]

Thirdly, 'expert assistance' may lead to an unpleasant operation of waiver of privilege. The process of expert assistance may involve the expert being privy to many sensitive and privileged communications. It is appropriate to assume that there is a very significant risk that waiver may extend to all such communications.

In light of the strategic dangers associated with using an expert for both 'assistance' and 'evidence', a well-funded litigant in a complex case will frequently engage different experts to provide the 'assistance' and the 'evidence', respectively.

Briefing the expert

Assistance in the formulation of instructions. There is no ethical difficulty in consulting with the expert in relation to the formulation of instructions. However, such consultation is in the nature of 'expert assistance', and is subject to the strategic dangers described above.

Preparation without formal instructions. Occasionally experts are not formally instructed until the report is being finalised. This creates no ethical difficulty. However, the deferral of formal instructions will increase the prospect of privilege being waived in relation to communications between the lawyers and the expert. This is because the absence of instructions during the period of preparation of the report raises the question as to the basis upon which the report was prepared, and supports a waiver of privilege in relation to associated materials to facilitate that question being answered.

False or incomplete instructions. It would be unethical to present a case on the basis of an expert report, when the expert was briefed on assumptions which contradict material facts known by the party (or where facts known to be material have been omitted from the instructions).[44]

Preliminary conferences. There is no ethical problem with extensive conferring to discuss and test the preliminary opinions of experts, prior to the preparation of a first draft. Some practitioners recommend this, to prevent the generation of a paper trail of draft reports which disclose the meandering evolution of the final opinion. I suggest that any conferring should be consistent with the guidelines suggested below under the heading 'Substance of the expert opinion'.

Minimising the prospects (and prejudice) of waiver

In the article in this edition titled 'Expert reports – waiver of privilege revisted', there are outlined some suggested strategies to minimise the prospects (and prejudice) of a waiver of privilege in relation to materials associated with the preparation of the expert report.

There is no ethical impropriety in such a strategy. The objective of protecting privilege requires no significant justification. Briefly, however, the justification includes promoting 'free exchange of views between lawyers and experts';[45] preventing experts being inhibited from changing their minds by fear of exposure of working papers and drafts; preventing the integrity and strength of an expert's final opinion being attacked through cross-examination on an expert's working notes and drafts (which have potentially been taken out of context); and avoiding the hearing being distracted and lengthened by 'what is usually a marginally relevant issue';[46] ie, the nature of (and reasons for) the evolution of the expert's opinion.

If a barrister proposes to raise matters for consideration by the expert in relation to

the substance of the expert opinion, an issue arises as to whether the communications should be made (or recorded) in writing. The creation of a paper trail has both advantages and disadvantages. The ostensible advantage of avoiding a written record is that any waiver of privilege will not generate a paper trail which records the lawyer's role in the evolution of the opinion, which might be manipulated by skilful cross-examination to compromise the credit of the expert and the weight of the expert's opinion. However, I suggest that the following circumstances support the prudence and propriety of maintaining a paper trail:

- if there is a waiver of privilege, the waiver extends to oral communications between the barrister and the expert. A skilful cross-examination of an expert about extensive oral dealings with lawyers is dangerously unpredictable. On the other hand, a paper trail can provide a crisp and clean demonstration of the propriety of the dealings;
- there is a significant risk that a court (consciously or unconsciously) might draw an adverse inference as to the propriety of dealings with an expert, if there were found to be a deliberate strategy of avoiding a paper trail;
- the recording of communications, combined with the ever-present risk of waiver, imposes a valuable chastening discipline on dealings between lawyers and experts. A lawyer will be forced always to ask: 'How will this communication be viewed by the court?'

The form of the expert report

As noted under the heading 'Caselaw' above, there is strong judicial support in Australia for the ethical propriety (and professional duty) of lawyers being involved in ensuring the clear and admissible expression of expert opinion. 'The court depends heavily on the parties' legal advisors to assist experts to address properly the questions asked of them and to present their opinions in an admissible form and in a form which will be readily understood by the court. Equally, the court depends heavily on the parties' legal advisors to ensure that any opinion expressed by an expert is an opinion the expert holds for the reasons that the expert gives and that the expert otherwise complies with the Expert Witness Code of Conduct'.[47]

This is consistent with practice in Sydney.

This position is to be contrasted to the position in the United Kingdom. In what remains a leading UK case on the ethical limits of lawyer's involvement in the preparation of expert reports, Lord Wilberforce held: 'Expert evidence presented to court should be, and should be seen to be, the independent product of the expert, *uninfluenced as to form* or content by the exigencies of litigation'.[48] In a subsequent case, Lord Denning relied upon that statement to conclude that lawyers must not 'settle' the evidence of medical reports.[49]

However, as a matter of principle and strategic prudence, the appropriate scope of the role of barristers in drafting expert reports is contestable.

The general considerations in favour of a barrister being involved in the actual drafting are as follows. *Firstly*, compliance with the demanding requirements of form and structure under the *Makita* rules may necessitate a lawyer's substantial involvement in the drafting, as a matter of professional responsibility. *Secondly*, as with any form of communication, the persuasiveness of an expert report will depend not just upon the substantive content of the opinion, but also the method of its presentation. The expertise of many experts may not extend to the skills of persuasive written communication. Lawyers may be able to provide valuable assistance in the persuasive presentation of the expert's substantive opinion, both in relation to structure and verbal expression. *Thirdly*, if the lawyer is participating in the drafting process, the lawyer is able to test any tentative opinions expressed by the expert, before that opinion is incorporated into the draft report. This is likely to prevent the creation of any documentary record of ill-considered opinion, which might damage credit if it is later the subject of waiver.

The general considerations in favour of a barrister being involved in the actual drafting are as follows. Firstly, compliance with the demanding requirements of form and structure under the Makita rules may necessitate a lawyer's substantial involvement in the drafting, as a matter of professional responsibility.

The ethical considerations weighing against a barrister personally drafting a report on instructions are as follows. *Firstly*, there is significant scope for a draft prepared by a barrister to diverge from instructions provided by the expert. This may be a product of carelessness in the recording or reproduction of instructions, the influence of unconscious adversarial bias on the barrister, or the simple fact that within the framework of an expert's instructions there will remain scope for significant nuance in the final expression of written opinion. *Secondly*, to the extent that the draft diverges from (or embellishes) the expert's instructions, the draft has a substantial capacity to corrupt the substance and expression of the expert's actual opinion. A draft report will have a powerfully suggestive effect on an expert, if it is persuasively expressed, well structured, and crafted by a respected authority figure (such as a barrister). Further, there is a significant risk that a busy expert will simply adopt a draft for expedience, without proper consideration.

There are also weighty strategic considerations against the substantial involvement of the lawyers in the drafting process. *Firstly*, irrespective of the integrity of a barrister's involvement in the preparation of a draft, and the coherence of the finally expressed opinion, the mere fact that a lawyer has crafted the words of the report may stain the credit of the expert in the eyes of a judge. *Secondly*, as Justice McDougall has observed extra-judicially: 'it is not desirable to fiddle too much with the actual phraseology of the expert. For better or worse, we all have our own individual modes of expression. Evidence – whether lay or expert – speaks most directly when it speaks in the language of the witness and not in the language of the lawyer who has converted it from oral into written form'.[50] *Thirdly*, the possibility of ill-considered adoption by an expert of a lawyer's terminology creates the risk of the expert stumbling over or disowning the wording of a report during cross-examination. *Fourthly*, requiring the expert to prepare the draft will likely increase the expert's engagement with the issues on which the expert is briefed.

Set out below is my personal suggestion as to where the line should be drawn in relation to various aspects and stages of drafting.

Template for report. An effective (and ethically sound) strategy is to provide to the expert a detailed template to assist the preparation of the first draft. The template might set out the structure of the report, the assumptions the expert is instructed to make, and detailed instructions as to what must be addressed in which section of the report. The template should be accompanied by detailed instructions as to the requirements of form and structure of an expert report under the *Makita* rules.

Preparing first draft. The better view is that there is no ethical impropriety under the present rules in the barrister preparing the first draft (in conference or alone), based on instructions received from the expert. However, the considerations of strategic prudence referred to above strongly dictates that the expert should typically prepare the

first draft.[51] This may properly occur after extensive conferring with the expert, in which the expert's preliminary opinion is discussed and tested.

Comments on first draft. It is common and acceptable for barristers to submit to experts a 'marked up' version of the first draft, which contains queries of the type described in the section below ('Substance of the expert opinion – Testing an unfavourable opinion'), and requests for the elaboration of reasoning in the draft, and which invites the expert to prepare a further draft in light of those queries and requests.[52]

Preparing subsequent drafts. I suggest that the ethical and strategic balance swings in favour of active participation of the barrister in the drafting process, when the substance of the opinion is effectively settled and recorded in a draft, and the focus is on the refinement of form and expression. As a proposed balance between facilitating the presentation of advantageous opinion, and avoiding the reality and perception of adversarial bias, I suggest the following guidelines:

- If the barrister is to be involved, it is desirable to undertake the drafting in conference with the expert (rather than for the barrister to produce a further draft independently following conference). This allows the expert to take immediate ownership of the formulation of words. If the redrafting is done by the barrister following conference, then enclose the draft under an email saying something to this effect: '…I have endeavoured to ensure that the amendments are consistent with your instructions in conference. However, please check the amendments very carefully, and ensure they accord precisely with the substance of your opinion and your preferred form of expression, and make all necessary amendments to ensure that is the case';

- It is appropriate for the redrafting to address the clarification of ambiguous expression, the comprehensive and coherent articulation of the reasoning process, and the amendment of wording which significantly detracts from the persuasive communication of the substantive opinion.[53] It is otherwise strategically imprudent to seek to refine or otherwise amend the expert's own words. Maintaining the authenticity of the expert's voice may be more advantageous then crafting perfect expression;

- Unless clearly obvious or inconsequential, any amendment of expression should generally be on the basis of specific and detailed instructions from the expert, and should reflect the expert's own words. The barrister should only suggest a mode of expression when open-ended questioning of the expert has failed to elicit wording which communicates with reasonable clarity the substance of relevant opinion;

- To the extent that the drafting process traverses substantive amendment to a previous draft, it may be strategically prudent for the drafting not to be done in conference with the barrister. Rather, the matter requiring substantive redrafting should be identified (possibly by some notation in the draft being worked on), and the expert should be invited to attend to the redrafting independently in a further draft (to avoid the appearance of undue involvement in the substance of opinion).

I suggest that this testing may relate to the appropriateness of assumptions, and the soundness of the reasoning, and the correctness of the conclusion

Notwithstanding the ethical propriety of involvement by lawyers in the process of preparing subsequent drafts, there will remain significant strategic advantage in avoiding or minimising a barrister's involvement. The appropriate role of a lawyer may depend upon the lawyers' assessment of the capacity of the expert to craft an opinion in admissible and persuasive form without assistance from lawyers.

Substance of the expert opinion

Exclusion of irrelevant opinion. It is ethically permissible for a lawyer to propose substantive amendments to a draft report, which relate to deletion of evidence which is irrelevant, or beyond the expertise of the expert. Beyond that point, the ethical consensus and clarity breaks down.

Testing an unfavourable opinion. Regulation 70 of the Uniform Conduct (Barristers) Rules expressly authorises 'testing in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to inconsistencies and other difficulties with the evidence'. I suggest that this testing may relate to the appropriateness of assumptions, and the soundness of the reasoning, and the correctness of the conclusion.[54] However, consistent with the prohibition on 'advising [directly or indirectly] what answers the witness should give' in Regulation 69, and the general ethical proviso that witness preparation strategy should minimise the risk of opinion corruption, the process of testing should only proceed by way of open ended questions, which simply direct attention to an issue, and which avoid (as much as possible) suggestion that the opinion is wrong and should be changed: eg, 'What are the assumptions for that proposition?' 'What is the basis for those assumptions?' 'Do you consider those assumptions consistent with A, B, C? How?' 'What reasoning supports the drawing of that conclusion from those assumptions?' 'Does it take account of D, E, F? How?' It should not proceed by way of closed questions which explicitly or implicitly suggest that the expert should change his opinion: 'I suggest that the reasoning is wrong, because of A, B, C. Do you agree?'

The practice of open-ended questions is not only ethically appropriate, but also strategically prudent for the following reasons. *Firstly*, in view of the (proper) sensitivity of experts to maintaining an independent and impartial stance, there may be a natural defensiveness to modifying an opinion in response to direct suggestion. *Secondly*, all communications with experts should be conducted on the basis that privilege in the conversation may be waived. The more suggestive and leading is the question which preceded a modification of opinion, the greater the risk that the final opinion will be discounted by reason of perceived adversarial bias (if the question is exposed following the waiver of privilege).

Testing a 'Joint Report'. It is now standard practice for conclaves of experts and joint reports to be ordered in cases involving expert evidence. A question arises as to whether it is permissible for any concession by a party's expert in the joint report to be 'tested' in private conference, and subsequently challenged during concurrent evidence. There is no prohibition on doing so in the court rules, or practice notes. I suggest that a party should be entitled to test in private conference a concession made by an expert in the joint report, in precisely the same manner as set out above. There is significantly less cause for concern about adversarial bias in relation to the testing of concessions in the joint report, because the expert's sense of independence has been sharpened through collegiate co-operation in the lawyer-free conclave, and substantial inertia inevitably attaches to a

concession recorded in the joint report.

Raising contrary propositions for consideration. This is moving into even murkier ethical waters. I suggest that this practice should be regarded as ethically permissible (and strategically prudent), if the following procedure is followed:

1. The barrister has first undertaken the open-ended 'testing' of the expert's opinion described above, and the expert has not independently expressed an opinion consistent with the contrary proposition;

2. Before engaging in the practice, the barrister exhorts the expert to abide by the spirit of the expert codes: 'Remember your duty is to assist the court impartially, and not to advance my client's case. I want to raise some propositions for your consideration and comment. I don't suggest that they are right or that you should adopt them. You should only do so if you genuinely consider the proposition to be correct';

3. Open style questioning is adopted: eg, 'What is your opinion about [proposition X]? What is the basis for that opinion?', and then 'test' in the manner described above;

4. The barrister does not engage in conduct which has the intention or consequence of pressuring the expert to adopt the proposition;

5. If the expert purports to adopt the proposition, the barrister rigorously tests the basis for it, to ensure that the expert is capable of reasonably justifying the proposition.

The conclusion that this practice should be regarded as ethically permissible is supported by the following considerations. *Firstly*, it may facilitate the articulation by the expert of opinion favourable to the client's case, which supports the legitimacy of the practice unless it gives rise to an undue risk that the expert's opinion will be corrupted through adversarial bias; *Secondly*, the mere fact that a change in an expert's opinion was triggered by a proposition raised by a barrister does not reflect that the modified view is not genuine or not reasonable. Barristers will often acquire substantial expertise in a field relevant to a case. In light of that expertise, the barrister's familiarity with the case, and the analytical capacities barristers will (hopefully) bring to bear on the matter, it is unsurprising that barristers might be able to raise valid propositions for consideration which an expert might reasonably and genuinely adopt. It has been judicially acknowledged that 'testing' may lead to a change in expert opinion.[55] *Thirdly*, the better view is that putting alternative propositions to the expert (in accordance with the guidelines proposed) falls within the safe harbour of 'testing' within Regulation 70. There is a profound ethical distinction between raising a proposition for consideration, and either 'advising what answers the witness should give' (Regulation 69) or 'encouraging the witness to give evidence different from the evidence the witness believes to be true' (Regulation 70).[56]

All that said, it is obvious that the mere fact of a barrister raising a proposition for consideration has inherent suggestive capacity, which generates the possibility of the corruption of opinion through adversarial bias. It is therefore obvious that there is scope for divergent views about the ethical propriety of such a practice.

'Crossing the Line': unethical practices. When then does witness preparation cross the line and become unethical?

In the USA, there is no prohibition on rehearsal.

Firstly, there are prohibitions on particular categories of conduct in Regulation 69 and 70, which are described above (advising 'what answers the witness should give', and encouraging evidence 'different from the evidence with the witness believes to be true').

Secondly, I suggested above that an appropriate ethical limit on 'raising propositions for consideration by an expert', is the proviso that the barrister must not seek to 'pressure' the expert to adopt the proposition (or engage in conduct which might have that consequence). This is admittedly a frustratingly question-begging limitation, but it is difficult to draw a brighter line. By way of (some) elaboration, factors which may be relevant to determine whether there is 'pressure' include the extent to which any question is expressed in a leading manner; the extent to which the question is repeated; the extent to which the barrister personally advocates the merits of the proposition; the extent to which the barrister highlights the strategic importance of the proposition to the case; the extent to which the barrister seeks to argue with the expert about the proposition (as distinct from testing the expert's opinion by open-ended questioning); and the relative stature of the expert and barrister (which may affect the power dynamic between the two).

General advice about the process of evidence

It is standard practice for barristers to give witnesses general advice as to court room procedure, courtroom demeanour, and methods for the presentation of testimony (in examination in chief, and cross-examination).[57]

There is generally no controversy as to the ethical propriety of such conduct.[58] This is because it relates to procedure and the form of evidence, rather than substance. It is therefore relatively innocuous in terms of distorting testimony.

Rehearsal of cross-examination

Rehearsal relates to the process of practising the presentation of testimony to be given in court. In light of general requirement that expert evidence 'in chief' be provided by way of written report, the issue of the 'rehearsal' of experts only arises in relation to cross-examination.

In the USA, there is no prohibition on rehearsal, and among witness preparation techniques it is described as 'the most strongly advised among trial lawyers' [59]. In the UK, barristers 'must not rehearse practise or coach a witness in relation to his evidence'.[60] In Australia there are some strong authorities against the practice. Justice Young referred to the 'very severe limits, in the interests of justice, in preparing a witness to give evidence…. we do not in Australia do what apparently happens in some parts of the United States, rehearse the witness before a team of lawyers, psychologists and public relations people to maximise the impact of the evidence'.[61] However, the practice is apparently widespread in Sydney.

The question of rehearsal raises particularly difficult ethical issues.

Arguments for rehearsal of cross-examination. A compelling case can be made for the propriety of a rehearsal of the cross-examination of experts. *Firstly*, for a number of reasons, the practice has the capacity to facilitate the presentation of testimony that does justice to the inherit merits of the opinion. The mere experience of formulating and articulating opinion under the pressure of cross-examination will likely improve the general quality of the presentation of testimony during cross examination at trial. More specifically, it will facilitate the development of strategies to combat the following techniques of cross-examination, which might otherwise cause the testimony of an expert to appear weaker than is warranted by the inherent merits of the expert's opinion:

- Techniques of cross-examination might be employed to engender a tendency of acquiescence, which leads to concessions contrary to an expert's genuine considered opinion. These techniques may include: inducing confusion through complex and rapid fire questioning; inducing submission through aggression or overbearing demeanour; provoking the witness to anger, in a way which compromises the ex-

pert's rational deliberations; encouraging a co-operative and trusting relationship with the expert through flattery and respect; creating a habit of acquiescence through a pattern of 'Dorothy Dixers'; weakening confidence by embarrassing the expert on collateral matters; trapping the expert in a logical corner which demands a concession, when the trap has been created by extracting the expert's agreement to flawed assumptions (which the expert might carelessly have provided, oblivious to the logical consequences of his concession).

- The cross-examination might damage the credibility of the expert by creating the impression that the expert is unduly defensive and evasive, by a conscious strategy of provocation;

Testing and probing the expert report can be readily undertaken in conference. General advice as to the techniques and traps of cross-examination can also be provided in conference. The experience of the actual rigours of cross-examination can be created by a mock examination on a subject matter unrelated to the proceedings.

- The cross-examination might probe the expert opinion to expose flaws and inconsistencies (real or imagined). If confronted with those contended flaws for the first time in cross-examination, the expert may be unable properly to address them (and the expert's testimony might be correspondingly weakened). However, the expert might have been able readily to explain them away (on reasonable grounds), had the expert had adequate time to reflect upon them.

The strategy of mock cross-examination has the capacity to alert the witness to the strategies that might be used to attack him or her, to alert the witness to his or her vulnerability to those techniques, and to facilitate the witness developing defences against them. By educating the barrister as to how the witness responds under cross-examination, a rehearsal of cross-examination also produces the advantages of facilitating preparation of re-examination and an informed assessment of the strength of the case.

Secondly, rehearsal of the cross-examination of experts does not have the same inherent distorting tendencies as rehearsal of lay witnesses. The susceptibility of lay evidence to suggestion is exacerbated by the inherent vulnerability of memory to unconscious reconstruction.[62] The extent to which expert opinion can be distorted by the rehearsal of answers in a mock cross-examination is (or can be) limited by a number of considerations. *Firstly*, an opinion is substantially anchored by the necessity to justify the opinion by reference to assumptions and a coherent process of reasoning. This constrains the extent to which the expert's opinion can be swayed by possible suggestion. *Secondly*, the pre-trial mock cross-examination will be conducted after the final report and joint report has been served. Any tendency to be swayed by suggestion will be counterbalanced by the fact that the expert is already 'locked in' to a publicly communicated position. *Thirdly*, the scope for distortion through suggestion can be further reduced if the cross-examination rehearsal is conducted on the proposed basis set out below.

Arguments against rehearsal of cross-examination. There are a number of considerations weighing against the ethical propriety of cross-examination rehearsals. *Firstly*, notwithstanding that mock cross-examination is aimed at 'challenging' the expert's evidence, the reality is that discussion and rehearsal of answers to cross-examination are integral aspects of the process. *Secondly*, the inherent vulnerability of witnesses to suggestion during the rehearsal of evidence on the eve of trial: 'rehearsal has a greater potential for suggestiveness than other preparation techniques. A witness naturally feels apprehensive about an upcoming appearance. The inclination to welcome a script is strong. Furthermore, repetition of a story is extremely suggestive.'[63] With respect to lay evidence, 'the danger in discussing with a witness his evidence prior to trial is that the witness's recollection of events will either consciously or unconsciously alter so as to accommodate what the witness perceives as a better, for whatever reason, version of events. Obviously this is a matter of degree'.[64] Different but analogous problems can occur with expert opinion. *Thirdly*, the legitimate objectives of mock cross-examination can be substantially achieved without the risks associated with that process. Testing and probing the expert report can be readily undertaken in conference. General advice as to the techniques and traps of cross-examination can also be provided in conference. The experience of the actual rigours of cross-examination can be created by a mock examination on a subject matter unrelated to the proceedings.[65]

Rehearsal: conclusion. It is a finely balanced and controversial question. As a purely ethical matter, I tentatively suggest that cross-examination rehearsal on the actual case should generally be ethically permissible, subject to the following parameters:

- The barrister should emphatically exhort the expert to abide by the witness codes;
- On no occasion should the barrister during the session give any direction or suggestion as to the substance of any answer which the expert should provide to any question;
- It is reasonable to discuss answers given in the mock cross-examination, for the purpose of: (i) exploring and testing the basis for any stated answer; (ii) exploring whether any answer (on further reflection) truly accords with the considered opinion of the expert; (iii) if not, exploring why the expert gave the answer in the mock cross-examination; (iv) discussing strategies to facilitate the expert responding to questions in a manner which accords with the expert's considered opinion;
- There should be no more than limited repetition of cross-examination on each subject matter.

Expert testimony plays a critical role in litigation. Witness preparation plays a critical role in the presentation of expert. testimony. A framework of rules and principles to provide effective ethical guidance in the area is needed. That framework does not presently exist

However, reasonable minds will differ as to the strategic prudence of the practice of mock cross-examination. Because there does not appear to be universal support for the ethical propriety of the practice, some judges might perceive the rehearsal of cross-examination as tainting the credit of the expert.

Reform in regulation?

I respectfully repeat my suggestion from 10 years ago that it may be useful to consider whether amendments to the Uniform Conduct Rules might provide more practical and clear guidance on witness preparation. Any such consideration might address the following issues:

- the general question of the appropriate nature of ethical regulation in this area.

There is often contrasted two types of ethical regulation: 'codes of ethics' (which prescribe high level principles to provide loose general guidance), and 'codes of conduct' (which prescribe specific binding rules consistent with the high level principles). Those different forms reflect the often conflicting goals of regulation: the retention of sufficient flexibility to permit ethical discretion which is sensitive to individual circumstance; and the provision of sufficient certainty to give firm practical guidance (and to facilitate enforcement);

- the relative priority of the conflicting policy objectives in this area;
- whether conduct should be proscribed merely because it creates an appearance of expert partiality.

Conclusion

Expert testimony plays a critical role in litigation. Witness preparation plays a critical role in the presentation of expert testimony. A framework of rules and principles to provide effective ethical guidance in the area is needed. That framework does not presently exist.

To facilitate the development of such a framework, I affirm my suggestion that it might be helpful to undertake the following steps:

- organise a working party through the Bar Council to address the issue. It would be desirable that the Law Society and the judiciary also be represented;
- survey existing practice in relation to expert witness preparation, across the Bar and within law firms;
- survey judicial attitudes as to the impact on expert credibility of various methods of expert witness preparation;
- survey practice in different legal cultures;
- circulate a discussion paper through the working party, setting out proposed guidelines;
- in light of responses to the discussion paper, produce guidelines for practice for approval by Bar Council.

I am interested in exploring this topic further, and welcome comments.[66]

END NOTES

1 Applegate, 'Witness Preparation' (1989) 277 *Texas Law Review* 277, at 279
2 Stowe, 'Preparing expert witnesses: A search for ethical boundaries', Bar New, Summer 2006/7, at page 44
3 For convenience and completeness, this article incorporates analysis from the previous article where it continues to be relevant. This article supercedes the earlier article referred to in footnote 1.
4 Applegate, supra fn 1, 278.
5 Applegate, supra fn 1, 327
6 Zacharis and Martin, 'Coaching Witnesses' (1998-98) 87 *Kentucky Law Journal* 1001, at 1006.
7 Applegate, supra fn 1, 352
8 *Abbey National Mortgages Plc v Key Surveyors Nationwide Limited and Others* [1996] 3 All ER 184; see also Fox v Percy (2003) 214 CLR 118, per Callinan J at [151]
9 NSW Law Reform Commission, Report 109, 'Expert Witnesses', page 70
10 NSWLRC, Report 109, supra fn 8, page 74
11 Quoted in J Langbein, 'The German Advantage in Civil Procedure' (1985) 52 *University of Chicago Law Review* 823, at 835; quoted in NSWLRC Report 109, supra fn 8, page 73
12 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705
13 Applegate, supra fn 1, at 350
14 Regulation 4
15 Regulation 35
16 *R v Momodou (Henry)* [2005] EWCA Crim 177; [2005] 1 WLR 3442, 587h-j and 588a-c.
17 *HKSAR v Tse Tat Fung* [2010] HKCA 156, at [79]
18 *Majinski v the State of Western Australia* [2013] WASCA 10, [30]
19 Suggestibility will be influenced by the 'power dynamic' between expert and the barrister.
20 Eg, contingency fee
21 Garth Blake SC and Phillippe Doyle Gray, 'Can counsel settle expert reports?', Bar News, Summer 2012-2013. The learned authors summary was approved in *Hunter Quarries Pty Ltd v Morrison* [2013] NSWIRComm 49, at [86]-[97]; and approved in obiter by Davies J to *Cassie Masters by her tutor William Masters v Sydney West Area Health Service* [2013] NSWSC 228, at [33] where His Honour 'commended' the summary to counsel before him.
22 although see *Cassie Masters*, ibid, at [33] for an obiter approval of the summary by Blake SC and Gray.
23 The authorities supporting those principles were identified as *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7)* [2003] FCA 893, per Lindgren J at [19], [27]; which was approved by Sackville J in *Jango v Northern Territory of Australia (No 2)* [2004] FCA 1004, at [10]-[18]; *R v Doogan* [2005] ACTSC 74, at [119]; *Boland v Yates Property Corporation* (1999) 167 ALR 575
24 (1999) 167 ALR 575
25 *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7)* [2003] FCA 893;
26 *R v Doogan* [2005] ACTSC 74, at [119]
27 *Jango v Northern Territory of Australia (No 2)* [2004] FCA 1004, at [10]-[18]; *Risk v Northern Territory of Australia* [2006] FCA 404, at [456]
28 *Hunter Quarries Pty Ltd v Morrison* [2013] NSWIRComm 49, at [86]-[97]
29 see [94],[95]
30 *Cassie Masters by her tutor William Masters v Sydney West Area Health Service* [2013] NSWSC 228, at [33]
31 *Traderight (NSW) Pty Ltd and ors vBank of Queensland Ltd* (No 14) [2013] NSWSC 211, at [23]
32 eg, *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7)* [2003] FCA 893, at [19]; *R v Doogan* [2005] ACTSC 74, at [119]
33 See my other article in this edition: 'Expert reports and waiver of privilege'
34 eg, *R v Doogan* [2005] ACTSC 74, at [117]; *Phosphate Cooperative Co of Australia Pty Ltd v Shears* [1989] VR 665; *Secretary to the Department of Business and Innovation v Murdesk Investments Pty Ltd* [2011] VSC 581, [101]-[111]; *Universal Music Australia Pty Ltd & Ors v Sharman Licence Holdings Pty Ltd & ors* (2005) 220 ALR 1, at [227]ff; *Hardy v Your Tabs Pty Ltd* [2000] NSWCA 150, at [133]
35 *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171, per Allsop J at [676], [678]
36 ibid
37 ibid
38 Ibid, [678]
39 *Fagenblat v Feingold Partners Pty Ltd* [2001] VSC 454, per Pagone J at [9]; *Aitchison v Leichhardt Municipal Council* [2002] NSWLEC 226, per Talbot J at [21]; ASIC v Rich [2005] NSWCA 152 (CA) [167]
40 *Fagenblat*, supra fn 22, [7]
41 *Fagenblat*, supra fn 22, [7]
42 *ASIC v Rich* [2005] NSWCA 152 (CA) [167]
43 *ASIC v Rich* [2005] NSWSC 650, per Austin J at [40]
44 see Bar Rule 36; *Bush* (1993) 69A Crim R 416 at 431,
45 NSW Bar Association Response to the NSW Law Reform Commission Issues Paper 25 – Expert Witnesses, [33]
46 ibid
47 *Traderight (NSW) Pty Ltd (ACN 108 880 968) and Ors v Bank of Queensland Ltd (ACN 009 656 740) (No 14)* [2013] NSWSC 211, per Ball J at [23]; see also *Harrington-Smith v Western Australia (No 7)* [2003] FCA 893, at [19]; quoted with approval in *Jango v Norther Territory (No 2)* [2004] FCA 1004, per Sackville J at [9], and *R v Coroner Maria Doogan* [2005] ACTSC 74 (Full Court, ACTSC), at [118]
48 *Whitehouse v Jordan* [1981] 1 WLR 246, per Lord Wilberforce at 256-257
49 *Kelly v London Transport Executive* [1982] 1 WLR 1055, per Lord Denning at 1064-1065. However, Callinan J has pointed out Whitehouse v Jordan does not support 'as far reaching a proposition as that propounded by Lord Denning': *Boland v Yates Property Corporation Pty Ltd (1999)* 167 ALR 575, at [279]
50 Justice McDougall, 'Commercial List Practice: Expert Evidence', College of LAW CPED Seminar, 28 July 2004
51 Urgency might create a necessary exception to this guideline
52 Some practitioners would prefer to organise a conference to discuss the matters raised, before a further draft was prepared
53 Eg, the amendment of wording which is convoluted.
54 This is consistent with the decision of Ball J in *Traderight (NSW) Pty Ltd and ors vBank of Queensland Ltd (No 14)* [2013] NSWSC 211, at [23]
55 *Traderight (NSW) Pty Ltd and ors vBank of Queensland Ltd (No 14)* [2013] NSWSC 211, at [23]
56 However, it could be contended that merely raising the proposition is indirectly suggestive of what the witness 'should say' in proceedings
57 For a good example of such guidelines, see Freckleton & Selby, 'Expert Evidence: Law, Practice, Procedure and Advocacy' (2nd Edn, 2002), at 706-713
58 See *Re Equiticorp Finance Ltd; ex part Brock [No 2]* (1992) 27 NSWLR 391, per Young J at 395; *R v Momodou* [2005] 2 All ER 571, at 588 (CA); *HKSAR v Tse Tat Fung* [2010] HKCA 156, [68]-[82]
59 G. Bellow & B. Moulton, 'The Lawyering Process: Preparing and Presenting the Case' (1981), at 357-8; see Applegate, supra fn 1, at 281 fn 13
60 Code of Conduct of the Bar of England and Wales, Rule 705(a); see also *R v Momodou* [2005] 2 All ER 571, at 588; *HKSAR v Tse Tat Fung* [2010] HKCA 156, [68]-[82]
61 *Re Equiticorp Finance Ltd; ex part Brock [No 2]* (1992) 27 NSWLR 391, per Young J at 395.
62 *Goodrich Aerospace Pty Limited v Arsic* [2006] NSWCA 187, per Ipp JA at [19]
63 Applegate, supra fn 1, 323
64 *HKSAR v Tse Tat Fung* [2010] HKCA 156, [73]
65 This was endorsed by the Court of Appeal in *R v Momodou* [2005] 2 All ER 571, at 588
66 hugh.stowe@5wentworth.com

Admissibility of expert evidence

By David Robertson & Charles Gregory

The laws in relation to the admissibility of expert evidence under the Uniform Evidence Act (**the Act**) are somewhat settled. Yet Courts continue to express opinions on the requirements of the opinion rule in the Act that either clarify or assume to settle outstanding conflicts. And some practitioners and commentators continue to disagree on the importance of common law rules to admissibility requirements or discretionary powers under the Act.

For that reason, the aim of this article is to provide a brief summary of the principles relevant to the admissibility of expert evidence in civil proceedings in those jurisdictions that have adopted the Act, namely the Commonwealth, New South Wales, Victoria, Tasmania (in part), the Australian Capital Territory and the Northern Territory.

In summary, in order to be admissible as expert opinion evidence under the Act:

(i) The opinion must be relevant to a fact in issue in the proceeding;

(ii) The opinion must be on a subject matter of 'specialised knowledge';

(iii) The opinion must be that of a person who has specialised knowledge based on the person's training, study or experience; and

(iv) The opinion must be wholly or substantially based on the person's training, study or experience.

Furthermore, in New South Wales, Part 31 of the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR) imposes additional requirements that must be met for expert evidence to be admissible in civil proceedings (although the Court retains a discretion to admit expert evidence that does not comply with these requirements), which will also be discussed briefly.

The opinion rule: section 76 of the Act

The 'opinion rule' in s 76(1) of the Act provides that evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

Like the hearsay rule, the opinion rule is a purposive rule, in that it only applies where a party seeks to adduce opinion evidence for the *purpose* of proving the existence of a fact about the existence of which the opinion was expressed. Therefore, in considering whether the opinion rule applies at all, there are two threshold questions: first, whether the evidence sought to be adduced is evidence of an 'opinion'; and second, whether the *purpose* for which the expert evidence is sought to be adduced is to prove the existence of a fact about the existence of which the opinion was expressed.

Evidence of an 'opinion'

The Act does not define the term 'opinion'. Therefore, what constitutes evidence of an 'opinion', as opposed to evidence of a fact, is determined by the application of common law principles (s 9 of the Act). In two decisions, the High Court has defined the word 'opinion' as 'an inference drawn from observed and communicable data'.[1] It has been long been acknowledged that the dividing line between evidence of 'fact' and of 'opinion' can be difficult to draw, and is in reality a continuum rather than a bright line. A useful practical test given by Finkelstein J in the Full Federal Court's decision *La Trobe Capital & Mortgage Corporation Pty Ltd v Property Consultants Pty Ltd* [2] is to consider the extent to which the evidence goes beyond the witness' direct observations or perceptions, with the result that 'the more concrete the evidence, in the sense that the more grounded the evidence is in a witness' direct observation or perception of an event, the more likely it is to be factual in nature'.

Relevance of the opinion evidence

As noted above, the opinion rule requires identification of why the evidence is said to be relevant in the proceeding, which (applying the test for relevance in s 55(1) of the Act) 'requires identification of the fact in issue that the party tendering the evidence asserts the opinion proves or assists in proving'.[3]

Ordinarily, the only possible relevance of the expert opinion evidence in the proceeding will be to prove the existence of the fact about which the opinion was expressed. Relevant expert opinion includes the following categories of evidence:[4]

- opinion evidence as to what actually happened in particular circumstances, on the basis of assumptions that the expert is asked to make, as when a pathologist expresses an opinion about cause of death;
- opinion evidence as to what might be likely to happen in the future, on the basis of assumptions that the expert is asked to make, as when an economist might predict the effect of identified phenomena on a market;
- evidence of what is normally done in particular circumstances experienced by the expert, as when a legal practitioner says what is normally done in a conveyancing transaction;
- evidence as to what can be done in particular circumstances that the expert is asked to assume, and which the expert has not experienced, as when an engineer says what could have been done to avoid a failure of a particular structure;
- evidence concerning special usage of language or terms in the field of the expert's expertise, as when a chemist explains special usage of terms that have a different meaning in everyday speech;
- opinion evidence about what should or ought to have been done in particular circumstances that the expert is asked to assume, as when a legal practitioner says what enquiries ought to have been undertaken in a particular transaction, as distinct from what enquiries are ordinarily undertaken;
- opinion evidence as to whether particular conduct that the expert is asked to assume satisfies or falls short of some legal standard, as when a medical practitioner says that a particular procedure was conducted negligently.

Within those general categories of relevant expert evidence, the expert can perform 3 legitimate functions:

- ***Generalising from experience and training:*** 'A person experienced in a particular discipline may, in the course of a lifetime, accumulate a mass of material about the subject of the person's expertise, from his or her own practice, from journals, from newspaper reports and from discussion with fellow practitioners, much of which the person may not be able to recall but which enables him or her to express an opinion more accurately than one who has examined only the facts regarding particular instances. Such a witness may base an opinion on his or her experience, without having to prove by admissible evidence all the facts on which the opinion is based. Such witnesses regularly generalise from experience, calling in aid all their training and professional experience in expressing an opinion upon a matter within their field'.[5]

- ***Acting as librarian:*** 'In many instances, a witness who has experience in a particular discipline may not himself or herself know the answer to a particular problem from his or her own study or experience. However, being trained in the relevant discipline, the witness may be able to refer to works of authority in which the answer is given. In that sense, the witness may be said to be acting as a librarian. In that function, the witness is not giving evidence of his or her own opinion, except to say that, in his or her opinion, the books to which reference is made are of sufficient standing to be accepted by the Court'.[6]

- ***Acting as statistician:*** 'The third function of such a witness can be to apply statistical methods to material available from various sources in order to draw relevant conclusions. The statistical expertise and experience of the witness may be brought to bear on material otherwise in evidence'.[7]

If the expert opinion evidence is relevant for some purpose other than to prove the existence of a fact about the existence of which the opinion was expressed, then the exclusionary opinion rule in s 76 does not apply and it will not be necessary to satisfy the exception in s 79 of the Act. Furthermore, by reason of s 77 of the Act, if the evidence is admitted for some other purpose, it may nevertheless be used to prove the existence of the fact about the existence of which the opinion was expressed, unless an order is made under s 136 of the Act limiting the use that may be made of the evidence.

If the expert opinion evidence is not relevant – that is, even if accepted, the evidence could not rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding (s 55(1)) – it is not admissible in the proceeding, whether as opinion evidence or otherwise (s 56(2)).

"Your Honour, I call Nigel From The Pub… expert witness on whatever you like."

Expert evidence admissible as an exception to the opinion rule: s 79 of the Act

If a party seeks to adduce expert evidence of an 'opinion' to prove the existence of the fact about the existence of which the opinion was expressed, the evidence must satisfy the requirements of s 79 of the Act in order to be admissible.

Section 79 of the Act provides an exception to the opinion rule for the admission of expert evidence. It is noted that other exceptions to the opinion rule are provided in Part 3.3 of the Act for other forms of opinion evidence, such as the exception provided by s 78 for the admission of lay opinion evidence.

Section 79(1) of the Act states: 'If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge'.

In *Honeysett v The Queen*,[8] the High Court noted that s 79(1) of the Act states two conditions of admissibility for expert evidence: first, the witness must have 'specialised knowledge based on the person's training, study or experience'; and second, the opinion must be 'wholly or substantially based on that knowledge'. Subsequent decisions of intermediate courts of appeal have emphasised that these two conditions of admissibility are the *only* conditions of admissibility imposed by s 79, and attempts to impose other conditions of admissibility (such as a test of 'reliability') have been rejected as being inconsistent with the statutory test imposed by s 79.[9]

'Specialised knowledge'

As to the first condition of admissibility, the term 'specialised knowledge' is not defined in the Act. In Honeysett at [23], the High Court said of 'specialised knowledge':

(i) It is to be distinguished from matters of 'common knowledge' (referring to s 80(b) of the Act);

(ii) It is 'knowledge which is outside that of persons who have not by training, study or experience acquired an understanding of the subject matter';

(iii) It may be knowledge of matters that are not of a scientific or technical kind and a person may acquire specialised knowledge by experience;

(iv) However, the person's training, study or experience must result in the acquisition of 'knowledge'. The term 'knowledge' is used in s 79 in the sense of 'an acquaintance with facts, truths or principles, as from study or investigation', and which is 'more than subjective belief or unsupported speculation … [It] applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds'.[10]

One issue that may arise in satisfying this first condition of admissibility is whether

some purported expert opinion constitutes 'specialised knowledge' within the meaning of s 79(1) of the Act. This issue sometimes arises where a purported field of expertise is new or emerging.

At common law, in order for an opinion to be admissible as expert evidence it was necessary to demonstrate that the subject matter of the opinion 'forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or expertise'.[11]

However, in drafting the Act, the Australian Law Reform Commission declined to include any 'field of expertise' test for determining the admissibility of expert evidence, instead preferring to rely on the general power under s 135 of the Act to exclude purported expert evidence that 'has not sufficiently emerged from the experimental to the demonstrable'.[12]

Recently, in *DPP v Tuite*[13] (a decision handed down after the High Court's decision in *Honeysett*), the Victorian Court of Appeal rejected an argument that expert evidence based on a new technique of DNA analysis was not sufficiently 'reliable' to be admissible under s 79(1) of the Act. The Court appeared to decide that (a) so long as the witness has knowledge of the subject matter which is outside that of persons who have not by training, study or experience acquired an understanding of the subject matter, and (b) that knowledge is based on the person's training, study or experience, the evidence is admissible under s 79(1) of the Act notwithstanding it is novel or that the inferences drawn by the witness have not been tested or accepted by others. The Court held that if expert evidence is to be excluded because it is 'unreliable' (that is, because it is untested, unverified or unsupported), it may be excluded on discretionary grounds under s 135 of the Act (or s 137, in criminal proceedings). The reasoning in *Tuite* was approved by the New South Wales Court of Criminal Appeal in *Chen v R*.[14]

Therefore, in light of these matters, if a challenge is made to an expert witness' evidence on the basis that the purported 'field of expertise' is not 'specialised knowledge', it will be necessary for the party seeking to adduce the evidence to satisfy the court that the opinion is 'specialised knowledge' (as explained in *Honeysett* and *Tuite*), otherwise the evidence may either (a) fail to satisfy the test for admissibility under s 79(1) of the Act, or (b) be excluded under s 135 of the Act.

Whether the purported expert has 'specialised knowledge based on the person's training, study or experience'

Another issue that may arise in satisfying the first condition of admissibility under s 79(1) is whether the particular witness *in fact* has the 'specialised knowledge based on … training, study or experience' which the witness professes to have. That is a question of fact which must be satisfied by the party seeking to adduce the expert evidence in respect of each opinion sought to be given by the witness.[15]

Whether the expert's opinion is 'wholly or substantially based' on specialised knowledge based on training, study or experience

The second condition of admissibility of expert evidence under s 79(1) of the Act is that the expert's opinion must be based 'wholly or substantially' on his or her specialised knowledge based on training, study or experience.

This condition of admissibility focuses largely on the *form* in which the expert's opinion is expressed, since it is necessary the expert sufficiently discloses his or her reasoning process so that the Court can be satisfied that the expert's opinion is based wholly or substantially on his or her specialised knowledge.[16] Therefore, it is 'ordinarily the case' that 'the expert's evidence must explain how the field of 'specialised knowledge' in which the witness is expert by reason of 'training, study or experience', and on which the opinion is 'wholly or substantially based', applies to the facts assumed or observed so as to produce the opinion propounded'.[17] Furthermore, an expert whose opinion is sought to be tendered 'should differentiate between the assumed facts upon which the opinion is based, and the opinion in question'.[18]

To be admissible under s 79(1), it is sufficient that the expert's opinion is 'substantially' based on his or her specialised knowledge. This allows for the fact that 'it will sometimes be difficult to separate from the body of specialised knowledge on which the expert's opinion depends 'observations and knowledge of everyday affairs and events''.[19]

In *Dasreef Pty Ltd v Hawchar*,[20] the plurality noted that in 'many, if not most cases', the requirements of this second condition of admissibility should be able to be met 'very quickly and easily', such as where a specialist medical practitioner expresses a diagnostic opinion in his or her relevant field of specialisation. In such a case, it will require 'little explicit articulation or amplification' to demonstrate that the witness' opinion is wholly or substantially based on his or her specialist knowledge once the witness has 'described his or her qualifications and experience, and has identified the subject matter about which the opinion is proffered'.

For completeness, it should be noted that in *Dasreef Pty Ltd v Hawchar*, Heydon J identified two additional common law rules as to the form in which expert opinion evidence is presented which his Honour held continue to apply to govern the *admissibility* of expert opinion evidence under s 79 of the Act (rather than matters going merely to weight). The first rule is the 'assumption identification rule',[21] which requires an expert to state the facts and assumptions on which the opinion is based. The second rule is the 'statement of reasoning rule',[22] which requires the expert to state the reasoning by which the conclusion arrived at flows from the facts proved or assumed by the expert, so as to reveal that the opinion is based on the expert's expertise. There are three points to make about Heydon J's reasoning. First, in light of the plurality's reasoning in *Dasreef*, which focused upon the two conditions of admissibility based on the statutory language of s 79(1) of the Act (discussed above), it is to be doubted that the 'assumption identification rule' and the 'statement of reasoning rule' continue to apply as standalone rules governing the admissibility of expert opinion evidence under s 79(1) of the Act. Second, however, the 'assumption identification rule' and the 'statement of reasoning rule' do not appear to differ much in substance from the second condition of admissibility identified by the plurality in *Dasreef* (discussed above), which focuses on the form of the expert opinion and requires the expert to sufficiently disclose his or her reasoning process so that the Court can be satisfied that the expert's opinion is based wholly or substantially on his or her specialised knowledge. Third, in practice it would be prudent to continue applying the 'assumption identification rule' and the 'statement of reasoning rule' in *preparing* expert evidence. An expert report certainly will not be open to attack on admissibility grounds if the expert has complied with the 'assumption identification rule' and the 'statement of reasoning rule' in preparing his or her expert report.

An additional issue: Whether the opinion must be based substantially on facts that have been or will be proved by other evidence in the proceeding (the 'basis rule' or 'proof of assumption rule')

In *Dasreef Pty Ltd v Hawchar*, Heydon J also identified a third common law rule which his Honour held continued to apply to govern the admissibility of expert evidence under s 79(1) of the Act. This is the common law 'basis rule' (or what Heydon J called the 'proof of assumption rule'), which provides that expert opinion is not admissible unless evidence has been or will be admitted that is capable of supporting findings of primary facts that are sufficiently like the factual assumptions on which the opinion is based.[23]

In *Dasreef Pty Ltd v Hawchar*,[24] the plurality acknowledged that the Australian Law Reform Commission's interim report on evidence had denied the existence of the common law basis rule and that the ALRC did not intend to include it in the Act.[25] Therefore, in light of the High Court's de-

cisions in *Dasreef* and *Honeysett*, it appears that there is not any 'basis rule' that governs the *admissibility* of expert opinion evidence under s 79 of the Act. This is the view taken in recent decisions of intermediate courts of appeal.[26]

However, expert evidence will likely be given little, if any, weight if the party adducing the evidence fails to prove by other evidence the truth or correctness of the assumptions on which the opinion was based.[27] Furthermore, it has been suggested that an expert opinion 'completely unrelated to proved facts' may be so hypothetical that it does not meet the test of relevance in s 55 of the Act, in which case the evidence cannot be admitted.[28] Furthermore, where an expert relies on unproven assumptions forming a fundamental basis for his or her opinion, the evidence may be excluded under s 135 of the Act.[29]

Part 31 of the Uniform Civil Procedure Rules 2005 (NSW)

Division 2 of Part 31 of the UCPR also includes rules relating to the admissibility of expert evidence in civil proceedings in New South Wales courts. Part 31 provides the Court with significant control over the use of expert evidence. Part 31 should be read in conjunction with relevant practice notes applying in the particular court in which the expert evidence is sought to be adduced.

The main rules imposed by Part 31 are as follows:

(i) Parties must seek directions if they intend to, or it becomes apparent that they may, adduce expert evidence: r 31.19(1).

(ii) Unless the Court orders otherwise, an expert witness's evidence in chief must be given by the tender of one or more expert's reports: r 31.21.

(iii) The expert witness must comply with the code of conduct set out in Schedule 7 of the UCPR: r 31.23(1). Unless the Court orders otherwise, the expert's report may not be admitted in evidence unless the report contains an acknowledgment by the expert that he or she has read the Code of Conduct and agrees to be bound by it: r 31.23(3). Furthermore, the Court may not receive oral evidence from the expert unless it orders otherwise or the expert has acknowledged that he or she has read the Code of Conduct and agrees to be bound by it: r 31.23(4);

(iv) A party must serve an expert report in accordance with a Court order, or any relevant practice note, or if no such order or practice note is in force, at least 28 days before the hearing: r 31.28(1). Except by leave of the Court or with the other parties' consent, the expert's report is not admissible unless it is served in this way: r 31.28(3)(a). Oral evidence from the expert is also not admissible without leave or consent unless the expert's report has been served in accordance with the rules and the report contains the substance of the matters sought to be adduced in the oral evidence: r 31.28(3)(c). The Court will only grant leave if there are exceptional circumstances or the report merely updates an earlier version of the report that was properly served: r 31.28(4).30

(v) Other than in a trial by jury, if served in accordance with r 31.28, an expert's report is admissible as evidence of the expert's opinion and, if the expert's direct oral evidence on a fact on which the opinion was based would be admissible, as evidence of the fact: rr 31.29(1) and 31.30(2). This is subject to the expert report complying with the admissibility requirements of s 79 of the Act, as discussed above.

(vi) If a party requires the expert for cross-examination, the expert's report cannot be tendered under ss 63, 64 or 69 of the Act or otherwise used in the proceeding unless the expert attends for cross-examination, or is dead, or the Court grants leave to use it: rr 31.29(5) and 31.30(6).

(vii) If an expert provides a supplementary report, neither the supplementary report nor any earlier report by the expert may be used in the proceeding unless the supplementary report has been served on all parties affected: r 31.34(1).

The failure to comply with one or more of the requirements of Part 31 of the UCPR does not result in the evidence being automatically inadmissible under s 79 of the Act, nor does it result in the mandatory exclusion of the expert evidence under s 135 of Act. However, the failure to comply with the relevant requirements of UCPR Part 31 may provide grounds for the discretionary exclusion of the evidence under s 135 of the Act.[31] That being the case, on any application to exclude expert evidence under s 135 of the Act, it will be necessary to consider whether the probative value of the evidence is outweighed by any prejudice, confusion or undue waste of time caused by the failure(s) to comply with Part 31 of the UCPR.

Conclusion

As can be seen, the admissibility of expert evidence requires more than a knowledge of s 79 of the Act. That provision must be considered along with the requirements of s 56 of the Act and Part 31 of the UCPR. The discretionary powers of the Court under Part 3.11 of the Act are also important, including where a field of specialised knowledge may still be in its infancy or where assumptions and facts that form the basis for the opinion are not proven by the close of evidence. Further, certain common law requirements such as the assumption identification rule and statement of reasoning rule continue to be important in practice.

END NOTE

1 *Lithgow City Council v Jackson* (2011) 244 CLR 352 at [10]; *Honeysett v The Queen* (2014) 253 CLR 122 at [21]
2 (2011) 190 FCR 299 at [44]-[46]
3 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [31].
4 P*an Pharmaceuticals Ltd (In Liq) v Selim* [2008] FCA 416, at [35].
5 *Pan Pharmaceuticals* at [26]
6 *Pan Pharmaceuticals* at [27]
7 *Pan Pharmaceuticals* at [28]
8 (2014) 253 CLR 122 at [23]
9 See eg *DPP v Tuite* (2015) 49 VR 196; [2015] VSCA 148
10 Citing *Daubert v Merrell Dow Pharmaceuticals Inc* (1993) 509 US 579 at 590
11 *R v Bonython* (1984) 38 SASR 45 at 47
12 ALRC 26, vol 1, para 743
13 (2015) 49 VR 196; [2015] VSCA 148 at [72]-[73]
14 [2018] NSWCCA 106 at [82]
15 *HG v The Queen* (1999) 197 CLR 414 at [40], [44]; Odgers, *Uniform Evidence Law* (13th ed, 2018) at [79.120]
16 *HG v The Queen* (1999) 197 CLR 414 at [39]
17 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [37], citing *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85]
18 *HG v The Queen* at [39]
19 *Honeysett* at [24]
20 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [37]
21 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [64]-[65]
22 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [91]-[94]
23 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [66]-[90]; see also Heydon, *Cross on Evidence* (11th ed, 2017), at [29070];
24 (2011) 243 CLR 588 at [41]
25 ALRC 26, vol 1, paragraph [750]
26 *Langford v Tasmania* [2018] TASCCA 1 at [36]-[42]; *Taub v R* (2017) 95 NSWLR 388; [2017] NSWCCA 198 at [30]-[33]; *Kyluk v Chief Executive, Office of Environment and Heritage* (2013) 298 ALR 532; [2013] NSWCCA 114 at [176]-[179]
27 *Taub* at [33]
28 *Langford* at [40]
29 See eg *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 7)* [2008] FCA 1364 at [332]-[354].
30 A useful discussion of 'exceptional circumstances' under the predecessor rule to r 31.28(4) is set out in *Yacoub v Pilington (Aust) Pty Ltd* [2007] NSWCA 290 at [66]-[67] (and see also *DJ Singh v DH Singh and Others* [2018] NSWCA 30 at [91].
31 *Chen v R* [2018] NSWCCA 106 at [20]-[29]; *Wood v R* (2012) 84 NSWLR 581 at [728]-[729]

The fascinating life of James Martin

John and Patricia Azarias, co-founders of the Lysicrates Foundation, introduce us to the Martin Orations, named in honour of James Martin, QC, attorney general, premier and chief justice of New South Wales.

The hub of Sydney is named after a forgotten man. Not one in a hundred people could say today who he was. Yet the story of James Martin (1820-1886) is a very Australian one – poor boy makes good through talent and determination, rises to the highest positions in the land, and shapes the future of the nation. It is time he was better known.

Born in Ireland, James Martin, son of Governor Brisbane's horse groom, was brought up in the servants' quarters of Parramatta's Government House. His talents emerged very early, and by the time he was 12, it was obvious he had to go on with his education. In 1832, there were no high schools in Parramatta, so his father tried to get a job in Sydney, but failed. The penniless boy looked set for a life cleaning out horse boxes.

James, however, was having none of it. He told his father it was simple. To get to high school in Sydney, he would walk. From home in Parramatta. So for two years, until his father did find a job in the city, the boy walked, hitched rides, stayed overnight and did everything he could to get an education. Within two years, the Sydney school he walked to, W T Cape's Academy in Phillip St, merged with Sydney College, and moved into the newly-constructed building nearby which is now Sydney Grammar.

There the young Martin learned to love Greek and Latin and everything they conveyed – balance, moderation, beauty, learning, the rule of law, and democracy. With a rare gift for words, he wrote, at only 18 years old, Australia's first book on what life was like in the colony. The next step was easy. He went into journalism, and became a feared campaigner for the self-determination of the colony.

It wasn't enough. In his spare time, he studied the law, and within a few years, had built a flourishing practice as a solicitor, and later, as a barrister. By 1868, still a lover of the classics, he was rich enough to pay twenty thousand pounds for a spectacular garden for his Potts Point house, to contain the lovely sandstone replica he had commissioned of the Lysicrates Monument (built in 334 B.C. in Athens). Today you can find it in the Botanic Gardens, in an even more dramatic position.

But for Martin, even the law was not enough. He entered politics, as the protégé of William Charles Wentworth. Soon he became the colony's attorney-general, and a QC, Australia's fourth, and first locally-trained, one.

And even that was not enough. He rose to become premier of New South Wales, three times, and ultimately, the first non-English chief justice. He is the only person ever to have filled all three roles.

So the poor Irish Catholic boy, whom the wife of Governor Hercules Robinson refused to admit to her salon, who was blocked from becoming chancellor of Sydney University, and who was blackballed twice by one of the most prestigious Sydney men's clubs, ended up being able to 'break the wig ceiling' (as Katie Walsh says in her 8 March AFR article, *Just how white is the legal profession?* written on the occasion of the 2018 International Women's Day), in a world dominated by supercilious and exclusionary English practices. A triumph for the nascent diversity of Australian society.

The life is fascinating enough. But Martin's passions are even more instructive for us today. His ruling drive was self-determination for a strong colony. To that end, he started programs to train street urchins in a trade; as Premier he strongly supported his protégé Henry Parkes in the introduction of the Public Schools Act; he created the Mint, popularly called Martin's Mint, so that Australia did not have to depend on Britain for its coinage; he advocated for democracy and transparency in government, writing that 'one of the greatest evils arising from this system of irresponsible government is the mystery in which the motives and actual purposes of their rulers are hid from the colonists themselves'; he was the first major lawyer in the colony to promote its cultural and intellectual endeavours; and, together with Parkes, he canvassed ideas for its future governance.

Their biggest idea, of course, was federation. The two of them were often to be seen in one of their neighbouring Blue Mountains houses, sitting on the verandah sipping a drink in the sunset, discussing how federation could be shaped and brought into being.

As a politician, Martin may have been a firebrand. But as chief justice he was a model of scrupulousness and impartiality.

It is an indictment of our public education that the man who did so much to create it, and indeed our whole system of governance, has been allowed to fall into oblivion. However, Gilbert + Tobin and the Lysicrates Foundation have come together to revive our memory of James Martin, the man, and the boy.

Together they have established the annual Martin Oration, to remember and honour this giant of our past. Two Martin Ora-

tions have now been delivered, one by Tom Bathurst AC, Chief Justice of the NSW Supreme Court, and the other by Robert French AC, former Chief Justice of the High Court.

A signal feature of Bathurst's Martin Oration was its stress on Martin's actions to affirm judicial independence, to adhere to precedent, and to follow the court's established colonial practice (rather than any contrary English practice). We hear a distant echo of the firebrand under the full bottomed wig.

In this, as Bathurst shows, two strains of Martin's legal thinking are evident: on the one hand, the strength of his traditional view that the law was 'a body of rules and precepts to be interpreted and refined by judges; but to be changed, if thought fit, only by legislators'[1], and on the other, his opinion that those rules and perspectives should be those established in the colony, not in and by the mother country. A traditionalist shaped by his classical education to value the rule of law; but a modern man, shaped by the new environment of the colony.

Bathurst stresses, too, some of Martin's extra-legal activities: his work as a trustee of the Australian Museum, as a member of the Hyde Park Improvement Society, as a promoter of Sydney College, which became Sydney Grammar, and as a strong advocate for children's welfare and education.

In his Martin Oration, French builds on the approach taken by Bathurst. He begins by regretting how little contemporary Australia does 'to celebrate those leaders of the Australian colonies who created the conditions for one of the world's most successful and durable representative democracies'.

Going on to highlight the broad issue of public trust and leadership, he points out that throughout his whole life Martin 'upheld the dignity and authority of all three of his high positions, was never accused of impropriety or corruption, and profoundly believed in the concept of public service as a public trust'.

He goes on to highlight Martin's contemporary relevance – to the 'idea of public office as a public trust and the related idea of public trust in the workings of our democracy and its institutions which underpin their legitimacy, their authority and their effectiveness'.

Against Martin's upholding of the concept of public service as a public trust, French looks at today's rather different climate. Today, he says,

> Democracy and its institutions are under challenge around the world… [we see] declining trust and rising populism… [and] disenchantment and lack of trust open the way for the snake-oil salesmen of populism, to come in from the bad lands of political ideologies to offer their own simplistic nostrums.

A replica of the Lysicrates Monument, which Martin commissioned for his Potts Point home, now found in the Botanic Gardens, Sydney.
Photo: Kgbo / Wikimedia Commons

Lamenting the 'partisan clamour' becoming endemic in Australia, he homes in on the key issue. 'The first responsibility of the holders of public office, parliamentary officials or judicial, in meeting the threat posed by those trends, is to treat each of their offices as a trust and commit to explaining what they are doing and engaging intelligently with their publics . . .trust by the people in their own institutions and trust-like behaviour by public officers are the fundamental binding force of our democracy'. To reinforce the point, he cites Brennan CJ, who in 2013 said 'all decisions and exercises of power [should] be taken in the interests of the beneficiaries, and that duty cannot be subordinated to, or qualified by, the interests of the trustee'.

But while French is alert to the threats, he is not in the end pessimistic for Australia. He ends his Oration with the words:

'Despite criticisms and concerns about the current state of democratic government, Australia remains a stable, durable and successful democracy. It could be better than it is. It is part of the legacy that Sir James Martin and his fellow nation-builders left to us. It is our duty to pass it on, at least intact, and, if possible, enhanced, to succeeding generations'.

We are fortunate to see such eminent jurists following Martin's thoughtful and civilised precedent. Their distinction of mind is a modern reflection of that of Martin himself.

END NOTES

1 J M Bennett, *Sir James Martin*, The Federation Press, 2005 p. 313, quoted by Bathurst in his Oration.

The Lysicrates Foundation has sought to revive the memory of James Martin through a number of initiatives. The Legal Friends of Lysicrates and James Martin (patron T C F Bathurst CJ) has been established to support the work of the Lysicrates Foundation. The sandstone Lysicrates Monument, which he financed, a replica of an ancient Athenian original built to celebrate a win in the play competition that stopped the city every year for a week, has been restored through the Foundation, with the generous support of the NSW government; and two drama competitions on the ancient model have been inaugurated: the Lysicrates Play Competition, where it is the diverse (non-paying) audience that chooses the winner, and the Martin-Lysicrates Play Competition for plays written for children, held in Western Sydney, where it is the children who vote for the winner. The fourth Lysicrates Play Competition was held on Sunday 11 March at the Opera House. The Governor of NSW, General the Hon. David Hurley AC, DSC (Ret'd), presented the prize to the winner, Travis Cotton, in a strong field including Christine Evans and H Lawrence Sumner.

In addition, the Lysicrates Foundation has sponsored two statues of the boy James Martin striding off to school, and an illustrated book, *Lysicrates and Martin: Two Arts Patrons return to give again*, MUP 2017, about the Foundation's first three years.

Gilbert + Tobin is a major Australian law firm. It places a strong stress on corporate social responsibility, and supports numerous public interest initiatives in the areas of justice, culture and sport.

John and Patricia Azarias
Co-founders, Lysicrates Foundation

United Nations Day Lecture 2017

50 years of UNCITRAL: What's next?

By Tim D Castle[1]

Introduction

The United Nations Commission on International Trade Law (UNCITRAL) was founded by a resolution of the United Nations General Assembly on 17 December 1966, just over 50 years ago to further the progressive harmonisation and modernisation of international trade law.[2]

One of Australia's early representatives at an UNCITRAL meeting in 1970 was the Hon. Robert Ellicott AC QC, then Solicitor-General for Australia. He recently commented at the Sydney presentation of this lecture at how he was struck by 'the commonality of principles that bring people together – fairness, equity, relevance and integrity'. That ethos, established early on in the life of UNCITRAL, permeated its work throughout its first half-century and continues today.

My own journey in relation to the United Nations started 39 years ago in 1978, when I was selected as a NSW representative at a model United Nations conference in Hobart. I was assigned the role of representing China in our deliberations, possibly because I was one of the first to enroll in what was then a new subject at high school called "Asian Social Studies".

To put these dates in further context, back then Anzac Day marches were still led by veterans from the Boer War, President Nixon visited China for the first time in 1972. In 1975 the Vietnam war ended, Britain voted to enter the European Common Market and Gough Whitlam was sacked by Sir John Kerr

as the Australian Prime Minister.

Casting our attention back to this era, we see a picture of the world emerging from European colonialism, the latter stages of the Cold War, and the first steps being taken towards the global revolutions in commerce, telecommunications and transportation that we know today.

Fast-forward to 2012, when I had my first engagement with UNCITRAL in a side-discussion that took place in a conference room overlooking Wellington Harbour in New Zealand. At that time, I was an observer on behalf of the New York State Bar Association at a meeting of the CISG Advisory Council, having just completed my qualifications to act as an Arbitrator as a Fellow of the Chartered Institute of Arbitrators. That's a rather big mouthful, but is indicative of the interconnected way in which the modern world operates.

The theme of this paper is to address some of those interconnections from a distinctly Australian viewpoint, in three parts - first, what is UNCITRAL; second, what are some of its achievements in the past 50 years; and, third, how might UNCITRAL's role evolve over the next decade?

Before beginning, I would just like to add some further context. As a result of the Wellington meeting, with the endorsement and support of the Commonwealth Attorney General's Department (which has primary responsibility for Australia's engagement with UNCITRAL), the Law Council of Australia and UNCITRAL itself, I set up the body now known as UNCCA - the UNCITRAL National Coordination Committee of Australia - in 2013, which I currently chair. This is our first UN Day lecture, which has now been delivered in Adelaide, Perth, Brisbane, Melbourne, Canberra and Sydney,[3] and I hope will become an annual fixture on the legal program in future years. I will say a little bit more about UNCCA later in this paper.

I - What is UNCITRAL?

Many of you will have heard of the acronym UNCITRAL – which stands for United Nations Commission on International Trade Law - from the UNCITRAL Model Law on Arbitration, which has been incorporated in Australian legislation in the *International Arbitration Act* 1974.[4]

The Model Law is referred to generically as a legal "text", which is produced by the processes set up by UNCITRAL. There are several other types of texts, which include 'conventions', 'model laws', and 'legislative

Representing Australia at the UN in 1966: Solicitor-General the Hon. Robert Ellicott QC.

guides', in ascending order of flexibility of application.

The problem that all of these texts seek to address is how to develop a uniform international legal regime to minimise differences between sovereign states. The UN is not, of course, an international parliament. Thus, a workable approximation involves the development of a standard or harmonised set of legal rules that can be applied by and across individual nations to minimise legal friction for businesses trading internationally.

This, in short, is the *raison d'etre* of UNCITRAL.

It is an independent commission comprising 60 member states elected every three years by the UN General Assembly. It is supported by a permanent Secretariat, based in Vienna, of about 14 legal officers, who form part of the Office of Legal Affairs of the UN. Australia is currently a member of UNCITRAL having been elected in 2015 for a 6 year term. UNCITRAL also has a Regional Centre for the Asia Pacific Region, based in Incheon, South Korea.[5]

Sitting beneath the commission are six working groups which are responsible for developing and drafting the texts. Each working group meets twice a year for a week, once in New York, and the second time in Vienna – 12 meetings in all per year, with continuous translation during their sessions into the six official languages of the UN. The best way I can describe these meetings is that they are very large, well structured technical committees comprising government representatives and invited NGO observers.

As a result of the work of UNCCA, Australians now participate in every working group meeting either as delegates of the Australian government or as observers, usually on behalf of LAWASIA. I will return to aspects of the work of the working groups later in this paper.

Forging consensus is an ambitious goal, and in one sense this is the genius of UNCITRAL's traditions and structure, but it is also its vulnerability

The short point to make is this. The working groups provide a rare forum for multi-lateral discussions of commercial and trade law issues, with a clear focus on producing a solution, in the form of a text, by consensus. UNCITRAL is clear that its modus operandi requires decision-making by consensus at every level through the development and finalisation of its texts.

That process is necessarily time-consuming, but through discussion there can be the discovery of common ground, the identification of differences and the harnessing of energy to find solutions. On the other hand, there is little point in developing a text that incorporates some but not all points of view, if the object is to produce a harmonised set of legal rules, which has a universal global appeal to nation states.

Relevantly, these points of view must take into account the dichotomies between civil and common law traditions, developed and developing countries, western democracies and socialist states, federal states and unitary systems, and different religious cultures. Forging consensus is an ambitious goal, and in one sense this is the genius of UNCITRAL's traditions and structure, but it is also its vulnerability, as I will return to in the Parts II and III of this paper.

How does the process work in practice? It starts with a 'mandate' or legal task being given by the commission to one of the six working groups. Typically each working group will be working on one major mandate at any given time, although some mandates may give rise to several related texts, such as a Model Law and a Guide to Enactment.

The commission meets once a year in July, alternately in Vienna or in New York, for a 2-3 week period. At that meeting it assigns new mandates, and reviews the progress on existing mandates through reports from each

of the working groups.

Once a text is completed by a working group, meaning consensus on all of the terms of the text has been reached, it is then considered in detail by the commission. Finalisation, or adoption, by the commission gives the text its official status. This is not a formality, even though the commission will have been involved in prior consideration of the work on the text as it has been progressed. Again, however, consensus is the key, and government and political considerations are more likely to be at the forefront of deliberations at the commission meeting than in the working groups.

For completeness, I should also mention that certain texts, such as conventions, require approval by the UN General Assembly before they are finalised.[6] In any event, the work of UNCITRAL is reported annually to the General Assembly, and the work of UNCITRAL is considered to be an important part of the broader goals of the UN associated with the promotion of the rule of law and human rights generally.[7]

This whole process from inception to finalisation can take many years. This is a lecture in itself, but the process works in many cases, although not so well in others, as I will turn to shortly.

I want to just say something briefly about the Secretariat. It has two main functions in practice. First, it provides the organisational support for the working groups and their meetings, but the Secretariat does not participate in the deliberations, maintaining studious neutrality and leaving the discussions to the participants. Second, once a text has been adopted by the commission, the Secretariat, particularly in the Asian region through the Regional Centre, organises conferences and seminars to promote the adoption and implementation of texts - which is also work which we in UNCCA have been involved in assisting, when invited to do so.

II - UNCITRAL texts and Australia

The next phase in the process, once a text has been finalised, is known as adoption and implementation. In this part of the paper, I will examine these issues, by looking at the Australian experience with five UNCITRAL texts. Please bear in mind that to have a truly harmonised international law, the process of adoption and implementation must be replicated by countries around the world. So, in one sense the finalisation by UNCITRAL of a text is only the start of the harmonisation process.

The first and obvious point to make is that an international instrument, even one supported and signed by Australia, does not enter domestic law by its own force. It must be embodied in local legislation.[8]

A second and related point is that the mere signing of an international convention by the Australian Government does not give the Commonwealth power to override the allocation of powers under the Constitution.[9]

I propose to deal with five texts to illustrate the complexities, successes and shortcomings of the UNCITRAL process, as seen from an Australian perspective.

1. International Commercial Arbitration

The first text, or related series of texts, are those which underpin the global system of international commercial arbitration. This is an easy starting point as the High Court has recently confirmed in the TCL case that this is an appropriate matter for Commonwealth legislation and, specifically that the enforcement by Australian courts of international arbitration awards is not inconsistent with Commonwealth judicial power.[10]

International commercial arbitration also has a well-established track record that facilitates international trade, by allowing disputes to be resolved by arbitral bodies that private parties are prepared to trust, and it is an area where Australian lawyers are already making an impact.

The main text underpinning this system is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).[11] Although this Convention predates UNCITRAL, UNCITRAL has taken on responsibility for the promotion of this text for adoption and implementation around the world. The Convention is also given force of law in Australia by the International Arbitration Act 1974. The Convention provides, in essence, that a properly constituted arbitral award can be enforced in any convention countries without a re-hearing on the merits, with very limited exceptions (even if it is prima facie erroneous). There are 157 countries that are parties to the New York Convention, with more being added each year.[12]

There are 12 arbitration texts listed on the UNCITRAL website, the most recent of which is the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration 2014 ('Mauritius Convention'). This Treaty enables investor state arbitrations, like the plain-packaging tobacco arbitration, to be conducted 'transparently'. That is, by allowing confidentiality restrictions on the arbitration proceedings and award to be removed, as these disputes engage not merely private interests, but also the public interest in the actions of government parties.[13]

The Convention entered into force on 18 October 2017, and is a good illustration of the adoption process. Australian Government representatives were actively involved in the development of the Convention, as members of Working Group II. The Australian Government has indicated its support for the Convention, by signing it. However the Government has not yet ratified it, as there are two domestic matters to be addressed, both of which provide an insight into the complexity of the adoption process.

The first is a review of the Convention, by the Australian Parliament, through the Joint Standing Committee on Treaties (JSCOT), which I understand is presently underway. The second is the passing of amendments to the *International Arbitration Act* to ensure Australian domestic law conforms to the obligations under the Convention. These amendments form part of an omnibus law reform bill currently before the Senate, which will hopefully pass soon.[14]

I hope it is not an over-prediction to state that UNCITRAL texts have now largely completed the task of developing the legal infrastructure required to support the system of international commercial arbitration. The current work of Working Group II involves the development of texts to support a similar system for conciliation, being the phrase used to describe alternative dispute resolution. Representatives of the Australian government and UNCCA have been actively engaged in this project, and it may be a suitable topic for next year's UN Day lecture.

One final comment to make in relation to arbitration is to refer to the joint judgment of French CJ and Gageler J in the TCL Case. In that judgment, their Honours specifically referred to and relied upon the '*travaux preparatoires*' of UNCITRAL, being the Working Group meeting records, for the purpose of interpretation of the Australian statute.[15] This is a signal reminder to all of us of the importance not only of the text as the outcome of the process, but also to the records of the process itself, as we are called upon increasingly to interpret or comment upon international law instruments adopted in Australia.

2. International Sale of Goods - CISG

The CISG, or UN Convention on Contracts for the International Sale of Goods 1980 (also called the Vienna Convention), provides an interesting contrast to the topic of international arbitration. This text represents Australian federalism at its best. The Convention was signed in 1980 and came into effect on 1 January 1988. Australia signed the Convention on 17 March 1988, and within approximately 12 months, all States and Territories passed parallel legislation implementing the CISG to enable the Convention to come into effect domestically on 1 April 1989.[16]

The CISG differs from the arbitration example in the sense that it deals with substantive law and not merely jurisdiction and procedure. Three important facts about the CISG that I wish to note specifically:[17]

(a) There are now 87 countries which have adopted it, comprising all our major trading partners, except the United Kingdom;

(b) Many countries, including China have based their domestic contract law on the CISG;

(c) There is an international jurisprudence about implementation of the CISG which includes the important work of a voluntary body of experts - the CISG Advisory Council, whose meeting I attended in Wellington - who seek in a very practical way to bridge common law and civil law concepts through the ongoing preparation of expert opinions which they issue and publish in support of a harmonised interpretation of the CISG.[18]

Behind this apparent success, there are three caveats that should be made:

(a) First, parties can opt out of the CISG under Article 6, which Australian parties do on a regular basis, driven in part by the boilerplate provisions in large law firm precedents - a matter which requires a more thorough analysis and debate over time.

(b) Secondly, the legal profession does not always recognise that where the CISG applies, it excludes domestic Sale of Goods Acts. The two sources of law are not the same, one striking example being the ability of parties to rely upon subsequent conduct for the purpose of interpreting the contract. This can lead ultimately to judicial error, where counsel either fail to rely upon the CISG, or alternatively seek to apply domestic jurisprudence rather than international jurisprudence, to the interpretation of it.[19]

(c) Thirdly, it has been pointed out that the CISG is a product of 1970s contract jurisprudence, which does not include many developments in the realm of estoppel and the infusion of equitable principles that form part of our current contract law in Australia. An attempt by the Swiss Government several years ago to seek to redress this perceived shortcoming did not achieve the necessary support at UNCITRAL; however, UNCITRAL is now working on a joint project to examine the workings of international sales law with the Hague Conference on International Law and with UNIDROIT.[20]

With respect to these caveats, one might say that it is better to have something which applies broadly at the international level, even allowing for its imperfections, than nothing; but there is certainly a live issue discussed overseas about how the international community should deal with the problem of updating international contract law in the current era of global trade, travel and communications.

3. Cross-border insolvency

The UNCITRAL Model Law on Cross-Border Insolvency 1997 is another UNCITRAL achievement. The Model Law has been adopted in Australia,[21] and was successfully tested in the aftermath of the Global Financial Crisis (GFC) of 2007/2008.

The problem this text addresses is a consequence of the rise of multinational corporations, with numerous subsidiaries around the world, and the easy movement of assets - particularly cash – within those corporate groups to jurisdictions that may have very little to do with the business operations that generated those assets. The advantages of such a regime may be seen with the failure of corporations such as Lehman Brothers, a financial giant with over US$600bn in assets worldwide. Multiple questions of great complexity arise in relation to how the assets of such corporations can be collected and distributed in a fair and equitable manner to creditors and other stakeholders.

Over time, an international body of law can be expected to emerge, with new problems arising, and being addressed, in what one might hope is a relatively harmonised way between the courts of the relevant countries.

The impetus for UNCITRAL to undertake work on the Model Law was the aftermath of the 1987 stock-market crash, almost 10 years before the Model Law was finalised, and 20 years before the GFC where it was tested.

The aim of the Model Law is to envisage a single liquidation of the corporate group by the recognition of a Centre of Main Interest (COMI) as being the place where the principal liquidation is to occur. The central idea is that the COMI approximates the location of the headquarters of the corporate group, pre-insolvency. All other courts and local liquidators around the world are then obliged to act in support of the court and liquidator (or equivalent) at the COMI.

In this way, the expectation is that all assets of the group can be pooled and distributed in an equitable manner to creditors and other stakeholders having a claim against the group. Such a process minimises the time and cost that arises from conflict between insolvency administrators of group companies, and the serendipity of where assets and creditors are located at the time of liquidation. Put simply, groups that are run as a single global enterprise are intended by the Model Law to be liquidated as a single global enterprise.

Australia is one of 43 states to adopt the Model Law, having done so in 2008, noting that Japan and Mexico adopted it in 2000, the United Kingdom adopted it in 2003 and the United States in 2005. Singapore is a recent addition to the list, with an adoption in 2017. There are notable absences from the list of adopting countries, in particular the European Union, which has its own rules relating to cross-border insolvency between member states,[22] as well as Brazil, China, India and Russia.

In UNCITRAL terms, this Model Law is still in its early stages, particularly given the absence of the EU states. It would be naïve to suggest that the Model Law is a panacea, although like the CISG, it is a substantial achievement to have a text that works, even if there are imperfections. One of the potential problem areas to emerge is the risk of forum shopping by groups approaching insolvency, to produce a favourable location for the COMI, which suits the interests of management or particular groups of creditors.

This type of problem was the subject of an important Australian decision in a case called *Akers v Deputy Commissioner of Taxation*[23] in which the Full Federal Court upheld a decision of Rares J to refuse to order payment of certain Australian assets to a liquidator of a company called Saad that was in liquidation in the Cayman Islands, a Model Law state. The problem for the liquidator of Saad was that the Australian tax debt would not be recognised in the Cayman Islands (as the COMI) as a valid claim on the assets in the global liquidation. Thus, put briefly, the court applied Arts 21.2 and 22.3 of the Model Law to refuse part of the transfer to ensure the interests of a local creditor (here the DCT) were adequately protected in a fair and equitable manner.

Over time, an international body of law can be expected to emerge, with new problems arising, and being addressed, in what one might hope is a relatively harmonised way between the courts of the relevant countries. I should note that outside the formal UNCITRAL processes, UNCITRAL organises judicial and non-judicial workshops and colloquia on a range of topics including cross-border insolvency. This role of UNCITRAL, which goes by the general name 'technical assistance', forms part of its role in the implementation of texts.

That is, once the government of a state formally adopts the text, there is then a familiarisation process which must be undertaken in all legal and commercial communities to embed consciousness of the text among relevant actors to make sure the text is used and

applied. Public lectures, such as these United Nations Day lectures, and this subsequently published paper, are all part of the dissemination process, and it is one of the areas for future development by UNCCA within Australia and in our region. I might add that one of the benefits of harmonised texts, and an international jurisprudence in support of that text, is that local legal skills can be readily translated and applied outside Australia in dealing with problems arising under the Model Law.

There is much more to say than time allows in relation to the area of cross-border insolvency and Working Group V, which has a full agenda of matters for consideration that has engaged, and continues to engage, an active international insolvency profession in Australia.

4. Electronic commerce

The fourth topic is one on which Australia has a mixed score-card, and highlights the difficulties of our federal system in maintaining leading-edge status in international commercial law.

I doubt that many of you will have looked into why it is that the law accepts electronic communications in most cases to be the equivalent of traditional hard copy communications. We just seem to take for granted that what can be done by email, or other electronic interaction, will be as good in most cases as if we had taken out pen and paper and sent the communication in the post, with an envelope and stamp on it. UNCITRAL prepared its first Model Law on Electronic Commerce in 1996 – the year Google was invented, the Palm Pilot was released and Microsoft released its first web browser. In 2001, UNCITRAL produced a Model Law on Electronic Signatures, and in 2008 UNCITRAL produced a Convention on the Use of Electronic Communications in International Contracts (known as the ECC Convention). Just to remind you, in 2008, the iPhone had just been released, and we were still running Windows XP on our computers.

The problem in Australia is that electronic commerce, like the sale of goods, involves both state and federal law. The 1996 Model Law on Electronic Commerce was adopted by matching legislation around Australia, both at the state and federal level by a series of cognate Electronic Transactions Acts.[24] An important point to make here about Model Laws, as a form of UNCITRAL text, is that there is greater room for flexibility than with Conventions. This flexibility is important for allowing differences between states and jurisdictions.

In the area of electronic commerce, the individual differences between the jurisdictions was provided for by creating common core provisions in the relevant Electronic Transaction Acts, but allowing each jurisdiction the ability to exclude the operation of the Act by a regulation in relation to particular activities. The net result was nine matching Acts, but nine separate regulations and lists of exclusions prepared by nine sets of parliamentary drafters. Although there are some common subjects for exclusion, such as wills and conveyancing documents, the regulations are not a model of coherence and uniformity which exhibit the benefits of harmonised law – quite the opposite.

The problem with this lack of uniformity became apparent when the Model Law of 1996 was updated by the ECC Convention of 2008. The Standing Committee of Attorneys General, as it was then known, endorsed the amendment of the Electronic Transaction Acts to encompass the changes embodied in the 2008 ECC Convention. This occurred in April 2007. JSCOT also approved the entry by Australian into the Convention in 2011.[25] However the nine state, territory and Commonwealth parliaments did not complete the process of amending their Acts until 2013.

Although the Commonwealth attorney-general, Senator the Hon George Brandis QC announced in December 2015 that Australia would move to become a party to the ECC Convention, this has not occurred in part because of the mish-mash of exceptions that exist in the regulations under the respective Electronic Transactions Acts. A particular problem in this regard is the Commonwealth Regulation, which clearly needs an overhaul as its exemptions include references to Acts that have been repealed and practices that no are no longer used. UNCCA has been offering advice and suggestions to the Australian Government about these problems, but as yet there is no clear solution emerging. The short point is that until this matter is addressed, Australia will not be Convention-compliant, and will slip behind world best practice in electronic commerce until action is taken.

In the meantime, the ECC Convention continues to grow in status, with countries such as Fiji and Cameroon becoming signatories in 2017, joining other earlier adopters such as Singapore and Russia. Further, the ECC Convention was to be one of the platforms to be mandated by the Trans Pacific Partnership (TPP) Agreement, which has not proceeded. However one might speculate that any subsequent multilateral trade agreement will adopt a similar methodology. I remain hopeful that we will have some better news to report next year in relation to the amendment at least of the relevant Commonwealth regulation and the subsequent entry into the ECC Convention.

Representing Australia at the UN in 1966: Solicitor-General the Hon. Robert Ellicott QC.

5. Rotterdam Rules

The fifth area paints a different picture again of the limits of legal harmonisation attempts by UNCITRAL. In 2009, the UN passed a Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, known as the Rotterdam Rules. This was an ambitious project commissioned by UNCITRAL to create a coherent set of rules to govern the rights and liabilities of parties involved in the international carriage of goods from door-to-door.

The problem these Rules were seeking to address is that the domestic part of any carriage of goods, say by road or rail, was regulated by domestic law, while the international part of the carriage by sea was regulated by international rules such as the Hague Rules

or the Hague-Visby Rules. With the growth of international commerce, one might be tempted to say that it would make sense for there to be a single set of rules that applies to individual shipments from the supplier in country A to the consumer or business in country B.

The Rotterdam Rules were the product of seven years work by Working Group I from 2002-2009, yet the Convention is not in force and there are parties who support it and those who oppose it, both domestically and internationally. Where particular parties stand in relation to the Rules seems to be related to whether the new Rules will create a perceived advantage or disadvantage to their side of the industry, *vis-à-vis* other participants in the transport industry. That is, sources of support and opposition do not appear to be geographically aligned, which of course makes the role for governments more difficult as they have constituents and stakeholder groups on both sides of the debate.

I do not wish to enter into the substantive debate, even if there were time to do so. However, the point I would make is that the Rotterdam Rules may be unique from the other areas I have examined, in that these Rules represent an attempt to fundamentally reshape an existing industry and practices, rather than put in place a harmonised legal framework where there were either no existing rules, or the pre-existing rules and practices were weak or divergent. In other words, in the realm of change-management of well-established existing rules, UNCITRAL may have a more difficult role to play than in the realm of creating new rules or bringing coherence to existing rules and practices.

III. What's next?

In this final part of this paper, I wish to touch on two current UNCITRAL projects, which are both of a very different nature, and highlight some interesting issues about UNCITRAL's future.

L to R: Chrissa Loukas SC, the Hon Justice Steven Rares, the Hon Robert Ellicott AC QC, Tim Castle, barrister and chair of UNCCA

1. Investor State Dispute Settlement

At its meeting in July 2017, the commission debated and resolved to give a new mandate to Working Group III to examine the current concerns about the workings of the Investor State Dispute Settlement (ISDS) process, and consider whether reforms were desirable. This is a complex topic, and the most I can do at this stage is set out some preliminary remarks.

For those of you who have not encountered the term ISDS, it is a relatively recent development in trade law. In essence, the bilateral investment treaties (BITs) of many countries now provide a remedy for an overseas entity which makes a financial investment in a foreign country. Where the government of that country exercises its sovereign power to change the law in that country which adversely affects the investment made by the foreign entity, the foreign entity has the right to commence an arbitration seeking damages against the country's government. An analogy to this remedy may be that of provisions similar to s 51(xxxi) of the Australian Constitution, which provide for the acquisition of property on just terms.

Australia has recent experience of such an ISDS dispute, when Philip Morris commenced an arbitration seeking substantial damages against Australia in relation to the passing of the plain packaging tobacco laws. In that case the arbitral tribunal dismissed Philip Morris' claim on a preliminary point as to jurisdiction.[26] This arbitration followed an unsuccessful application by another tobacco company to the High Court of Australia involving claims, inter alia, that the legislation contravened the just terms provision of the Constitution.[27]

There are three important issues that are raised by this topic. First, the desirability of having a mechanism that allows claims to be made by investors, to encourage foreign investment, by removing an element of sovereign risk. Secondly, the philosophical dilemma of an international tribunal (however constituted) passing judgment on the exercise by a state of its sovereign power to act. Thirdly, the tension between the role of the courts exercising judicial power within the state, in accordance with the Constitution and usages of that state, and the role of external tribunals adjudicating on disputes arising out of a treaty entered into by the state with another state.

The third of these issues has been the subject of a paper by French CJ.[28] As the tobacco litigation demonstrated, this tension is not merely theoretical. While it may be accepted that the High Court and the ISDS arbitration in relation to a given piece of legislation would be concerned with different legal heads of claim, it is questionable whether the Australian public would be so discerning, if the High Court were seen to be upholding the legislation and an arbitral tribunal (not subject to any right of appeal) was seen to be declaring the same legislation to be a breach of Australia's international duties, sounding in a very large award of damages.

There are, of course, other areas in which the Australian Government participates in international tribunals – a recent example being the case involving Timor-Leste and Australia's maritime boundaries in the Permanent Court of Arbitration, or Australia's claim against Japan in relation to whaling in the International Court of Justice.[29] This leads to one of the criticisms that has been made of the current ISDS system, that it is essentially one based upon ad hoc tribunals constituted by private individuals who are appointed as arbitrators. These individuals are all eminent members of the arbitration community, and as a member of that community, I can attest to the high standards expected of its members. But the eminence and qualifications of the individuals is not

the essential point.

The real question I suspect goes much deeper, and it is one of the challenges of our times. That is, as Spigelman CJ often remarked, the legitimacy of the exercise of judicial power depends upon public acceptance of the institutional presence of a court and the court system, rather than upon the individual judges who comprised the courts from time to time.[30] In the case of private disputes, party autonomy naturally leads to the conclusion that private appointment of ad hoc arbitration panels is an acceptable exercise of the power to resolve that dispute. I am not sure that the same logic applies to disputes about the exercise of public power.

I don't wish to say too much more on this topic, other than to refer to an excellent paper given by Warren CJ and Croft J in relation to the advantages of international commercial courts.[31] Such a court now exists in Singapore, as an extension of its domestic court system, and there is no reason why an Australian International Commercial Court could not be established, as their Honours have observed.

One of the questions for Working Group III will be whether some form of court ought to be established to deal with Investor State Disputes, whether as a permanent court, or as an appellate body to link in with the existing arbitration mechanisms. However, there are then a myriad of issues to be worked through – what are the extent of its powers, how are judges appointed, where should it be based and so on.

The point I wish to make is this, as Working Group III embarks on its journey into uncharted waters, UNCITRAL has been selected by the member states of the United Nations as the forum for the purpose of having these discussions – albeit over the objections initially made of several member states.

To borrow slightly from Spigelman CJ, such a decision recognises the institutional strength of UNCITRAL and its working groups, as a forum for conducting respectful and effective debate and dialogue about issues that affect international trade and commerce. It is a track record built up over 50 years, based on a model of consensus-driven decision-making, and it is an area in which Australia has played and continues to play an effective role.

We know that the Australian Government intends to play an important role in the ISDS discussions, and we at UNCCA together with other interested organisations hope to provide such advice and opportunities for consultation and discussion within the Australian legal and academic community as may be considered appropriate in support of the Government's endeavours. This will be an endeavour that will unfold, I expect, over many years, but I would encourage all of you who are interested to become informed and participate in these discussions.

2. Simplified Company Law for Less Developed Countries

From the macro to micro, I wish to finish with one of UNCITRAL's ongoing projects that is close to my own area of legal practice. It is the work of Working Group I, which I have the privilege of contributing to, in relation to the development of a text for a simplified company law for less developed countries.

This mandate commenced in 2013 as part of a desire on the part of UNCITRAL to provide assistance to less developed countries to reap the benefits of globalisation, by allowing women and communities, for example, to participate in the global supply chain of goods and services. The foundation assumption is that extending limited liability to micro, small and medium enterprises (MSMEs) will provide an important foundation for participation in economic life. It allows the individuals behind the entity to take risks associated with trade and investment, which are essential to economic participation.

Company law in developed countries like Australia is complex, to say the least, and is hardly a model for countries and communities seeking to take the first, tentative steps towards economic participation in global supply chains.

However, company law in developed countries like Australia is complex, to say the least, and is hardly a model for countries and communities seeking to take the first, tentative steps towards economic participation in global supply chains. The exercise being undertaken by WG I is therefore an attempt to start with a clean sheet of paper, to identify the essence of a limited liability corporation to allow millions of people to set themselves up in business quickly, cheaply and effectively.

Although the idealism behind this project is expressed in terms of those in developing economies, it has certainly occurred to me that if a simplified company law could be developed with universal appeal, then it might also serve as a model for developed countries like Australia to attempt to introduced simplified set of rules here for small business. This is not an uncommon scenario – UNCITRAL has recently adopted new Model Laws in relation to Secured Transactions. While Australia has its own relatively well-developed Personal Property Security Act (PPSA), one of the projects being undertaken in UNCCA at the moment is to look at the insights provided by the Model Laws for the operation and application of our own PPSA.

Returning to Working Group I, what I encountered in New York in April 2016 was an attempt by over 100 individuals from around the world to try to distil the essence of a limited liability entity. It was not an easy task, because of the overlay of systemic and cultural conceptions of what a company is and does.

At a personal level, I felt that the wheel had come full circle from my student days at the model UN conference I attended in Hobart in 1978. However, this time the work was being done by committed experts from around the world, seeking to address challenging issues potentially affecting the lives of millions of ordinary people, founded, as Mr Ellicott QC observed, on the search for common principles of universal appeal. This work will continue, and I hope with a successful and durable outcome for the benefit of the global community generally.

Conclusion

This paper has, in many respects, only touched the surface of the work of UNCITRAL. As I have sought to convey, it has developed an institutional strength and robustness to distil the essence of many important problem areas into workable legal frameworks, through the process of discussion and consensus-building.

As one of the participants remarked at the Canberra presentation of this Seminar, UNCITRAL involves a rather unique partnership between the public and the private sectors. On the one hand, government is concerned with effective and efficient regulation. It makes the domestic laws and it has the official seat at UNCITRAL and the UN. On the other hand, the rationale for the regulations is to facilitate trade and business by the private sector, operating in a global context. The private sector is therefore vitally interested both in the content of the texts being developed, and also in the adoption and implementation of those texts within domestic legal systems.

My work with UNCCA illustrates the possibilities that a body such as ours can offer both to the government and also to our stakeholders among legal practitioners, academics and students interested in participating in and contributing to the work of UNCITRAL. It has been an inspiring journey for me to work with so many passionate and motivated individuals both in the Australian

community and also among our diaspora.

This year, we have restructured our organisation to take account of the interest and success we have achieved in the last four years. We have now signed a Memorandum of Understanding with the University of Canberra to operate our Executive Office for the next three years, and I will shortly be passing over the role of Chair of UNCCA to Justice Neil McKerracher of the Federal Court, based in Perth.

That said, our work will continue. Australia has, since 2015, been represented either officially or by NGO Observers (through LAWASIA) at every UNCITRAL Working Group meeting. We have an established track-record of holding annual Seminars in Canberra in May to encourage the interchange of ideas between the Government and our UNCCA members; we have a successful student programme (UNLAWS) which has approved over 20 law students to attend UNCITRAL Working Group meetings – many with the financial support of their universities; and now we have an annual UN Day lecture to be delivered in major cities around Australia. I know that all of my colleagues at UNCCA look forward to continuing in this work, as do I, under our new structure.

Thank you to all of our distinguished commentators and chairs who have participated in this UN Day lecture series (noted earlier), and to those who have attended the lectures. This paper has undergone revision from its initial draft to reflect some of the feedback and commentary received at these events. I hope that some of those in attendance may join UNCCA as a result, as associate members, and thereafter progress to full membership (as Fellows of UNCCA) by attending future working group meetings.

It would be remiss of me not to mention in closing the tremendous support UNCCA and I have received from my regular interaction with the two heads of the Regional Centre for Asia and the Pacific; initially Luca Castellani and more recently Joao Ribeiro. Their professionalism, inspiration and guidance, and the ideas they have and are constantly generating, have given our work at UNCCA a great sense of significance. The partnership we have with the Regional Centre is a strong one, and there is plenty of scope for development in the future, in the area of the provision of experts to provide technical assistance into the Asia and Pacific Region.

Global commerce does not stand still. The regulatory regime must keep pace, and UNCITRAL plays a vital role in facilitating trade. I commend its work to you, and also the work undertaken by UNCCA in support of that work.

END NOTES

1 Barrister, 6 St James Hall, Sydney; Chair of UNCITRAL National Coordination Committee for Australia (UNCCA); Fellow of the Chartered Institute of Arbitrators.

2 'A Guide to UNCITRAL: Basic Facts about the United Nations Commission on International Trade Law' (2013), www.uncitral.org

3 Adelaide in the Federal Court on 17 October 2017 with Besanko J as chair and Hon Paul Finn as commentator; Perth in the Federal Court on 18 October 2017 with McKerracher J as chair and Professor Camilla Baasch Andersen as commentator; Brisbane in the Federal Court on 23 October 2017 with Greenwood J as chair and Professor Khory McCormick as commentator; Melbourne at Corrs Chambers Westgarth on 24 October 2017 with Bronwyn Lincoln as chair and Croft J as commentator; Canberra at University of Canberra on 1 November 2017 with Professor Lawrence Pratchett as chair and Ian Govey AM as commentator; and Sydney in the Federal Court on 5 December 2017 with Chrissa Loukas SC as chair and Rares J as commentator.

4 The Model Law is set out in Schedule 2 to the *International Arbitration Act* 1974 (Cth). Section 16 of that Act gives the Model Law the force of law in Australia.

5 See Guide to UNCITRAL, op. cit., which contains further details.

6 Guide to UNCITRAL, para 48.

7 Guide to UNCITRAL paras 67-68.

8 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

9 *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1 per Mason J at 131.

10 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533. See Allsop CJ and Croft J, 'The Role of Courts in Australia's Arbitration Regime', 11 November 2015, www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/

11 There are multiple websites where information about the Convention and all related documents can be found – see for example www.newyorkconvention1958.org or www.newyorkconvention.org for a comprehensive set of references to the Convention, court decisions around the world, *travaux preparatoires* and other related materials.

12 Of the 39 member nations of the UN that are not parties to Convention, 13 are in the Asia-Pacific region - namely the Federated States of Micronesia, Kiribati, Nauru, Niue, North Korea, Palau, Papua New Guinea, Samoa, Solomon Islands, Timor-Leste, Tonga, Tuvalu and Vanuatu.

13 The Convention text can be found on the UNCITRAL Website: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html

14 *Civil Law and Justice Amendment Bill* 2017, Schedule 7. This Bill also includes amendments to the *Acts Interpretation Act* 1901, *Archives Act* 1983, *Bankruptcy Act* 1996, *Domicile Act* 1982, *Evidence Act 1995*, *Family Law Act 1974*, *Legislation Act 2003*, *Marriage Act 1961* and the *Sex Discrimination Act 1984*.

15 TCL case at [11]-[14] per French CJ and Gaegler J.

16 *Sale of Goods (Vienna Convention)* Act 1987 (ACT); *Sale of Goods (Vienna Convention)* Act 1986 (NSW); *Sale of Goods (Vienna Convention)* Act 1987 (NT); *Sale of Goods (Vienna Convention)* Act 1986 (Qld); *Sale of Goods (Vienna Convention)* Act 1986 (SA); *Sale of Goods (Vienna Convention)* Act 1987 (Tas); *Sale of Goods (Vienna Convention)* Act 1987 (Vic); *Sale of Goods (Vienna Convention)* Act 1986 (WA).

17 There is a wealth of information on the internet about the CISG, and I would not do justice to it to summarise it in a footnote. The best place to start is Pace University's Institute of International Commercial Law website, www.iicl.law.pace.edu, or the UNCITRAL website.

18 CISG Advisory Council website, www.cisgac.com

19 L. Spagnolo, 'The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers', [2009] *Melbourne Journal of International Law* 141.

20 This project is in its early stages, with a meeting of Group of Experts taking place in October 2017 to coordinate the preparation of a guidance document – see 'UNIDROIT, UNCITRAL and HCCH Meet with Experts to Discuss Guidance Document on International Sales Law in Frankfurt', http://www.unidroit.org/89-news-and-events/2285-unidroit-uncitral-and-hcch-meet-with-experts-to-discuss-guidance-document-on-international-sales-law-in-frankfurt.

21 *Cross-Border Insolvency Act* 2008 (Cth)

22 European Union Insolvency Regulation No 1346 (2000).

23 Akers v Deputy Commissioner of Taxation (2014) 223 FCR 8; [2014] FCAFC 57.

24 *Electronic Transactions Act* 1999 (Cth); *Electronic Transactions Act* 2001 (ACT); *Electronic Transactions Act* 2000 (NSW); *Electronic Transactions (Northern Territory) Act* 2000 (NT); *Electronic Transactions (Queensland) Act* 2001 (Qld); *Electronic Transactions Act* 2000 (SA); *Electronic Transactions Act* 2000 (Tas); *Electronic Transactions (Victoria) Act* 2000 (Vic); *Electronic Transactions Act* 2003 (WA)

25 House of Representatives Committees, 'Chapter 4 United Nations Convention on the Use of Electronic Communications in International Contracts 2005', Report 116 (2011), https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/1march2011/report/chapter4.htm

26 Attorney General's Department website, 'Tobacco plain packaging – investor-state arbitration', https://www.ag.gov.au/tobaccoplainpackaging

27 *JT International SA v Commonwealth* (2012) 250 CLR 1.

28 French CJ, 'ISDS- Litigating the Judiciary', (2015), Chartered Institute of Arbitrators Centenary Conference,http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj21mar15.pdf

29 *Timor Leste v Australia* (Arbitration under the Timor Sea Treaty), Permanent Court of Arbitration, see https://www.pcacases.com/web/view/37; *Australia v Japan* (Whaling in the Antarctic), International Court of Justice, see http://www.icj-cij.org/en/case/148

30 Spigelman CJ, 'Seen to be done: The principle of open justice' (1999), in T.D.Castle (ed), *Speeches of a Chief Justice: James Spigelman 1998-2008* (2008), Sydney.

31 Warren CJ and Croft J, 'An International Commercial Court for Australia: Looking beyond the New York Convention' (2016), https://www.monash.edu/__data/assets/pdf_file/0009/467658/Com-CPD-April-2016-Paper.pdf

Here he lies: Justice Douglas' Arlington grave

By Geoffrey Watson SC

William Orville Douglas was an associate justice of the United States Supreme Court from 1939 until he reluctantly retired in 1975 – a period of 36 years, the longest service by a judge on that court. He remains admired, almost venerated, in liberal circles. A man of great natural intellectual ability with vast reserves of restless energy, Douglas betrayed those gifts with his arrogance, hubris, ambition and simple-minded prejudices. An uncontrolled sex-drive seriously complicated things. An egomaniac, he had scant regard for the constraints of precedent – he boasted 'I'm not bound by precedents – I make precedents'. After 36 years on the Supreme Court Douglas managed to leave no positive mark

on American jurisprudence.

The odd thing is that Douglas seems generally well-remembered – well, he is

well-remembered by those people who did not actually know him. The American jurist and legal theorist, Judge Richard Posner, actually knew Douglas – and this is what Posner says:

> Apart from being a flagrant liar, Douglas was a compulsive womanizer, a heavy drinker, a terrible husband to each of his four wives, a terrible father to his two children, and a bored, distracted, uncollegial, irresponsible, and at times unethical Supreme Court Justice who regularly left the court for his summer vacation weeks before the term ended. Rude, ice-cold, hot-tempered, ungrateful, foul-mouthed, self-absorbed, and devoured by ambition, he was also financially reckless – at once a big spender, a tightwad, and a sponge – who, while he was serving as a Justice, received a substantial salary from a foundation established and controlled by a shady Las Vegas businessman.

Not much fence-sitting there.

A man of great natural intellectual ability with vast reserves of restless energy, Douglas betrayed those gifts with his arrogance, hubris, ambition and simple-minded prejudices. An uncontrolled sex-drive seriously complicated things.

Douglas' story is complex and long – and much too long for here. So I want to focus on the first point that was made by Posner – his statement of fact that Douglas was 'a flagrant liar'. In particular I wish to tell the story about Douglas' grave. Douglas died in 1980 and was buried in Arlington National Cemetery in that part of the grounds reserved for US Supreme Court Justices who had seen military service. One side of his sombre grey granite headstone bears the words 'Associate Justice, United States Supreme Court', the other side is far more humble – it bears his name and these words 'Private, United States Army'.

Who was Bill Douglas?

Usually at this point I would give you a potted history of Douglas' life, but an accurate biography is nearly impossible because the truth has become so obscured by Douglas' deliberately false accounts of his life.

We do know a few things for sure. Douglas was born in 1898 and raised in Yakima – a remote rural area in Washington state. He attended Whitman College in Walla Walla, Washington. He was accepted into Columbia Law School. He graduated fifth in his class (although he later claimed he ran second). He worked briefly in a 'white shoe' firm, but left for academia and taught at each of Columbia and Yale. He became chief at the Securities Exchange Commission in those heady days following the Wall Street crash. He had strong and influential connections in the Democratic Party and was appointed by Franklin Delano Roosevelt to the Supreme Court in 1939. Douglas was one of the crucial appointments made by Roosevelt as part of his relentless drive to liberalise the court in the days of the New Deal.

Early on I described Douglas as an egomaniac. This is a man who pictured himself in the Oval Office. Almost as soon as he was appointed to the Supreme Court, Douglas became bored and began exploring political options. In 1944 the only candidates seriously considered for the vice president were Douglas and Harry Truman. The selection of a vice-president at that time was especially important because it was already obvious that Roosevelt was ailing – the vice-president was very likely soon to become president. Douglas was bitter about losing that race to Truman. Another shot at power failed in 1960 – Lyndon Johnson had promised to make Douglas his vice-president in the event that he won the Democratic Party nomination.

Maybe this is why Douglas began to tell so many lies about his own life. His own life seemed, at least to him, to be a disappointment – could it be reconstructed and improved? Perhaps this is why he was always marrying younger and younger wives (he married his fourth wife when he was 68 – she was a 22 year old cocktail waitress). It seems that he was constantly attempting to reinvent himself.

The creation of a new, more exciting Bill Douglas

One of Posner's points was that Douglas often found himself short of cash. In 1948 Douglas was in real financial distress, and he hit upon an idea for self-funding – he would write an autobiography. By the end of his life he had written no less than three autobiographies. These autobiographies contained a new and much more interesting version of Bill Douglas' life.

But his first shot was a total failure. In 1948 he presented his manuscript to a publisher – modestly titled *Of Men and Mountains*. After careful consideration the publisher rejected the book – upon the grounds that it was just too boring.

Well, there is one obvious way of improving the interest level of the story – just make stuff up. As Douglas rewrote *Of Men and Mountains* his life began to improve markedly in the retelling. For example, according to his fictionalised version, Douglas descended from a Civil War hero (untrue; his grandfather was a deserter). He said he was raised in poverty (untrue) and his early education was held back because of this (equally untrue). Slogging away against this (invented) injustice, Douglas told how he went on to be accepted by Columbia (that part is true), but he said he was so short of money that he arrived in New York in 1922 with six cents in his pocket (not true). He even said he could only get to the University by smuggling himself onboard a cattle car and 'riding the rods' like a hobo (untrue; he was a fully paid passenger). His autobiography recounted how he struggled financially at Columbia (untrue; he lived comparatively well, supported by his first wife who was a teacher).

And it was in *Of Men and Mountains* that Douglas first introduced the American public to the story his greatest fight – and his greatest triumph – his childhood battle with polio. Douglas told how he was destroyed by

An accurate biography is nearly impossible because the truth has become so obscured by Douglas' deliberately false accounts of his life.

that evil disease, but how he conquered his disability and taught himself to walk again, and how he built up his 'pipestem legs' climbing the mountains near his childhood home. The public loved this – and, to be honest, it really is inspiring stuff. Bear in mind this was only three years after the death of Roosevelt. Douglas must have seen the vacancy and stepped into the job of America's most beloved polio victim. This story propelled Douglas into the public heart – he became an American hero.

The disgraceful fact is that the polio story was untrue; Douglas simply made it up. No-one (until recently) checked the facts.

Strangely enough, the fact that Douglas' never had polio made his bravery more admirable. His adoring public noted how Douglas never mentioned his polio in the numerous interviews he had given over decades of public life, and perversely Douglas received

William Orville Douglas, 40 year old successor to retired Justice Louis D. Brandeis, before be was sworn in on April 17, 1939. Photo: Everett Collection Historical / Alamy Stock Photo

greater kudos because he had kept quiet about his disability and had never traded on the sympathy factor. What a guy.

The new, improved *Of Men and Mountains* became a nationwide best seller, netting its author the then substantial sum of $32,900.

I could go on with more detail about the remarkable misrepresentations made by Douglas over many years – there is not space here to do that. I will put all of that aside and now focus on a standout misrepresentation made by Douglas, and which led to his burial in Arlington.

Douglas' burial in Arlington

Arlington National Cemetery has a sacred place in the American psyche. Only veterans who saw active duty are permitted to be buried in Arlington. Arlington is in Virginia, just a few miles south of Washington DC. The portion set aside for the former US Supreme Court judges is an especially lovely part of the park, high on the hill and close to the old house, with panoramic views over the Potomac and back up toward the Capitol.

In his private papers Douglas made it clear that he wished to be buried in Arlington, an entitlement he claimed derived from his service as a private in the First World War. Douglas had taken many opportunities to recount his war experiences, and he had referred to them in some of his autobiographies. A personal anecdote regarding his war service even figured in one of Douglas' Supreme Court judgments. In *Secretary of Navy v Avrech* 418 US 676 (1974) a marine was court-martialled for criticising the Vietnam War. The soldier challenged the charges, alleging they infringed his right to 'free speech'. The majority declined to deal with the argument on jurisdictional grounds. Douglas dissented, and in doing so drew directly upon his own experience as a soldier (at 680):

> Soldiers, lounging around, speak carefully of officers who are within earshot. But in World War I we were free to lambast General 'Black Jack' Pershing, who was distant, remote and mythical. We also groused about the bankers' war, the munition makers' war in which we had volunteered. What we said would have offended our military superiors. But ... we saw no reason we could not talk about it among ourselves.

One can almost picture young Douglas taking cover in those muddy trenches in France, artillery fire bursting overhead.

But it wasn't true: Douglas had invented his military service.

The truth is that while at Whitman College Douglas had joined the Student Army Training Corps – the SATC is an American equivalent to what we would call the cadets. Douglas only joined the SATC on 1 October 1918. In the 41 days between joining the SATC and Armistice Douglas remained a full-time college student. He was never issued with a weapon. His SATC uniform only arrived after the war was over. Little wonder Black Jack Pershing was regarded as '*distant*'.

The disgraceful fact is that the polio story was untrue; Douglas simply made it up. No-one (until recently) checked the facts.

When Douglas died his wife asked for him to be interred in Arlington. Arlington's mandatory check of military records showed there were no records of Douglas' service. It was simply assumed that his records must have gone astray. After all, this man was a US Supreme Court justice – he could be trusted. The authorities accepted the claim and Douglas was buried with full military honours.

So there he was buried – Douglas lies in Arlington in two senses.

And a postscript: The typical reason a college student joined the SATC was that it was a means of avoiding conscription. Douglas, the self-perceived military hero, was, in all probability, a shirker.

Further reading:

Bruce Murphy, '*Wild Bill: The Legend and Life of William O Douglas*', 2003 – the most enjoyable judicial biography I have ever read, written by one of America's finest judicial biographers.

Percy Valentine Storkey:
The Sydney law student who won a Victoria Cross

On 11 April 2018 Rear Admiral the Hon. Justice M.J. Slattery RANR, Judge Advocate General of the Australian Defence Force delivered the following lecture at Sydney Law School

Until you received the flyer for tonight's event I suspect many of you were unaware that a law student from this university, and later a barrister and District Court judge, had won one of Australia's 64 First World War Victoria Crosses.

I too was not aware of this until recent years. I learned of it a few years ago in conversation with my late father, the Hon John Slattery AO QC, who practised at the New South Wales Bar between 1946 and 1969 and who served on the Supreme Court between 1970 and 1993. He said to me that he could remember appearing as a young barrister before a District Court judge in the early 1950s, who had won a Victoria Cross.

Intrigued by my lack of knowledge of this judge, I went searching, and found out about him. The need for that search, and what I found, revealed to me an immense gap in our knowledge of the many law students and members of the legal profession who fought, and many of whom were killed or wounded, in the First World War, in the Second World War and in subsequent conflicts. That gap has since been made up by historians such as Tony Cunneen and Philip Selth.

The stories of these veterans are now being told more widely. For reasons that are not wholly clear to me, until the laudable initiative of Chief Justice Bathurst on 11 November 2016 for this State's Supreme Court to celebrate Remembrance Day, it had not annually done so. In contrast, for example, the Supreme Court of Victoria has always held such an annual commemoration within the living memory of Victorian lawyers.

Many of us were law students once. Many of you still are. In early 1915 Percy Storkey faced all the usual course choices of an early third year law student at this university. But the outbreak of the First World War presented to him yet another, far tougher, choice: would he enlist? He did. He joined the First Australian Imperial Force just three weeks after the Anzac landings at Gallipoli.

He fought on the Western Front for two years where he was twice wounded. He earned the Victoria Cross in an action exactly 100 years ago last Saturday, on 7 April 1918. His action was early in the decisive battles around Villers- Bretonneux, battles in which Australian troops bridged the line to stop the last great German offensive of the First World War. After repatriation he completed his studies and practised at the bar from 1921 to 1939, when he was appointed as a judge of the District Court.

Percy Valentine Storkey has significance for us at many levels. First and foremost he believed his story should be told to the general public for the benefit of all veterans. His early years after the war are filled with his journeys in New Zealand and Australia, speaking to community groups on behalf of veterans.

But at a second level Storkey reminds us of the heroism and willingness to volunteer in both World Wars of members of the legal profession.

At the risk of being accused of suggesting that lawyers were over-represented among the ranks of VCs in the First World War, may I tell you there was in fact another. His name was Arthur Seaforth Blackburn, a newly admitted Adelaide solicitor about the same age as Storkey, who was decorated for his extraordinary bravery in the Battle of Poizeres in July 1918. His grandson, Tom Blackburn SC, now practises at the New South Wales Bar.

Storkey made firsts wherever he went within the legal profession. He was not the first lawyer to win a VC; that honour went to Blackburn. But he was certainly the first barrister and the first District Court judge and the first and only member of the Australian Judiciary to hold such an honour. Only one other judge in the British Commonwealth ever held a VC: Lord Justice Sir Tasker Watkins, who earned his VC for action in Normandy in August 1944, was appointed to the High Court in 1971 and later became deputy lord chief justice of England.

A third reason why Storkey is important, every military officer in this room will immediately recognise. Despite the Storkeys and the Blackburns and the leadership of General Monash, himself a lawyer, there can at times be an undercurrent within the ADF that sounds like this – 'well, why do we need lawyers in the military anyway?' But to that kind of carping my constant answer in recent years has been, 'let me tell you about Percy Storkey, a lawyer who won the Victoria Cross'. This has been very effective in silencing critics.

Finally, and most importantly, Storkey is also important because he represents the large number of students who volunteered from this law school for First World War service. In the law school's Jubilee history (for the period 1890 – 1940) the Honourable Sir Thomas Bavin puts the number of law students volunteering for active service in the First World War at just over 100. Of those, 11 were killed in action. Their names appear among those on the Roll of Honour under the Carillion Tower. I will speak of them later.

So let me tell you Percy Storkey's story now. It is, as I will show you, a story not only about outstanding courage, but a story showing

a deeply human response to the sacrifice of the soldiers around him.

But before I do so, I wish to acknowledge the extensive and original research undertaken by my acting associate Imogen Yates (also a graduate of this law school) in the preparation of this speech and the sourcing the images that accompany it. I also wish to thank Mr Phillip Rankin, Archivist at Napier Boys High School, and Ms Jane Myers of the school's staff for important source materials from New Zealand and Tony Cunneen and Philip Selth for their scholarly assistance with Australian-based historical research.

Storkey was born in Napier, New Zealand on 9 September 1891. He attended the Napier Main School (a primary school) between 1897 and 1906 and from there he attended Napier Boys High School.

His leadership skills and intelligence showed early. In his final year at Napier Boys High School, 1910, he became a prefect and was dux of the high school.

He had a full classical and scientific education taking Latin, heat and mechanics (what we would call 'physics') algebra, history and English. He did so well academically that he became dux of the school and only just missed out on a scholarship to university. He then went on to Victoria College, Wellington.

But, like many of the best soldiers, he was both adventurous and successful on the sporting field. He made the first XV as a full back in his final year at school and the first XI cricket team the same year. His school reports showed, according to one former Headmaster, Mr M Spackman, 'Percy was mad about his cricket'. When he later toured and gave speeches later as a Victoria Cross winner in Australia and New Zealand he could often be later found at nearby cricket fields watching local cricket games.

Storkey had an early association with citizens' militias. By the time he left Napier Boys High School his interest in the military was clear. Through the schools cadets, he had risen to the rank of colour sergeant. Before migrating to Australia, he had already spent five years in the New Zealand militia.

Percy, his brother and three sisters, lived with their parents, Sam and Edie Storkey, in Milton Road, Napier until 1911. They migrated that year as a family to live in Australia. His father worked for the *Daily Telegraph* in Napier. He continued to work in the newspaper industry here in Sydney. The rest of the Storkey family returned to live in Napier a few years later. But Percy remained in Sydney. He had already started his law studies.

After migration to Australia, Percy Storkey initially worked for the Orient Steamship Co. in Sydney. By 1912 he had joined the administrative staff of the University of Sydney. This background assisted him in 1913 to enrol at the university law school. By the end of 1914, he had completed his first two years of study. He began final year in 1915.

On 10 May 1915 he enlisted in the AIF as a private. The date of his enlistment is itself a remarkable part of Australian legal and military history. In August 1914 Colonel Henry MacLaurin, then a senior junior at the New South Wales Bar, had organised a battalion of troops, who embarked for Gallipoli in October 1914. But on the second day of the Gallipoli campaign, Colonel MacLaurin was tragically killed. The chief justice, Sir William Cullen, held a special sitting of the Supreme Court on Wednesday, 5 May 1915 to mourn the loss of the first war casualty from the legal profession.

The news of MacLaurin's death swept down Phillip Street. Percy Storkey had not yet joined any Australian civilian militia, it can confidently be inferred that this final year law student decided that this was the moment to put his training into practice. He was no doubt aware of, and perhaps prompted just a little, by the major recruitment poster campaign that was launched in Australia after the Gallipoli landing.

It perhaps may surprise you to know that, in its own way, this law school obliged the war effort. The Jubilee History of the Sydney University Law School shows that in 1914 and 1915, the end of term examinations were advanced, so students could complete exams before they enlisted. I hope the examiners were merciful.

But university journals of the day also encouraged enlistment. It is clear from the May 1915 edition of *Hermes*, the university's literary journal, that a competitive spirit for enlistment existed among the faculties of Medicine, Engineering and Law, others among them. By August 1915 *Hermes* was making a direct appeal to the spirit of students to 'do their duty' and enlist.

Close to his 24th birthday in September of that same year, Storkey was commissioned as a second lieutenant in the AIF. His university education, his age, his character, and his prior military experience had marked him for promotion from private soldier to officer within just four months. The photograph of him taken in the uniform of a 2nd Lieutenant about that time, gives colour to a comment that was made about Storkey in his last year of school. One of his teachers, a Mr Spriggs, described him as, 'a fine gentleman; a person full of confidence and sparkle'. Storkey was keen to go overseas. The words he has written across the photo say, 'Thank goodness I will be off soon'.

In December 1915 he sailed to England via Egypt to join members of the 19th Battalion in training. As he sailed from Australia his background alone could predict much about what was to come. It was a background of extraordinary intellectual and sporting achievement and fine character. He was not untypical of many young officers in the First AIF.

What do you do with a Second Lieutenant, third year law student, in the AIF in Egypt? Of course, you put him in charge of Courts-Martial. And that is what Storkey was drafted to do during the long months of training in Egypt and then in England.

Storkey's exercise of courts martial jurisdiction in July 1916 in Egypt and then in England intersected with a simmering but now long-forgotten Australian wartime dispute – the alleged failure of significant numbers of rugby league players to enlist in the AIF. Storkey sentenced Bob Tidyman, one of the few rugby league players who did enlist, to four days confinement to barracks for being late on parade. Tidyman, who played for Easts before the war, was later listed as missing in action. My source for that was rugby league's own historical account of its players in WW1 (http// www.rl1908.com/Rugby-League- News/Anzacs.htm, 'Rugby League ANZACS of World War One').

On 14 November 1916 he joined his unit in France. Within a week of arriving at the front he was wounded near Flers, at the end of the Battle of the Somme. Percy Storkey's service records are now all online courtesy of the Australian War Memorial. From what I can work

out from the records, he suffered two wounds during his service before his heroic action on 7 April 1918, he had a bullet wound to the thigh and a badly damaged ankle. But subject to convalescence, and some leave back in London, he fought continuously on the Western Front for the 22 months from November 1916 until September 1918.

He was promoted to lieutenant in January 1917 and was wounded for the second time, on 10 October 1917 in the Third Battle of Ypres.

But we all know October 1917 for a different reason, the Bolshevik Revolution. As he convalesced, events unfolding two thousand miles away in Russia began to give shape to the final contest of the war in which he would win his Victoria Cross.

Let me step back for a moment and give you a bigger picture. After October 1917 hostilities ceased on the Eastern Front between Germany and the new Soviet State. This released almost a million German soldiers, for transfer to the Western Front – a barely imaginable number, even today.

In early 1918 the German High Command planned a massive offensive on the Western Front based on a simple calculation.

The United States had entered the war in April 1917. But the additional strength from US troops was only just starting to be felt on the Western Front. Action before that was indicated.

Amiens was the major railway junction behind allied lines. The German High Command planned that a conquest of Amiens would threaten Paris and force the Allies to seek an armistice before the fresh US troops could influence the course of the war.

Without warning on 21 March 1918, a mass of 47 German divisions moved against the British Third and Fifth Armies across an 80 mile front east of Amiens. The British Fifth Army collapsed under this pressure and a gap opened in the Allied lines. Australian troops under General Monash ultimately blocked the enemy thrust towards Amiens with a thin extended line which first began to hold on 27 March 1918. The Germans renewed their attack in force on 4 April 1918. Their counter attack threatened to encircle Villers-Bretonneux, a critical gateway to Amiens and about 10 kilometres to its north-west. A regiment of German troops penetrated dangerously to the south-west of Villers-Brettonneux. Its three northern companies infiltrated and occupied a strategic timbered rise, called Hangard Wood, just two kilometres to its south and just outside the little village of Hangard.

'Hangard' had been so named since the middle ages: ironically, given what was about to follow, its name is derived from two words of Germanic origin, meaning 'Hano's Garden'.

Australian infantry were ordered to counter-attack and to retake Hangard Wood on 7 April so as to reduce the German threat south of Villers-Bretonneux. The 5th Brigade (2nd Division AIF) of which Percy Storkey's 19th Battalion was one part, led this counter-attack. Lieutenant Storkey was a platoon commander in the company at the very leading edge of the assault.

Even before it had begun, the military logic of the plan to take Hangard Wood was neutralised by faulty allied intelligence and artillery failures. Allied aircraft had reconnoitred the wood. The resulting intelligence had wrongly concluded that it was only lightly held by enemy forces and could be covered by a nearby allied field of fire. The planned 5.00 am infantry attack was to be supported by an artillery barrage to hold the enemy fast in their trenches. Instead only a few random shells fell, prompting the Germans to prepare for the imminent assault.

Storkey's company launched east from a small covered area just to the west of Hangard Wood, across several hundred metres of open ground, from where it was hoped the company would penetrate the wood and mop up the few German soldiers thought to be inside. But exhausted from continuous battles since 21 March, Lieutenant Storkey had dozed off. He awoke to see his company 100 yards ahead of him, crossing the open country and already coming under fire.

As he re-joined his company on the open ground, it was caught in a murderous fire from unseen machine guns from inside Hangard Wood. The company commander, Captain Wallach, was hit through both knees. Two other lieutenants were killed. Twenty five percent of the company were hit. The remainder of the company was pinned down in the open. Storkey now became the company's senior surviving officer, and therefore its commanding officer. He was assisted by another surviving officer, Lieutenant Lipscomb.

At this moment we should pause, so we can begin to understand at the human level what happened next. Storkey was always very frank in the accounts that he gave after the war, that he had fallen asleep, and that he was behind his company's advance. He never sought to hide it. It appears in many contemporary accounts.

But think for a moment how he must have felt. Because he was asleep, his company had proceeded ahead of him; he had been left behind; over 20 of his fellow soldiers were dead, and he was alive. His immediate reaction was to prove himself worthy of his chance survival. He more than made up for his bad start.

Storkey detached six men from the company and headed north and west around the wood, trying to find the German machine guns. He was soon joined by Lieutenant Fred Lipscomb who had four men with him. Between them, there were two officers and ten soldiers, a group the size of a section, or just a third of a platoon. They struggled towards Hangard Wood. And in case you have some romantic ideas of a thick forested wood, like the Bois de Bologne – and perhaps it was in early 1918 – after the war it appeared in Bean's Official History after many more battles looking like this.

They struggled through the wood. Apart from Storkey, Lipscomb and the ten men with them, the rest of the company had gone to ground, to avoid further casualties from the machine gun bullets raking the ground around them.

The 12 Australians made their way around to the east and then pressed south trying to get to the rear of the machine guns. Suddenly they burst into a small clearing where just ahead they saw half a dozen short enemy trenches, each one a machine gun post, manned by eighty to one hundred Germans, riflemen and machine gun crews, all with their backs to Storkey's party. The heavily armed enemy outnumbering Storkey's party nearly ten to one, were still firing at what remained of his company. Conventional military theory of the time advised that an attacker should bring to bear a force three times the size of the force to be vanquished. Storkey faced a far greater ratio against him.

What then followed can be no better described than

in war historian C E W Bean's own words:

> As the Germans were seen there was a yell, and some of the enemy, looking round, caught sight of the Australians emerging into the open behind them. The situation called for instant action – either attack or be annihilated – and Storkey's decision was immediate. Shouting as if the whole battalion was following, he at once led a charge upon the rear of the Germans, himself at one flank of his ten men, Lipscomb at the other. The Australians had only twenty yards to go. Before the nearer Germans could realise what was happening, the New South Welshmen 'got in quickly,' as Lipscomb wrote, 'with bombs, bayonet, and revolver'. The Germans in the nearer trench at once put up their hands, but those in the farther ones hesitated. They had only to swing round one of their machine guns and the Australians standing close above the northern part of their line could have been annihilated.

We would now perhaps call this a sliding door moment. It was a moment when 80 plus Germans could have turned around and easily out-gunned the ten Australians. But with the bravado that makes VCs, Storkey led his men forward with such confidence that the entrenched Germans believed they were the leading edge of a much larger force. Contemporary newspapers recount that the attackers expressed this confidence using what were described as 'Australian oaths'. Bean's Official History then continues as follows.

> But Storkey's confident manner made them uncertain as to what forces might not be in the surrounding bush. On the first sign of hesitation to obey his order to surrender and climb out of the trench, he immediately shot three with his revolver (which then jammed) and some of his men slipped the pins from their bombs, rolled a couple into the trenches, and then ducked away to avoid the explosion. In all 30 Germans were killed, and the remainder, three officers and about 50 men, were made prisoners and were at once sent to the rear, the two escorting Australians carrying back one of the machine guns. [2] (Official History of Australia in the War of 1914 – 1918, Vol 5, The AIF in France 1918, CEW Bean, pp 507 – 508.)

Storkey's brave action cleared the defenders from the area and saved the lives of the rest of his company.

Histories of the 19th Battalion abound with stories of the amazement of fellow troops, as Storkey's men marched their long column of German prisoners and captured machine guns back behind the battalion's lines. As a result of the action, Australian infantry took Hangard Wood and secured the southern side of Villers-Bretonneux. Only two weeks later the town would be lost by the British and then famously retaken by Australian troops in an audacious attack on the third anniversary of Anzac Day.

But what happened next takes Storkey's story to yet another level. Within an hour of proving his physical courage, Storkey's moral courage was tested to the limit. Storkey's view from inside Hangard Wood was that it could not be held. Concerned for his men's safety, he ordered their withdrawal back to allied lines with the prisoners. The history of the 19th Battalion records that his battalion commander ordered him back to Hangard Wood immediately. But Storkey refused. He thereby risked a serious charge of disobeying a lawful order.

He argued the wood was a death trap for his men. Gaining no traction with his colonel he appealed to the brigade commander. He then deployed his lawyer's skills to the full. He persuaded the Brigadier of the merits of caution. The Brigadier is said to have 'gratefully received' Storkey's information about the numbers of enemy in Hangard Wood. The order to return was rescinded.

Storkey continued to fight with 19th Battalion throughout the Australian advance to the Hindenburg Line after the exhaustion of the German Spring Offensive. In May 1918, Storkey was appointed company commander and promoted to the rank of captain. On 10 June 1918 he was confirmed in that rank. But in the meantime he had been recommended for the award of the Victoria Cross.

What character type wins the Victoria Cross? What character type threatens to disobey orders to save his men? One fellow officer described Storkey in these terms: 'In any emergency, Percy Storkey was always as cool as an arctic iceberg, and always maintained a keen sense of humour – a priceless possession in war as well as in peace'.

His Victoria Cross was announced in the *London Gazette* exactly two months later, on 7 June 1918. It was awarded to him by King George V in a ceremony at Buckingham Palace in July 1918. The official photographic portrait of him at Buckingham Palace is perhaps the best known image of him, after the Max Meldrum portrait.

But there is another less formal image taken outside Buckingham Palace that so very clearly conveys his character. The photograph outside the Palace I believe to be the woman that became Storkey's wife, Minnie Mary Gordon, *née* Burnett. Every age has its contradictions, including ours. But when nearly 20,000 men could be killed on the first day of the battle of the Somme in July 1916, two years later Percy Storkey was being criticised for his romance with Minnie - on the simple ground that she was a divorcee.

But this photograph and her presence and her dress all help us to realise that at the time of his heroism many glimmers of our recognisably modern world were already starting to appear. In New South Wales the debates that led to the passing of the Women's Legal Status Act later that year had already commenced. Women over 30 had just been granted the right to vote in England. The Austrian symbolist painter Gustav Klimt had just died.

But I hear you ask: what happened to Lieutenant Lipscomb, Storkey's companion. He was awarded the

Military Cross for the same action. But wounds to his knee that day forced him out of active service. He was nursed back to health in England, where he met an English nurse, Isobel May Ward, and they married. He returned to Australia and settled back in Goulburn, where he died in 1952.

Storkey returned to Australia on 26 November 1918. His AIF appointment ended in January 1919. Thereafter he was allocated to the Army Reserve on 1 July 1920. According to Storkey's relatives who were interviewed by newspapers in Napier after the war, Storkey decided to settle in Australia because he considered there was more scope for him to further his legal career here.

But he always remained very attached to his city of birth. Upon his return to Napier in late January 1919 after the war there were many parades and celebrations in his honour. He was hoisted shoulder high and marched around the band rotunda. In his reply to speeches on these occasions, witnesses recall him saying, 'this is Napier's VC'.

Like so many veterans, Storkey wrote nothing of his war experiences that survives. But one of the speeches he made back in Napier in January 1919 was recorded by a local paper and speaks eloquently to his fundamental modesty. Reported in the third person this is what he said in reply to a welcome by the Mayor of Napier:

> 'After a number of welcoming speeches Captain Storkey took the stand in reply and the *Telegraph* reported:
>
> > 'Because he had won the VC it was not because he was any braver than any other soldier, nor because he was a warlike person who liked fighting. As a matter of fact he disliked fighting very much and was a peace-loving person.
> >
> > He had only tried to do his duty and had taken the opportunity when it arrived. A man did not have to be a hero when the opportunity showed and he had only to keep his head and do his duty when it did.
> >
> > Up till this welcome he had not been proud, and they would forgive him if he was now. He had been pleased to gain the honour but until now had not felt anything more.
> >
> > He did not want them to run along with the idea that it had made him swell-headed',

Though born in New Zealand, he has always been counted among Australia's VC winners as he was a member of the AIF. But trans-Tasman rivalry abounds in every sphere. It will not surprise you that the New Zealand tabloid press have commonly claimed him as 'a Kiwi VC'.

Storkey went back to law school in 1919 and 1920 and completed the remainder of his degree while acting as the associate to Sir Charles Wade, a puisne justice of the Supreme Court. His employment as associate with Sir Charles represents part of a deep tradition of support for First World War veterans within the Supreme Court, led by Chief Justice Cullen, Justice Ferguson, and others.

The same thing happened after the Second World War. The commander of *HMAS Australia* in the battle of the Coral Sea, Admiral Harold Farncomb, left the navy in the 1950s and became the associate to the chief judge in Equity, David Roper, before going to the Bar.

Storkey was called to the bar on 8 June 1921, a memorable year for new admissions. Also admitted in 1921 were the powerful common law advocate, J W Shand (father of Alec) and Ada Evans, the first woman barrister in New South Wales.

On 15 April 1922 he married Minnie at St Stephen's Presbyterian Church, in Sydney. They made their home in Vaucluse.

Storkey commenced a common law and criminal law practice from the old Selborne Chambers.

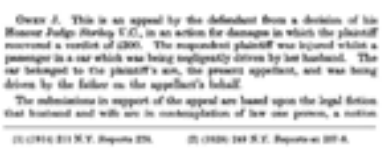
It was the custom of the bar in the 1920s for new barristers to nominate their availability to practise on one of five country circuits. Storkey selected the South Western Circuit, covering a vast area bounded by Goulburn, Albury, Deniliquin, Hay, Wyalong and Broken Hill. The *Law Almanac* for 1921 shows that also at least nominally practising on the Southern and South Western Circuit were one F R Jordan (later chief justice of New South Wales) and one J G Latham, from Melbourne (later Sir John Latham, chief justice of the High Court of Australia).


SIXTH SUPPLEMENT
to
The London Gazette.
Published by Authority.

He continued in private practice from Selborne Chambers for only four years until 1925, when he was appointed a Crown prosecutor for the South Western District. He moved to Crown Prosecutors Chambers and spent the next 14 years until 1939 prosecuting mainly on the South Western Circuit. One contemporary newspaper estimated that he travelled some 30,000 miles each year on circuit.

Perhaps not surprisingly, given all he had been through, as a prosecutor Storkey was regarded as practical and realistic and had an outlook tempered by humour and compassion. Judge H T A Holt illustrates this characteristic with a story ((H TA Holt, *A Court Rises*, The Law Foundation of New South Wales, p.225). Having prosecuted two men on circuit for theft for removing a safe, blowing it open with explosives and then stealing its contents, Storkey later fell into private conversation with the judge who expressed some doubts that he may perhaps have sentenced too leniently. The judge said: 'Dangerous men Storkey, using explosives like that…'. The prosecutor, who had seen more explosives than either of these criminals is said to have replied rather mildly in reassurance to the judge, 'Well judge, how else were they to get the money out?'

Storkey was often briefed by the Crown and quickly appeared in reported cases. He appeared as junior counsel to the attorney general in *Ex parte Attorney-General, Re Cohen* (1922) 23 SR (NSW) 111 before the full court, a case dealing with the availability of the writ of certiorari against inferior courts. He appeared as junior counsel for the appellant in *R v Ead* (1923) 24 SR (NSW) 117, a case dealing with what evidence might constitute corroboration of the unsworn evidence of a child. As many crown prosecutors did in those days, he maintained a right of private practice at the common law bar and also appeared in negligence cases, such as *Barton & Jamieson v Transport Commissioners* (1932) 33 SR (NSW) 17, a cause concerning the duty of railway authorities to fence property to prevent injury to straying stock. He appears in the *Commonwealth Law*



Reports only once in *R v Porter* (1933) 55 CLR 182 before Sir Owen Dixon sitting as a single judge exercising the original jurisdiction of the High Court in the Australian Capital Territory before the creation of the ACT Supreme Court.

As the Second World War approached, Storkey again felt the call of duty. He had remained in the Army Reserve. He re- enlisted in the army in October 1938 along with the mass transfer of reserve lawyers into the fledgling Australian Army Legal Department (AALD). He became legal staff officer to 2nd Division, based in Sydney, under the command of the judge advocate general. However, in May 1939, before the outbreak of war, he was elevated to the District Court at the age of 48, and he relinquished his army service.

He became chairman of Quarter Sessions for the Northern District of New South Wales. There it is said that he 'became an identity making many friends and being recognised for his quick assessment of character and for his sound commonsense' (*Australian Dictionary of Biography*, Online Edition, Percy Valentine Storkey (1893 – 1969) Warren Derkenne).

I asked my father about Storkey, the judge. He remembered him as 'always courteous and efficient, while running his courtroom with great decorum'.

Phillip Selth has given me an interesting example about Storkey as a judge on the Northern Circuit that also shows he was practical and a realist. His cases were often reported in the (Taree) *Northern Champion* and the *Manning River Times*. He was commonly described in the press as Judge Storkey VC, giving additional weight to his judicial office. Let me give you examples of his work from just one circuit. He presided over the March 1947 Taree Quarter sessions. Emerton of counsel appeared for a butcher, George Bulley, appealing a conviction and fine of £5. Bulley's lorry had run into some cows at John's River bridge coming home early in the morning after fishing. Judge Storkey dismissed the appeal, saying that no one travelling in a reasonable manner should run into a wall of cows without seeing them. Emerton also acted for Victor Lyne, who was appealing a conviction of driving a motor lorry under the influence of liquor. His Honour said that the sooner people realised that they must leave liquor alone if they were to drive cars, the better it would be for them.

Judge Holt's history and other contemporary sources recount another story about Storkey that deserves to be told. District Court judges on circuit were entitled to a full compartment to themselves on trains no matter how crowded the rest of the train was, in case they were by change to encounter circuit litigants in the same carriage. During the Second World War, Storkey's train stopped on one occasion at Whittingham Station, the entraining point for Singleton army camp. A battalion of soldiers piled on. They quickly became resentful that Judge Storkey had a compartment all to himself. Some banged on the door and demanded to be let in. It is said that the battalion's Colonel even sought to commandeer Judge Storkey's compartment. Storkey's associate quietly took them aside and said, 'Do you know you're making trouble for a man who won a Victoria Cross in the First World War?' Before the train arrived at Central Station, the Colonel had made formal apology to the judge. (see also District Court Judges at War, Brian Herron QC, *Bar News* – Summer 2009.)

Storkey retired from the bench in 1955 and went to live in England, where he lived in Teddington, Middlesex, with his wife. He died on 3 October 1969 at the age of 76. He bequeathed his Victoria Cross to his old school in Napier.

Whilst he was a District Court judge, only one appeal from Judge Storkey to the full court was reported in the *State Reports*, the matter of *Waugh v Waugh* (1950) 50 SR (NSW) 210. It is a convention of legal reporting that post-nominals and the decorations of judges and counsel, which are unconnected with the law, are not included within case reports. In *Waugh v Waugh* a notable reported exception to this convention was made for Storkey. The appeal came before Chief Justice Sir Kenneth Street and Justices Maxwell and Owen in May 1950. Only Justice Owen referred to the trial judge by name, describing him by his full title as 'His Honour Judge Storkey VC'.

This departure from convention to honour Storkey, is especially understandable in Justice Owen's case. Owen had enlisted underage just after Storkey and had served for almost the same period as Storkey on the Western Front. Justice Owen ensured that the judge's Victoria Cross was referred to in his judgment and hence in the *New South Wales State Reports*. In doing so he saluted a great Australian.

The great American Jurist and Civil War combatant, Oliver Wendell Holmes, judged character according to an exacting standard. He said in a famous Memorial Day address to army veterans (Memorial Day Address delivered 30 May 1884, at Keene New Hampshire, before John Sedgwick Post No 4, Grand Army of the Republic, in R.H. Posner, *The Essential Holmes*, University of Chicago Press, 1992, page 82.):

> I think that, as life is action and passion, it is required of a man that he should share the passion and action of his time at peril of being judged not to have lived.

This brief account of the life and valour of Percy Valentine Storkey VC proves that he lived to Holmes's high standard as

few others would dare. He now inspires us all and helps us remember the many others who did not return.

May I now turn to them, and recite in conclusion for you, in commemoration of their sacrifice, the names of the eleven law students killed in action in the First World War and the dates of their deaths: Laurence Whistler Street (19 May 1915) and Charles Bernard Donaldson (20 July 1915) died at Gallipoli. All the others on the Western Front: Arthur Gardere Ferguson (14 June 1916), Francis Maxwell Barton (11 August 1916), Alan Russell Blacket (16 August 1916), James Blackwood (2 December 1916), Thomas Storie Dixon (8 December 1916 in training accident), Harold Robertson Blanksby (12 February 1917), Adrian Consett Stephen (14 March 1918), Morven Kelynack Nolan (26 March 1918), and Lancelot Vicary Horniman (1 September 1918).

Percy Storkey reminds us of them all, and all who served.

LEST WE FORGET.

How to stop waking at 3am thinking about work

By Theresa Baw,[1] 19 June 2018

Meditation and mindfulness are now widely recognised as important for professionals to practice. Practising mindfulness has been shown to improve focus, clarity, and creative problem solving, while reducing stress and anxiety. Mindfulness is cultivated through meditation. It is no wonder that an increasing number of organisations such as Google, Accenture, Goldman Sachs, the UK Parliament; the US military; and numerous chambers at the UK Bar are providing mindfulness meditation courses for their members and employees. In October 2017, the UK hosted the first summit on mindfulness, with politicians from 15 countries meditating in the House of Commons.

The effectiveness of meditation has been known for millennia. Mindfulness mediation[3] originates from Buddhist teachings 2,600 years ago, which have been secularised in the west in the last 40 years by figures such as Jon Kabat-Zinn at the University of Massachusetts Medical School,[4] and researchers at top universities including Harvard, Stanford, Oxford & Cambridge. Meditation and mindfulness are not predicated on any religious path, and are practised by people of all faiths. Their benefits are now supported by scientific evidence.

Michelle Yu, a Reader at the NSW Bar who began a mindfulness meditation practice earlier this year, said that she has found meditation has helped her – instead of dwelling on a bad day in Court and ruminating over what happened, she can more easily accept it, acknowledge that it is in the past, and shift her attention to what needs to be done now.

What is mindfulness meditation?

The term "monkey mind" is often used to describe how our busy minds distract us from the immediate experience; we are usually too absorbed in our thoughts to be truly present. Especially in this digital-age of smartphones and social media, we are overwhelmed by stimuli. It takes effort for our mind to settle into stillness for even the briefest of time. Many of our partners will comment that we are not 'listening', which in truth means we are present but our mind is elsewhere, often churning through what went wrong that day, or what is to come tomorrow.

"The faculty of bringing back a wandering attention over and over again is the very root of judgment, character and will. … an education which should improve this faculty would be the education par excellence."

William James[2] in Principles of Psychology published in 1890.

'Mindfulness changes the brain, and it does so in ways that anyone working in today's business environment, and certainly every leader, should know about.'

Harvard Business Review, 2015

Mindfulness meditation is easy to explain but often people doubt whether they are doing it properly due to the tendency of the mind to wander while meditating. Put simply, there are two parts to mindfulness meditation. Firstly, it is consciously focussing on the breath. Whenever your mind wanders off you bring your attention back again to the breath. Secondly, as your mind becomes more settled and your attention is drawn to different sensations in the body, or external sounds, or images or thoughts that arise in the mind, you observe that experience and then return your focus to the breath.

By following your breath you are also tracking your attention. Each time you bring your attention back to the breath, you bring your mind back to the present moment instead of all the thoughts that are otherwise trying to crowd into your mind.

Each time you catch your mind being lost in thoughts or feelings and bring it back to the breath, you have stopped being carried away by the content of your thoughts or feelings and come back to the direct experience.

Nick Poynder, a barrister at the NSW Bar for more than 20 years, does a weekday meditation practice of at least 10 minutes each morning. He says that meditation literally takes the weight off his mind and gives it a rest.

Why do meditation?

Neuroplasticity is the lifelong capacity of the brain to create new connections and cells in response to our behaviours and environment. So it is no surprise that there has been scientific evidence that practising various forms of meditation consistently over time has the power to transform us not only in the moment, but in more profound, lasting ways.

a) Meditation Increases Focus and Concentration

In this digital world, the phenomenon of multi-tasking has become a catch phrase. But research shows that the brain does not "multi-task" but rather switches rapidly from one task to the other. Following every switch, when our attention returns to the original task, its strength has been diminished and it takes several minutes to ramp up again to full concentration. Since mindfulness meditation is a practice of attention training, it is no surprise that it has been shown to increase focus and concentration. Studies have shown that mindfulness strengthens the brain's ability to focus on one thing and ignore distractions, and to sustain that attention over time.[5]

b) Meditation Enhances our Alertness and Clarity

Meditation has also been shown to help combat habituation—the tendency to stop paying attention to new information in our

environment. By noticing the details of the experience, the sights, sounds, tastes and sensations that we would otherwise habituate, mindfulness transforms the familiar into the fresh and intriguing. We notice small or rapid shifts in what we experience.[6] As we become more alert we enhance our creativity and problem-solving ability.

c) Meditation Improves our Resiliency to Stress

According to neuroscience the amygdala, the more primitive part of our brain, triggers the freeze-fight-or-flight response, while the prefrontal cortex, a relatively recent part of our brain, manages our emotional reactivity. Neuroscientists know that the stronger the connectivity between the amygdala and the prefrontal cortex in the brain, the less a person will be hijacked by emotional downs and ups.[7]

Meditation helps us to be less reactive to stressors and to recover better from stress when we experience it. The more hours of practice, the more quickly the amygdala recovers from the distress.[8] It means that resilience can be learned and strengthened. In our profession this can be particularly useful when vicarious trauma can be a cumulatively significant but a hidden source of stress.

Nick Poynder acknowledges that a profound benefit of meditation for him is to develop and increase resilience. By focussing on returning to the present moment, he says that it allows him to take his mind off the stressor even if it is for just a split second. Often that's just enough time to stop being spun off into a neurotic chain reaction.

d) Meditation Helps us to Respond rather than Automatically React

When we are paying attention to the present moment, and cultivating a self-awareness, it is an opportunity to change how we perceive the world. Meditation gives you the tools to train your mind to reduce negative habits or perceptions, and frees up your mind to respond with equanimity towards yourself and in relation to the world around you.

For example, if you are driving to work and someone cuts you off. What is your first reaction? Do you experience anger? Do you end up mulling over the event and your reaction for the rest of the day? That single event can have a long-term effect on how you react the next time you are stressed, and every time after that.[9]

With meditation, you have the opportunity to become aware of this pattern and condition yourself to respond differently rather than react on autopilot. You can catch yourself in the heat of the moment or even before you flip off the other driver. You learn to let go of negative thoughts and feelings. Mindfulness enables you to respond to circumstances skilfully without judgment or reactivity, even when someone cuts you off while driving.

In my own experience, I have caught myself appearing in Court as my emotions rise, my heart is pounding, my mind is racing at a hundred miles an hour, and I am about to say something that I will later regret. At that point, I have paused and realised that I seem to be over-reacting and there may be a better way to deal with the situation.

How and Where do you Meditate?

Mindfulness meditation is not a panacea, it is one of the many tools to wellbeing. It cannot guarantee that you will stop waking up at 3am thinking about your next day in Court, but incorporating mindfulness meditation, just like getting enough sleep, eating healthy, and doing regular exercise, can bring balance into your life.

Mindfulness is completely experiential. It is not effective if you only theoretically know it, read about it or hear about it. It is through the practice of *doing* mindfulness meditation that the mind can be trained.

The beauty and simplicity of meditation is that you do not need any equipment. All that is required is a quiet space and a few minutes each day. You do not need to sit cross-legged on the floor - sit however you feel most comfortable, preferably in a quiet place where you will not be interrupted. You can start with 10 minutes or even commit to 5 minutes a day. Consistency is the key at the beginning, and preferably at a regular time and space. That way you can establish a habit, just like brushing your teeth. Also important is to practise over a decent period of time as the benefits are usually incremental, so give yourself a reasonable chance. You will find that at first you might only last 20 seconds before you realise your mind has wandered off and you need to bring your focus back to the present. Slowly, with practice, you will increase the amount of time you are free of the busy thoughts that otherwise occupy your day. The longer you maintain that focus the calmer you will feel, both immediately after the session and throughout the day.

These days there are many apps on mindfulness meditation that provide guided meditations and enable you to do it in your own time, including: *The Mindfulness App; Headspace; Calm; Insight Timer; 10% Happier*; and *Smiling Mind*. Ingmar Taylor SC uses a device that monitors the effectiveness of his meditation, called Inner Balance by HeartMath. He finds that his sessions are more effective when he has done high intensity exercise the day before.

Chris O'Donnell SC, who has started mindfulness meditation this year says that in his experience, learning from a meditation teacher has enabled him to develop a proper technique and helped him to stick to the practice. In the past, he had tried to meditate on his own but it felt like he was trying to learn to drive a car on his own. Now, in addition to his daily individual practice, he benefits from attending a weekly group guided meditation.

You are welcome to join other meditating barristers at a weekly guided group session on ***Wednesdays from 1.15pm to 2pm at Frederick Jordan Chambers***. They are free drop-in mindfulness meditation classes led by the writer. Or if you would like more information or have any questions on mindfulness meditation, you can email the writer at *tbaw@fjc.net.au*.

END NOTES

1 The writer was called to the Bar more than ten years ago and has been practising mindfulness meditation since 2001.
2 William James was an American philosopher and psychologist, and the first educator to offer a psychology course in the United States.
3 also called insight meditation or vipassana meditation.
4 Founder of Mindfulness-Based Stress Reduction, a program that incorporates mindfulness to assist people with pain and a range of conditions in a hospital setting.
5 Daniel Goleman and Richard Davidson, *Altered Traits: Science Reveals How Meditation Changes Your Mind, Brain and Body*, Avery 2017.
6 Daniel Goleman and Richard Davidson, *Altered Traits: Science Reveals How Meditation Changes Your Mind, Brain and Body*, Avery 2017.
7 Daniel Goleman and Richard Davidson, *Altered Traits: Science Reveals How Meditation Changes Your Mind, Brain and Body*, Avery 2017.
8 Daniel Goleman and Richard Davidson, *Altered Traits: Science Reveals How Meditation Changes Your Mind, Brain and Body*, Avery 2017.
9 David R. Vago Ph.D., 'The Brain's Response to Meditation', *Psychology Today*, posted 15 July 2015.

Regional practice in 2018

By Alexander H Edwards and Ting Lim (Bar Association)

It is possible to spend a career as a barrister in New South Wales without venturing beyond the stretch of city joining the Supreme Court to the Downing Centre. It is possible to sit on Macquarie Street in the afternoon and feel that one is in the leafy extremities of the bar. Yet there is a world beyond.

There are, according to the most recent statistics collected by the New South Wales Bar Association, 134 barristers practising in chambers located outside of the Sydney CBD. This figure does not include public defenders with primarily regional practices, and it does not reflect the number of those with chambers in Sydney who regularly travel the state for hearings.

NEWCASTLE CHAMBERS	TOTAL	MALE	FEMALE	SILK	JUNIOR	BAR ASSOCIATION MEMBERS
Mackinnon	2	2	0	0	2	2
Evatt	2	2	0	0	2	2
Newcastle	14	11	3	1	13	14
James Dowling	9	8	1	0	9	9
Hunter Street	14	11	3	1	13	14

PARRAMATTA CHAMBERS	TOTAL	MALE	FEMALE	SILK	JUNIOR	BAR ASSOCIATION MEMBERS
Arthur Phillip	12	5	7	0	12	12
Lachlan Macquarie	30	25	5	0	30	30

OTHER REGIONAL CHAMBERS	TOTAL	MALE	FEMALE	SILK	JUNIOR	BAR ASSOCIATION MEMBERS
Lismore (2 Chambers)	11	8	3	1	10	11
William Owen (Orange)	2	2	0	0	2	2
Hargrave (Wollongong)	5	4	1	0	5	5
Papayanni Chambers (Wagga Wagga)	3	2	1	1	2	3

The significance of the regional bar is inestimable. A client in need of the services of a barrister in Newcastle, in Wagga Wagga, in Bathurst, should not be expected to travel to Sydney in order to conference in person. Geography is the first frontier of gaining access to justice. If representation and legal advice cannot be physically accessed, people's ability to know their rights and assert them fall short of the concept that there is justice for all. Further, a barrister who understands a community, their values and the fabric of the regional community, may be a more accessible legal resource than one with chambers in Wentworth Selbourne for reasons beyond that of location.

Having determined to prepare an article along these lines, one of the authors of this article had by coincidence the privilege of appearing in hearings in the beautiful towns of Orange and Lismore this year. Photographs taken during that travel have been used to illustrate this article. By further coincidence, in Orange, his opponent was Mr Walsh, author (with Mr Nash) of an article in the *Bar News* of Winter 2011 entitled 'The development of the regional criminal bar'. It is a fantastic reflection on the role of courts, media and the bar to regional New South Wales to which the reader is commended.

The primary object of this article is to capture the face of the regional bar in 2018. It is hoped that anyone at the Sydney bar considering a sea change (or tree change) will find something in the remarks of our interviewers to encourage them. There is much there. Beyond these preliminary remarks, the authors do not pretend to be able to capture the experience of the regional bar. We recommend that you attempt to experience it for yourself. However, it is hoped that the reader will receive from the following exchanges a picture of a practice that reflects positive developments in the broader bar and the continued importance of the regional bar to NSW.

Heydon Miller

Called to the bar in 2009 - Orange

'I heard a solicitor say, "fantastic, we've got someone local."'

How have you come to be practising where you are?

A few things came together. Much of practice relates to tax and taxation disputes. I was thinking about a tree change and I reflected that there might be a need for a tax barrister in the regions. I hadn't heard of anyone with a similar practice having setting up in Orange.

What is the best part of basing your practice outside of the Sydney CBD?

Interpersonal relationships and professional networks are easier to develop and more meaningful in a regional community. Plus, Orange is a great town with a whole range of sport, food and cultural events. In practical terms, because it is well served by a regular and short flight, being based here allows me to maintain a commitment to traditional city based clients.

What are the challenges of practice in the regional areas?

The largest challenge has been my own attitude. I keep thinking that solicitors based in Orange and surrounds won't want to brief a barrister who isn't in chambers on Phillip Street. But my experience so far has proven me wrong. I heard a solicitor say, 'fantastic, we've got someone local'.

How has technology changed the way you practice?

Email and so on we take for granted. But the way legal work is carried on has made it possible to practise anyway. Travel is easier too. Being based in Orange means my practice might require me to travel relatively large distances to other places in the state. Being able to travel without reams of physical documents is helpful.

What would you suggest to a barrister who was considering moving their practice to the regions?

Do it. There are lots of opportunities for the bar outside Sydney. It's also important for Sydney barristers not to underestimate the quality of other professionals (for example, solicitors and accountants) who may contribute a significant source of work. From my experience, it would be a real mistake to think that another professional will be less exacting or sophisticated because they are not based in Sydney.

Shanna Mahony

Called to the bar in 2015 - Parramatta

'In joining chambers in Parramatta at Lachlan Macquarie, I have enjoyed the great benefit of both interlocutory and hearing work on a regular basis together with the opportunity to conduct circuit work in regional areas of Western NSW.'

How have you come to be practising where you are?

My practice before coming to the bar was primarily in Western Sydney. I elected to join chambers in Parramatta at Lachlan Macquarie to enjoy the collegiality of a smaller bar and to reduce my travel and seek to achieve a work/life balance.

What is the best part of basing your practice outside of the Sydney CBD?

The variety of work available to new members of the bar at Parramatta appears to me to be greater. I have enjoyed the great benefit of both interlocutory and hearing work on a regular basis together with the opportunity to conduct circuit work in regional areas of Western NSW.

Describe the culture of the chambers and the practice of law in the regions.

Lachlan Macquarie is a supportive and welcoming chambers with a variety of barristers willing to share their experience. We have a wide range of experience across vast areas of practice that allows new members of the bar an opportunity to learn and gain valuable experience to develop their own practice.

How often do you travel for your work?

I am fortunate to receive regular work in the Dubbo and Orange circuits of the Federal Circuit Court. I travel on average for one week every two months to complete circuit work in these regional areas.

Which courts/jurisdictions do you commonly appear in?

I commonly appear in the Family Court and Federal Circuit Court in both property and parenting family law matters and the Childrens Court, District Court and Supreme Court in child welfare matters.

What is the place of the regional bar to the NSW community in 2018?

The regional bar is in my view an essential part of ensuring access to justice for the wider community across NSW. The Parramatta bar allows greater access to representation for the ever increasing western Sydney population by providing services close to their homes and employment and close to the Court Registry within which their matter is listed.

Belinda Epstein

Called to the bar in 2017
- Newcastle - Sydney

'The best things about practising outside of the Sydney CBD are the collegiate and friendly legal community, the pace of life and not having to fight Sydney traffic.

How have you come to be practising where you are?

I grew up primarily in Newcastle and after a period overseas and in Sydney, have lived here for the last 12 years. However, a lot of my work as a solicitor was conducted in Sydney, hence my decision to continue this by having chambers in both locations. For my reading year I have also had a tutor in each city, which has been excellent.

When you came to the bar, did you ever consider practising in the Sydney CBD? If so, why did you choose to practise regionally?

With three children a (8, 10 and 12) already in school in Newcastle, it wouldn't be practical to uproot everyone. While Sydney certainly offers a broader range of opportunities, tribunals and jurisdictions and great proximity to events, Newcastle offers a wonderful lifestyle and a collegiate and friendly legal community. It's also only two hours from Sydney, so quite manageable for a day trip or overnight. It's amazing how much reading you can achieve on the train between the two cities.

Describe the nature of your practice.

I have only been at the bar 11 months so am keeping a very open mind at the moment about the type of work I do. As a solicitor I practised in various areas, primarily in civil litigation. For the last 5 years I have practised principally in health law and medical negligence. This is an area which I love and in which I am busy now at the bar.

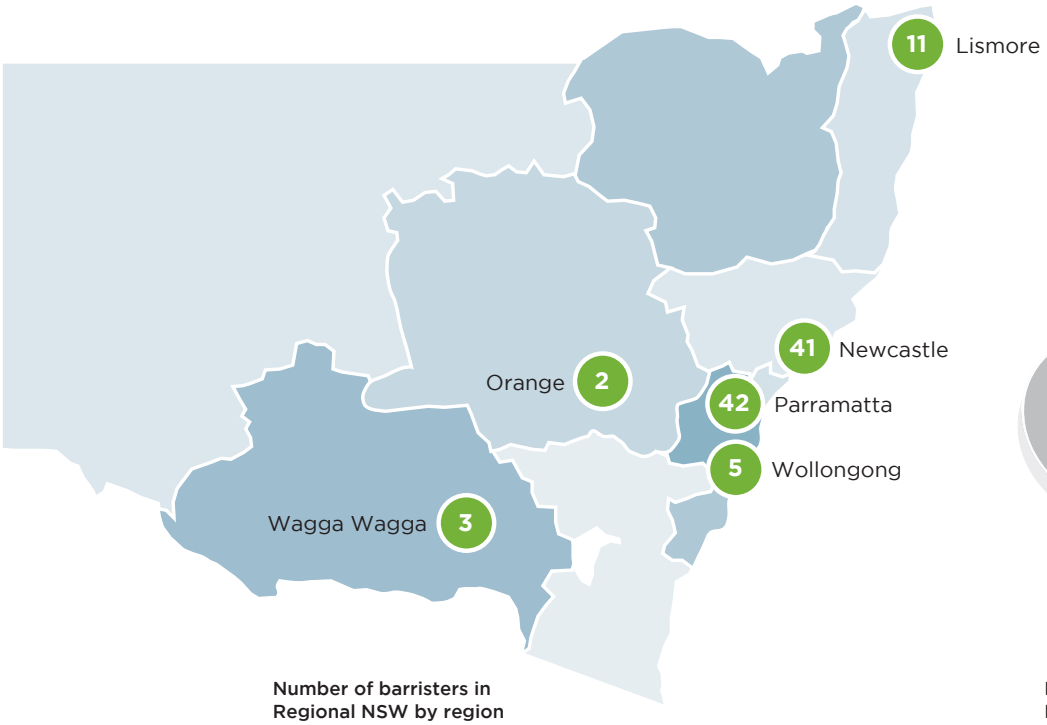
My chambers in Newcastle – Hunter Street Chambers – has a very friendly and warm culture, with members supporting each other and happily giving advice and assistance. Chambers is also five minutes' walk from beautiful beaches, plenty of cafes, restaurants and the harbour.

What would you suggest to a barrister who was considering moving their practice to the regions?

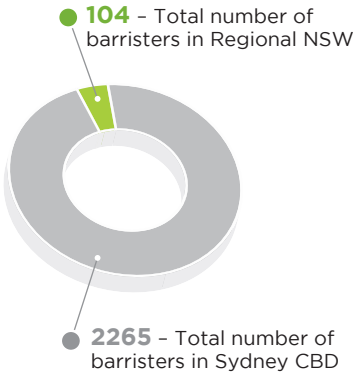
I would encourage them. I think practising in 'the country' is fantastic.

What is the place of the regional bar to the NSW community in 2018?

It has an important place. Regional courts require skilled practitioners, just as city courts do. The community expects this.



Number of barristers in Regional NSW by region



Number of barristers in Regional NSW in comparision to Sydney CBD

Sophie Anderson

Called to the bar in 2014 - Lismore

'I choose to practise regionally because practice is diverse, varied and at a high volume.'

How have you come to be practising where you are?

After initially practising in Sydney CBD and for the Redfern ALS, I left the city when I was a junior lawyer and went West to the Western Aboriginal Legal Service in Dubbo. I had an amazing early experience as a young lawyer with fantastic mentors, and loved the regional practice which offered a diversity of work at high volume. I then moved to the coast, to Lismore ALS and found my home. After the ALS I worked in private practice, and then after 15 years of being a solicitor, decided to go to the bar.

Practicing in Lismore and Byron Bay areas seemed a natural transition as I had lived and worked in this area for over 10 years. I now have chambers here in the Far North Coast.

When you came to the bar, did you ever consider practising in the Sydney CBD? If so, why did you choose to practise regionally?

I guess I contemplated it, but not in any real depth. I love regional practice and all that it means. And it's hard to replace the quality of life, but I haven't ruled out commuting to Sydney from the North Coast.

I choose to practise regionally because practice is diverse and varied. If I need to go to a city, Brisbane is a stones throw away, and Sydney is an hour by plane. It's possible to have a fulfilling career here, while living the charms of a regional life.

What is the best part of basing your practice outside of the Sydney CBD?

I think for me it's the work/ life balance and the strong collegiate bar. I am able to manage that balance more or less, and still enjoy a very busy practice with other colleagues who are like minded and well regarded. I also have an excellent chance to develop close relationships with other practitioners in this region and work closely with them.

Describe the nature of your practice.

The majority of the work I do is criminal trial work; with some limited civil litigation and personal injury work; employment law, industrial relations and coronial work.

I am lucky to be situated in a chambers with eight other barristers who all have varied practices from family law, equity, commercial, civil and construction, and some crime. It's a lively and very busy chambers with a supportive atmosphere.

How has technology changed the way you practice?

Enormously, as I'm sure for many barristers. E-briefs these days are a very quick and efficient way of receiving large volumes of documents. There are also pitfalls of course, and I am a bit old fashioned in that regard because I like a paper brief to mark up. But I can see the way technology has changed the way practice works, and I hope in the future this leads to more improvements and greater access to justice for people.

What would you suggest to a barrister who was considering moving their practice to the regions?

Come and check it out first, see if you like it. It is not for everyone of course, and it helps to have some roots down in the community to make sure that you get work but it's very rewarding, and if anyone was contemplating a move to the north coast I'd be more than happy to share my knowledge and time.

What is the place of the regional bar to the NSW community in 2018?

I think the regional bar is a very important community asset. It assists in a resilient and robust regional community and allows people access to legal advice without the expense and travel to larger cities if that doesn't suit them.

The sky is the limit, and the sky is blue

Talitha Fishburn chats with Mark Higgins, the New South Wales Bar's award-winning formation skydiver.

Ironically, skydiving is a grounding pursuit for Mark. His approach is almost meditative. 'It forces you to be in the moment', he reflects. 'It clears your head of noise... At that critical moment nothing else exists but the immediate present'. When he lands, he smiles. For an enduring period of gathered euphoria. Contrary to popular belief, skydiving is not the pastime of adrenalin junkies. Some try it, but they tend to move on. Instead, it is a haven for the meticulous. It is a sport focussed on utmost precision, especially *formation* skydiving.

For every formation skydive, Mark devises detailed contingency flowcharts. This is no fly-by-night sport. He maps out every possible scenario, with a corresponding planned response. A Call To Action from 20,000 feet. This approach is vital where time to act is critical; seconds, or even less. For instance, scenarios such as a teammate not exiting correctly, premature openings, line twists, canopy collisions, environmental factors changing…the parachute not o-p-e-n-i-n-g … well, he has a backup for that one: contingency *numero uno*.

The focus on precision is not without

comparison to practice at the Bar. Both require precision in their delivery. Mark draws further analogies between skydiving and barristerial work. For instance, the need to plan, the need to prepare and the need to manage (occasionally) stressful situations. Unsurprisingly then, there is an Australian Lawyers Parachute Society, albeit, currently with only 10 members, most of whom are based in Queensland. Mark observes that it is hard to identify a 'type' of skydiver, but it is not uncommon for them to be drawn from the ranks of the military, special forces, emergency services and, perhaps curiously, IT. These occupations require precision, careful planning and programming.

Most skydivers commence in their 20s. Mark is atypical in this regard. His first jump was in his 40s. He is a member of POPS, aptly acronymised as it stands for 'Parachutists Over Phorty Society'. The sport attracts longevity. To this end, Mark has jumped with an 86-year-old veteran skydiver who has jumped for over 60 years. Mark values the human capital of the sport's elders.

But utmost precision does not mean that accidents do not happen. Mark laments that on average, one person a year loses their life to skydiving in the skydiving circles known to him. This includes the life of his mentor who encouraged his entry to skydiving as well as a subsequent coach and three other friends. The losses hit Mark hard; he took time away from the sport on each occasion. But he resumed the sport by dedicating a period of advanced training with some Arizona based champions. Despite the fragility inherent in his sport, his passion has gone upwards, but he is ever alive to the realities of loss that characterise the sport, even at its highest levels. If accidents happen they are almost always catastrophic if not fatal.

Mark's formation skydiving serves as artistic installations of geometric patterns. There are various formation categories, for example, 4 way, 8 way, 16 way etc leading to 'Large Formations' or 'Big-Ways'. Mark's technique is 'flat'. This means belly to ground; aka Superman style.

The competitive scene is niche. But competition is hotly contested. Records are broken, and new ambitious goals are soon baked. The World Championships (held every two years) will take place for the third time in Australia in October 2018. Scanning the list of former world champions, most are drawn from either the United States of America or France.

The regime for national and world records is near militaristic. A week-long camp takes place involving at least double the required jumpers. Over the week, half the field is eliminated, leaving only the best. At 19,000 feet (and below) risk is unassailable. Mistakes cannot occur. Team solidarity is key .

The crown jewel of Mark's competition achievements occurred in June 2015 in Perris, California. Incredibly, it was a 119 person 'snowflake' formation. It is the current record for the largest group of Australian formation skydivers. It involved seven planes and thousands of hours of preparation. To qualify, the team were required to be linked together for at least 3 seconds; no mean feat at 200 feet a second from 19,000 feet. Mark's role was 'outer whacker' which required him to be on the very outer rim. The 'last say', so to speak. Not for the faint hearted! Training took three years in smaller groups before converging in California to take the plunge.

The sport takes daily maintenance. At a minimum, Mark does 50 chin ups, 100 push ups, 100 squats and 100 sit ups. All this in 15 minutes at 5 am. Formerly being a triathlete and champion swimmer, his discipline runs like Swiss clockwork. His actual jumping training takes place at his 'DZ' (dropzone) located in Goulburn every second weekend.

For the vertiginous among us, including myself, speaking to Mark offers a vicarious glimpse into taking the plunge sans reality. It starts with a feeling of flying. Initially, almost in slow motion. The legs are engaged to manoeuvre the body. The upper body is still. The first 1,000 feet takes 10 seconds. Then, acceleration kicks in and you reach terminal velocity; every 1,000 feet takes 5 seconds. The force of the up wind pushing is intense. The freefall is for 60 seconds, then… the parachute opens…and you sit, suspended in the harness, coasting forward; a pull on a riser sends you spiralling, the centre of gravity changing as your body pendulums relative to the canopy. Then, spiral and steer, spiral and steer, spiral and steer, all the way down.

In Australia, the sport is governed by tight rules. A self-administering body known as the 'Australian Parachute Federation' controls most civilian skydiving operations in Australia. With the approval of the Civil Aviation Safety Authority it sets the standards of operation, conducts competitions, issues licences, certifications and instructor ratings, conducts exams and distributes publications to keep members informed of current events and safety standards. Its 'Sporting Code' is detailed; 106 pages covering the minutiae of competition rules.

In October 2018, Mark will be nearing his millenary jump. The occasion calls for something special. The plans are still underway, but he is thinking of a 5 point 16-way formation in Goulburn with close friends. He has already celebrated a few friends' 1000th jump and, remarkably, one person's 10,000th jump.

For all its military precision, the sport has a comedic side. Mark has jumped in a tuxedo (though never in the *Wig & Gown*), nude, in only underwear, jumped with an inflatable pool toy, jumped from hot air balloons and even jumped close to someone jumping with a canoe, yes, a canoe. The sport also has an amusing street (or 'sky') talk. Charmingly, 'Blue Skies' is the salutation. It's like the Aloha of Hawaii. 'Sunset Load' is the last jump of the day.

Blue Skies!

Greg Tolhurst

Dr Greg Tolhurst was appointed Executive Director of the New South Wales Bar Association in October 2016.

Who are the guiding influences for you in the law/ have had most of an impact upon you?

I prefer to use the term 'inspired' because to say someone influenced you suggests you seek to emulate them in some way. I have the same issue with music; there are musicians who inspire me but I cannot say they influenced me because if I practised all day, every day, I still could not play a bar of what they play. The same is true in law.

So if we stick to those who have inspired me, my mentor for many years as an academic was Professor John Carter. John showed me how to go about - and how to enjoy - doctrinal legal research and is probably the cause of my lifelong unrequited love affair with the law of contract.

I have written a number of books with Professor Michael Furmston and have learnt much from him.

As a teacher for close to 18 years and coming from Sydney Law School one cannot help but be inspired by Ross Anderson. Everyone is inspired by Ross Anderson in their teaching; he is Mr Chips of the law school.

Professor Neil MacCormick's writings really made me reflect about the law and legal reasoning more than any other writer and also why thinking about law is a good use of your time.

Many people across the university also showed me the importance of cross-disciplinary approaches to research.

At the judicial level, all of my students know how much of a fan I am of Dixon CJ. The list could go on and on, Lord Macnaghten, Lord Diplock, Mason CJ, there are many others. I've recently started to read through all the dissenting judgments of Windeyer J in contract cases, I think many of his dissenting views perhaps now reflect the law: I should try to finish that article. I would add that a number of the judgments of McPherson JA of the Queensland Supreme Court were pivotal to my Phd.

During my time as tipstaff to the Honourable Justice Cripps I was inspired by many barristers who appeared in the Land and Environment Court and the NSW Court of Appeal. I don't think it would be appropriate to mention names as many are still in practice.

It is naïve to think the wave of technology currently impacting on legal services is cyclical and can be simply ridden out.

Do you think that academia has prepared you well for the rather obscure world of the Bar?

I disagree with the premise that the Bar is 'obscure'.

I suppose that for those who have not had to use a barrister before it may appear to be an obscure world, much like that of a leading surgeon; until you need to use the services of a barrister the Bar is probably a world that people don't know much about.

I have been around the law for a long time, and as a doctrinal scholar you are very much in touch with practitioners; there was no real culture shock, except of course for bench and bar dinners!

In some ways, there are strong similarities between academia and the Bar. A good academic, and a good barrister, doesn't simply accept the law as it is. Rather they both question, evaluate and argue for clarity, for improvement and, for justice.

The work of the Bar Association on behalf of its members is not purely reactionary or bureaucratic.

We do not unquestioningly accept the law or the policies put to us – the association investigates, interrogates and champions meaningful law reform and access to justice.

I think the skills I honed as an academic are relevant to the work I do for the Bar Association.

What is your perspective of technology on the legal sphere and the impact of obsolescence thereof?

It is naïve to think the wave of technology currently impacting on legal services is cyclical and can be simply ridden out. However, history tells us that workplace revolutions result in more jobs being created than lost. Of course it can be difficult to work out exactly what those new jobs look like while you are living through a period of disruption. Artificial intelligence itself needs to be regulated – this is a growing area of law. The 'Human Rights and Technology' project recently launched by the Australian Human Rights Commission will be a significant piece of research on such regulation.

There will inevitably be other new areas of law and we need to think as a profession about what they might be and what skills our members will need to take advantage of these new areas. I recently saw a chart of areas of legal practice that did not exist 15 years ago. It was surprising how long it was.

Before I left the university I was working with Associate Professor Simon-Reay Atkinson, an engineer who studies complex civil systems. We were looking at cyber which now forms a type of stateless jurisdiction with a growing body of rules and customs. As a complex system, behaviour in cyber cannot be regulated by command and control rules, but one can influence behaviour in a network. We need to understand how you do that as it is a world where people are operating alongside some of the darker elements of society. The work made me think differently about the extent of what law is, what type of laws can influence behaviour, the role of lawyers in that world and their relationship to other disciplines.

AI is already impacting on legal work, we all know that. But from the reading I have done, it does not seem that what Nick Bostrom in his book *Superintelligence* refers to as 'human-level machine intelligence' will be attained in my working life. So there is no immediate concern that the creative aspects of legal practice, the advocacy, the applied philosophy, the careful moulding of legal argument will be replaced soon. This is the work of the Bar, perhaps the Bar will in fact be the last institution standing when all around have faltered.

Were you ever attracted to coming to the Bar?

I was never attracted to law! I only ever wanted to be a drummer in a rock n roll band! That did not go as planned, I say this was due to tendonitis but that probably camouflaged a lack of talent. But when you pursue something like that from a young age, I think I starting gigging around town at 15 or 16, it can have a remarkably negative

impact on your HSC mark, leaving you with few immediate options. So I found myself as an accounts clerk in an insurance company being pressed to study accounting (the name of the insurance company will remain withheld). I did accounting for about a year, and with respect to those who love accounting, it was not for me. I did law so they would leave me alone, and because they had not reacted positively to an earlier suggestion that they give me time off to study archaeology. I only said 'law' because earlier that day I ran into a school friend on the bus travelling into work and he told me about what was then the Supreme Court SAB and BAB exams. So I never sat down and considered what I might do with this legal qualification and when I did finish it the academic route opened up. If at that time I had a friend who was a barrister they may well have led me in that direction but I did not know any barristers, I only recall knowing two solicitors.

How did you enter legal academia?

Complete happenstance. I never intended finishing law, I did 18 months, put on a backpack, and headed off overseas. Much later I was sitting in a pub in London with people I had been travelling with and it dawned on me that they had all finished University before they travelled. I thought I should head home and at least finish the qualification I had started. But I had no plans as to what I would do with it. I studied hard and my best friend's mum took pity on me and cooked me dinner every Sunday night. Their next door neighbour was Professor John Carter who started to take an interest in my marks and when I finished he asked me what I intended to do. I replied 'no idea but I liked international law. I might do a masters in that'. He smiled a 'that will be a passing interest' smile - and offered me a job as his researcher on the second edition of *Contract Law in Australia* with Professor David Harland. He brought me over to the dark side of commercial law. But having a diploma in law rather than a degree, I did not think I had much of a chance of obtaining an academic position so I entered practice as an in-house solicitor. Later my partner enrolled to do a PhD at Cambridge and so off we went to the UK. Sir Anthony Mason had recently retired from the High Court and was teaching Comparative Constitutional Law there and I got to know him. I understand his reading list was the largest Cambridge had ever seen! Anyway two minutes at the photocopier one day with Sir Anthony changed everything. He gave me two pieces of advice. He asked what I was copying and I referred to the particular case I was copying. He said 'I wouldn't bother'. I didn't and it saved me a lot of time! He then asked me what I was doing and I told him that a mutual friend of ours (Professor NE Palmer) had asked me to deliver a paper at a conference on export licencing of moveable cultural heritage. I said I would have to say no as I knew nothing about the topic. He said 'you should say yes'. I did the paper! Giving your first ever conference paper to a group of scholars, many from Oxford and Cambridge, and surviving, gives you a bit of confidence. It also resulted in the publication of some of my first papers which focussed on cultural heritage and that, together with art law more generally, is a field I have enjoyed ever since although it did not become my academic research area. I also got a position as Sir Jack Beatson's researcher on the new edition of Anson's. He said to me one day 'you really like this academic work don't you?' I replied 'yes' and he said 'well you should do it'. Between them I was inspired not to manufacture limitations. We returned home, I applied for a job at UNSW business school. I got it, I was teaching. I then applied for a casual position at Sydney Law school. I got it. I did a PhD after our first child was born but we had number two and three while I completed it. I think I had graduated by the time number four was born. Life was complete chaos but exciting. I ended up with a full time position at Sydney University Law School and there I remained for 17 years. Loved it.

There are a lot of challenges facing those who provide legal services. For barristers some of those challenges might be faced individually and some as chambers operating as a business unit.

Was there a key reason to move from an academic chair to a job as the Bar's next chief executive?

I had been taking on more administrative and managerial positions at the University, various Associate Dean Roles, Pro-Dean and Acting Dean. I found I enjoyed the work; it was intellectually stimulating to develop ideas with colleagues, whether they be new degrees, new units of study or other programmes, work them through various university committees and then implement them. The work involved lots of meetings, speeches, reporting and some media. I loved every bit of it. Also as Pro-Dean and Acting Dean you get to work closely with colleagues and help them with their careers and often help them as much as you can in their personal lives. It is rewarding work. I was hoping that a full time management position at the University might come my way when a friend put the advertisement for the position of Executive Director on my desk and said 'much of this sounds like what you have already been doing here'. I applied and three interviews later got the job.

What is your perspective on the notion of 'One Bar', the NSW Bar which unites town and country? (e.g. Newcastle, Orange, far North Coast right down to the Victorian border). How do you see it developing in the future?

The notion of 'one Bar' has always been important and remains so. Indeed the future of the Bar will depend in large part upon that notion. There are a lot of challenges facing those who provide legal services. For barristers some of those challenges might be faced individually and some as chambers operating as a business unit.

But other challenges may need to be faced by the profession as a whole requiring us to come together as the NSW Bar and at times the Australian Bar. Grappling with the challenges and opportunities presented by changing technology, ensuring diversity and building international practices are examples. And the notion of 'one Bar' allows the Bar Association to take the lead on some of these challenges.

Of course some sections of the Bar face discrete challenges that require nuanced and targeted solutions, which is why the Bar Association maintains area of law committees

and sections. Our Committees comprise 309 barristers, which represents around 10 per cent of all practising barristers who give up their time to work for their colleagues as one bar.

The Sydney Bar asserts that it is the leading Bar in Australia. What are your views on that? (the number of barristers, the number of cases in the Supreme Court and Federal Court)

I don't know if it would be appropriate for me to comment. It is what it is! We all know that! To say otherwise would be fake news. I let the evidence speak for itself.

But one serious point which I alluded to before is that sometimes the Bars will need to come together and be represented as the Australian Bar. To that end I do think we need to put some energy behind ensuring we have a well-funded and strategic oriented Australian Bar Association. I have seen over the last 12 months under Noel Hutley's Presidency that the ABA is positioning itself to take on a more strategic role for the benefit of all the Australian Bars.

What are your impressions on the rising number of new barristers?
How do you envisage the Bar fitting into the new world? (several new universities with law faculties)?

The recent Bar reading course had one of its largest ever cohorts. We do not know why so many at this time are seeking to come to the Bar. Overall the numbers at the Bar have not risen sharply.

Diversity remains a major issue. While female law students have outnumbered male students for decades and the male/female ratio of solicitors is reflecting that as an overall figure, we are still not seeing these figures represented at the Bar. The first year and one to five year figures show that there is a problem with attracting (and retaining) women to the Bar.

As I said, law schools have been producing large numbers of graduates for some time now. I understand that generally 50 per cent of those graduates say that they never intend to practise law. So you can only assume that a law degree is seen as valuable for many careers. Similarly engineering has become a much more general degree with many going into other walks of life such as banking. What we are not seeing at the NSW Bar is a large number of new graduates sitting the bar exam. The vast majority have been in practice for some time. So I am not seeing the large numbers graduating university as impacting on the Bar at the moment.

Where further thought could be focussed is helping members with planning for life after the Bar, that is, using the skills they gained from a law degree and years of practice in alternative pursuits, a thing that 50 per cent of current graduates already perceive from having a law degree.

As regards fitting into the new world, the Bar is the new world. We speak today of the gig economy, a world where efficiencies are obtained by companies and individuals entering into short term contracts for work and services. That is the Bar; the Bar is very much then 'on trend', and it can deliver the efficiencies and savings that companies and individuals seek from that economic model. I know it is counter-intuitive to 'brief early' but it does result in savings and we need to communicate that message. But the solicitor branch of the profession is seeking to sell 'retain early' too, we are both trying to communicate a similar message and perhaps we can work on that message together.

I recently watched Tom Wilkinson's portrayal of a barrister in the movie, 'Denial'. It was a perfect example of the importance of that independence.

Have there been any immediate challenges/concerns and improvements which you have identified?

The New South Wales Bar Association carries a diverse portfolio. From professional development (bar practice course, bar exam, CPDs lectures and conferences); practice support services (library, member services, benevolent fund, growing demands for more platforms such as secure document storage); advocacy (developing policy and championing meaningful law reform, submissions to government and stakeholders, speech writing, media and communications); professional conduct (certification, statutory obligations and complaints); operations (finance, HR, IT facilities, events, data and analytics etc). In addition there is silk selection, Bar Council elections and a significant number of events each year including working with the ABA to develop the national and international conferences. Not to mention the extensive liaison and engagement work the Bar Association does with the judiciary, government and other stakeholders.

No other Bar Association does all of this to the scale that the NSWBA does. In addition to this there is the need to deliver on the strategic plan initiatives. As I said in the annual report last year, a large focus has been to review many in-house systems to see where we can find efficiencies in order to create the capacity to help the Bar Council and committees on the work of the strategic plan. In saying that I do not want to suggest that I put efficiency and optimisation above all other considerations. To do so can result in an organisation that cannot adapt and change. If you look at organisations that have truly stood the test of time (e.g. Bologna (1088), Cambridge (1209), Oxford (1167), Harvard (1636), Stadsbank van Lening (1614), Barclays (1690), the Royal Navy, the Bar and the Inns of Court, the Vatican, the Barone Ricasoli winery (1141) and the Shepherd Neame Brewery (1698) there are some common features. Those who study this such as Professor Scott E Page point to diversity of people and ideas (best served when there is a willingness to adapt to a growing awareness of the what 'diversity' encapsulates) and having a certain level of slack in an organisation to allow for experimentation, adaption and to make an organisation robust. A complete list would not contain many businesses that have been driven solely by principles of efficiency. Rather longevity is based on collaborative social influences which drive decision making and taken over time rather than hard coordination rules and control systems that merely drive decisions 'now' and 'in time'. I put aside the apparent relevance of having a good cellar that the above list might suggest.

The strategic plan itself has numerous initiatives but in order to achieve those initiatives you need an end point. For example, the objects of the Bar Association are set out

in the Constitution but if you were to try and summarise many of those objects you might say that the role of the Bar Association is to safeguard the rule of law and support the administration of justice in NSW through a sustainable cohort of high quality independent practitioners at the Bar operating with integrity and thriving in a changed legal environment. From that you then have to ask, 'what would success look like'?

That is not an easy question to answer. Indeed it is not an easy question to answer in a single entity like a company, it is more difficult when you are thinking of around two and a half thousand sole practitioners. But it is necessary to find a way of having the conversations that seek to answer that question so that you know how to approach the initiatives in the strategic plan or at least where to hedge your bets. Working out how to do that has been a challenge, there are a lot of moving parts, but we have made much progress and there will be more to follow on this.

What are your opinions of the importance of the Bar and where it sits in our society and also in preserving it as an independent 'private Bar'? Do you have any observations or perspectives on that notion?

When addressing the Bar Readers Course the President, Arthur Moses SC often quotes from Dixon CJ's swearing in speech as chief justice of the High Court on 21 April 1952 where his Honour said, '[B]ecause it is the duty of the barrister to stand between the subject and the Crown, and between the rich and the poor, the powerful and the weak, it is necessary that, while the bar occupies an essential part in the administration of justice, the barrister should be completely independent and work entirely as an individual'. It is difficult to express the importance of the Bar any better.

That independence and the cab rank rule are essential to our legal system. I recently watched Tom Wilkinson's portrayal of a barrister in the movie, 'Denial'. It was a perfect example of the importance of that independence.

Not too long ago I was sitting at a table with a group of leading commercial solicitors and the topic got onto, 'if I got into real trouble with my bank and I needed very sophisticated legal advice, could I go to one of the large law firms to get it'?

There was a general consensus that it would be difficult to get such advice because of the conflicts of interest that are likely to arise with the banks being clients of the firms. Now they may or may not have overstated the position, but the question does not arise when you discuss the Bar because of that independence. Any person can brief a leading banking barrister.

How has your perception of barristers changed, if at all, from being an academic to being the executive director in charge of the Bar? Were there any preconceptions before you came?

I do not think it has changed. I have been around the law, lawyers and barristers for a long time and my preconceptions were simply of a hard working group of people who work in a highly stressful environment where people's liberty or financial security is in their hands each day.

I was reassured and encouraged to find that this was in fact the reality of life at the Bar.

I probably appreciate their life a little more, particularly on the criminal law, family law and personal injuries side as these were not my areas of practice or research.

What is the 3-5 year plan for the Bar and what do you envisage to this rather 'cloistered world' of the Bar?

I wouldn't describe the Bar as 'cloistered'. Like the judiciary and police force, many of our members see far too much of the dark side of humanity. The work barristers do in representing clients in all fields of law very much puts them 'out there' in the world.

The long term plan is all in the strategic plan. The Bar Association staff will strive to work with the Bar Council and its Committees to implement the initiatives in the strategic plan while carrying out the day to day functions of the Bar Association.

Does the executive director hazard a guess how the role of barristers will change given the numbers and the changing face of the law? (Technically, the Bar has not increased in size as much as people think.)

I hope it does not change! The independent referral Bar is crucial to the administration of justice and that role needs to be protected. It is difficult to predict the optimum size of the Bar and the nature of advocacy keeps developing. We have seen a rise of the inquiry of late and barristers are uniquely equipped to work in those arenas. But it is important to communicate the extent of what advocacy entails. We know it transcends the court to mediation and arbitration, but a large part of what barristers do is manage risk and help clients make strategic decisions in difficult, disruptive and stressful situations. That important skill is one that clients need to tap early and is why the message of 'brief early' is so crucial. There is an important session in the upcoming Australian Bar Association and New South Wales Bar Association national conference on this topic. The session is entitled 'Effective Triage of Major Multi-faceted Disputes – positioning clients to survive the feeding frenzy' and is being moderated by Elizabeth Cheeseman SC with a panel comprising Caroline Cox (Group Corporate Counsel BHP Billiton), Neil Young QC and Reay McGuiness (Webb Henderson). But of course that skill transcends commercial work to every type of matter that barristers are involved in.

Finally I think the escrow account that is now being developed with the National Australia Bank and should be rolled out in early 2019 will give our members a lot more flexibility as to how they wish to run their practice.

We speak today of the gig economy, a world where efficiencies are obtained by companies and individuals entering into short term contracts for work and services. That is the Bar; the Bar is very much then 'on trend', and it can deliver the efficiencies and savings that companies and individuals seek from that economic model.

Family Court of Australia in the Parramatta Justice Precinct. Photo: Manfred Gottschalk / Alamy Stock Photo

Chronic underfunding is the cause of delays in family law

By Michael Kearney SC

In May 2018, the federal attorney-general announced the government's proposal to merge the Family Court of Australia and the Federal Circuit Court, a move that would effectively lead to the abolition of the Family Court of Australia.

The proposed merger would create a new single 'Federal Circuit and Family Court of Australia' from 1 January 2019, in addition to a new Family Law Appeal Division in the Federal Court of Australia to hear all appeals in family law matters from the new merged court.

At the time of the announcement, which took the profession largely by surprise, the federal attorney-general advised the president of the Bar Association, Arthur Moses SC, that he was willing to engage in discussions about the proposed reforms. To date, no discussions have occurred.

The announcement was made in the middle of a review of the family law system being carried out by the Australian Law Reform Commission (**ALRC**), which has been asked by the Australian Government to consider (amongst other matters) 'whether the adversarial court system offers the best way' of resolving parenting and property disputes.

The Bar Association's position has always been that real and lasting reform of family law has to be based on evidence which is aimed at reducing the unacceptable delays that exist in the current system. The provision of sufficient judicial resources and appropriate legal aid

funding is at the heart of dealing with those delays.

In late July 2018 the Bar Association released a Discussion Paper intended to foster debate and encourage the government to consult in relation to these important reforms.

The Discussion Paper called for a national conversation about the benefits of preserving a specialist family court in Australia and outlined a proposal for structural reform of the Federal Courts that maintains a stand-alone, properly resourced Family Court of Australia 2.0 as an alternative to the restructure proposed by the attorney-general.

The difficulties faced by the family law jurisidiction is experienced throughout New South Wales and is particularly acute in metropolitan and regional areas.

The delays in both the Sydney and Parramatta Registries of the Family Court of Australia mean that a case commenced today (involving children and/or financial issues) is unlikely to be finally determined for at least three years and, in a significant number of cases, will take longer. That is unfair to families and is not sustainable.

Barristers in NSW are at the coalface of dealing with the problems that arise from stretched judicial and court resources.

In Dubbo and Orange, practictioners report that since about 2015, sittings for duty matters and hearings have reduced dramatically in the Family Court and the Federal Circuit Court. The Family Court sat in Dubbo for at least four hearing weeks a year until about 2017. Following the appointment of Justice Gill to the Canberra Registry it was announced that his Honouor would sit for 20 weeks a year at Parramatta, to enable Justice Foster to cover the Dubbo sittings. As it turned out, Justice Gill did not sit at Parramatta for 20 weeks a year as proposed and the sittings of the Family Court at Dubbo ceased completely.

The resumption of the Family Court sittings at Dubbo for two weeks a year is under consideration. However, that would still represent only half of the sittings that have historically taken place at Dubbo.

Although there are scheduled sittings of the Federal Circuit Court in Dubbo and Orange in 2018, and it is recognised by local practitioners that the sitting judges work very hard – in one recent case, the court sat until 7.15pm so as to avoid having to adjourn a two day specially-fixed part-heard matter – there

are still significant delays, an inability to obtain an urgent or interim hearing date and a risk of matters being 'not reached' on more than one occasion.

Albury circuit

On the Albury circuit, a reduction in sittings is causing severe delays in the resolution of proceedings. In about 2015, sitting weeks reduced from about 10 a year to five weeks a year. Generally, the duty list operates on Monday of the sitting week and hearings are listed from Tuesday to Friday. Hearings are allocated for specific dates within the hearing week, rather than as a rolling list; however, local practitioners report that some matters inevitably roll over to the following day, and legal representatives are expected to be in a position to appear on any day of the sitting week. As with any list, some cases are adjourned and some resolve on the day of hearing. Others are marked 'not reached'.

By way of illustration, on a sitting week in December 2017, some 58 matters were listed before the court. Four matters involved interim hearings, and the balance were listed for directions. From Tuesday to Thursday of that week, 48 matters were listed for final hearing. At least one of those matters had twice previously been marked 'not reached', a not uncommon occurrence. Such 'over-listing' of final hearings results in a duplication of costs for clients in preparing for trial.

Legally aided matters often reach the cap in funding without the proceedings being heard. Multiple applications must be made if a matter is not reached. Delays in processing Legal Aid applications in turn result in funding not being granted in time for trial evidence to be filed in accordance with court orders.

Local practitioners report that final hearings are listed before the preparation of a Family Report, which is often released very close to the hearing date. Legal Aid will often not even consider applications for trial funding until the Family Report is released. This results in delayed preparation of trial documents. At a practical level, case management occurs during sittings. There is no provision for telephone directions hearings to occur, for example, after a conciliation conference or mediation or after the release of a Family Report.

More proceedings are now being transferred to Melbourne for hearing than was the case when 10 hearing weeks were allocated to the Albury Circuit. The costs associated with travelling to Melbourne is prohibitive for many litigants and difficult for regional practitioners. The listing of urgent interim hearings is sometimes delayed by up to three months, resulting in practitioners listing urgent matters before the Local Court or in Melbourne.

Coffs Harbour/Lismore

On the Coffs Harbour circuit, the Federal Circuit Court sits for final hearings for about five weeks a year, which is a similar period to the Lismore circuit. The court also sits in both centres on other occasions for other hearings, sometimes by phone, other times physically.

In a recent Coffs Harbour circuit, in the week of 20 November 2017, there was a large number of matters listed each day at 9.30am, along with a sizeable list of mentions and interim applications, which often take up two hours of the court's hearing time. Coffs Harbour is a region with a large amount of parenting applications, which often, necessarily, take priority. To add to the workload, by the Thursday of that week, fresh final hearing matters were listed. Two matters were heard to finality in the course of the week. The position is similar in Lismore.

The delays are illustrated in one parenting case involving a child aged under two years, to whom the father did not initially have access. Following an appeal of an interim decision, the matter was listed for final hearing in June 2017. The matter was heard for one day, then marked part heard. The hearing resumed on on 14 September 2017, at the end of which it was again marked part heard, and was again listed in December 2017.

Submission to review of the family law system

Against that background, the Family Law Committee prepared a submission in May 2018 on behalf of the association in response to an 'issues paper' released by the ALRC as part of its review of the family law system.

In that submission, the association stressed that fundamental to the federal review should be a recognition that family law in NSW has been adversely affected by a chronic and sustained lack of resources in both the Federal Circuit Court and the Family Court of Australia in its NSW registries, which has resulted from an absence of commitment by successive governments to the proper funding of the system.

'Any recommendations made by the ALRC as a result of this review need to recognise and acknowledge that without a commitment by government to a properly resourced family law system, such recommendations will be, at best, of limited utility,' the association stated in its submission.

'The association considers it imperative to ensure that, while alternative dispute resolution is utilised wherever possible and appropriate, the broader family law system, including the courts, is properly resourced, maintained and supported to administer justice for those affected by complex family law matters that cannot otherwise be resolved.'

The average number of cases in the docket of judges in the Federal Circuit Court is in excess of 400, a crushing workload. The lack of resources relates not only to an insufficient number of judicial officers to deal with an expanding jurisdiction and increasing workload, but also insufficient funding to maintain counselling and assessment services previously provided by the courts.

The Bar Association's submission also stated that although there is a great willingness among the members of the NSW Family Law Bar to provide *pro bono* assistance, the association is concerned that the provision of *pro bono* assistance for those involved in family law proceedings simply cannot and should not be a substitute for the proper funding of the courts and the legal aid system for those in need of family law assistance.

Without a properly funded family law system the rights and interests of litigants and children alike cannot properly be protected. Without proper representation, there is a real risk of uneven playing fields and unfair outcomes.

The Family Law Committee's position is that a properly-resourced court must be a key part of any blueprint for the future of family law, just as it has been a critical, if underrated, part of the system's success over the last four decades.

Many parts of the ALRC's 'issues paper' make reference to various family law systems and models which operate around the world. What is missed is that so many different countries look to Australia as the 'gold standard' and benchmark of family law systems. Over the last four decades the Australian family law system has built up procedures and jurisprudence held in high regard in almost all areas of the world except, it often seems, Australia.

The most difficult matters and the most complex matters will ultimately require the assistance of a court. It is critical for the benefit of these clients and children involved in these cases that the court must be properly supported and resourced to adjudicate justly, promptly and affordably.

The Bar Association's submission to the ALRC conluded: 'The association recognises the work of the courts, the judiciary and the barristers who have achieved what has been achieved despite the chronic underfunding of the system and without the support and resourcing required. In conclusion, the association believes that the future of a fair, robust and just family law system must include a properly resourced, respected and supported court. The association encourages the ALRC to consider the resourcing and funding of the courts as a crucial part of any proposed reform and to call on government to support the courts' ongoing work for and on behalf of the community.'

As part of its review, the ALRC is scheduled to release a discussion paper in early October 2018, and the Family Law Committee will prepare a further submission in response to it on behalf of the association, which will be the subject of an article in a future issue of *Bar News*. The ALRC is due to provide its final report to the Attorney General on 31 March 2019.

The Honourable Charles Simon Camac Sheller AO QC

Simon Sheller QC, the former Court of Appeal Judge, has died aged 84 years. He had a remarkable career in the law - he was the judge's judge.

Charles Simon Camac Sheller was born to Horace and Mary Sheller on 2 May 1933. He was an only child. He was educated during the Second World War at Cranbrook, Bellevue Hill and then at the King's School at Parramatta.

After he left school Simon travelled to England. He went up to Trinity College Cambridge where he read for the MA. He then trained as a Scots Guard (Second Lieutenant BAOR) in 1955. For a time, he served in the British Army in Germany.

In this busy time, there was even a brief appearance in the film *Around the World in 80 Days* with David Niven and Shirley MacLaine. He is depicted in a scene among his military colleagues in uniform near Buckingham Palace.

Simon was the last associate to Sir Dudley Williams on the High Court in 1957 and 1958 before returning to England where he was called to the Inner Temple (London) in 1958. Sir Dudley imbued Simon with the learning, diligence and care which would sustain him throughout his career. The intimacy of the High Court premises at Darlinghurst gave Simon a great exposure to the judges, in particular Sir Owen Dixon who was always willing to offer Simon advice which he enjoyed receiving.

Sir Dudley was steeped in the practice and procedure of the Equity courts and before that of the Chancery and was the finest equity silk. He confided in Simon that he preferred the work in the Equity Division of the NSW Supreme Court and should never have left that court.

Simon was called to the Bar in Sydney on 25 November 1959. The most significant moment in his time at the Bar occurred within four months of his calling when, on 31 March 1960, he took a phone call from someone he had never met before, Jan McDowell, seeking a lift to a party taking place the next day. His considered response was a critical step into a married life that lasted 57 years.

As a reader his Pupil Masters were Bernard Reilly and Forbes Officer. Simon regarded their instruction as the foundation for his career at the Bar.

Simon's style of advocacy was polite, understated, and gentlemanly – an inimitable courtesy became his hallmark. He had an urbane style which stood in stark contrast with the rambunctious cohort of common law types which dominated the Bar in the years 1960–1980.

In his early days at the Bar, Simon assisted on inquiries and royal commissions in the 1970s, most notably when he was led by Bill Fisher QC in the Petroleum Inquiry in 1975 (the same year he took silk) headed by Mr Justice Collins. Thereafter, he had the greatest respect and fondest regard for Fisher.

There were also several appearances in the High Court starting with *Ravenshoe Tin Dredging Ltd v Federal Commissioner of Taxation* (1966) 116 CLR 81,

Simon practised at the Bar unstintingly for 32 years. He shared chambers with Poulos QC, Hunter QC, Staff QC and later Maconachie QC (his last pupil). They were members of the Eleventh Floor. That clerk of clerks, Paul Daley, became Simon's personal and family friend over 28 years of service. Simon fraternised with the great luminaries of Wentworth Chambers: Paul Donohoe QC, Bill Fisher QC, BB Riley QC, BT Sully QC, The Hon. TEF Hughes QC, FS McAlary QC, WP Deane QC, RJ Bainton QC, Dusty Ireland QC, Robert Shallcross Hulme QC and of course, a younger Maconachie QC. He led the likes of AJ Meagher SC, MA Pembroke SC and MB Oakes SC.

Simon's *cause celebre* was *Ritz Hotel v Charles of the Ritz* before Malcolm McLelland then Chief Judge in Equity which required 23 appearances. It was an arduous case about comestibles bearing the famous hotelier's name. The Hon. Bob Ellicott QC, an erstwhile opponent, complained that he knew the meaning of 'aggrieved person' in the aftermath of having lost to Simon.

By 1975, Simon was in silk and practised as a QC *par excellence*, in the heady commercial litigation which carried on through the 1970s and 80s. He never failed to help a junior counsel – as a guiding and reassuring light.

Many well-known cases followed including *Baltic Shipping v Dillon* and *Australian Broadcasting v Bond*. At his height, he argued *Cole v Whitfield* and the Hammersely cases. He was often in the High Court and in the NSW Court of Appeal.

Simon was offered a judicial appointment in 1991, directly to the NSW Court of Appeal. The Hon. Murray Gleeson AC QC, then chief justice, said at the time that he could not have been a more suitable candidate for judicial appointment. Indeed, as a judge he would sit with the likes of Spigelman CJ, Samuels JA, Meagher JA, Handley JA, Hodgson JA, Beazley JA and Michael Kirby, Dennis Mahoney, Keith Mason as Presidents. It was a superb time in that Court and Simon felt a special honour to be part of the court.

On the bench, Simon was always polite and engaging. He remembered what it had been like to appear before intemperate judges. He would not emulate such judicial behaviour. As Kirby P noted, on the Court of Appeal Simon maintained a friendly visage.

Simon sat on countless committees over 13 years while on the Court, including the Law Court's Library Management Committee, 175th Anniversary Committee and the Law Court's Renovation Committee which supervised the renovation of the old Supreme Court. He was chairman of the Judicial Conference and Barristers Sickness and Accident Fund. He was also the chancellor of the Diocese of Grafton 1974–1996.

On the occasion of Simon's retirement from the court in 2005, the then chief justice, JJ Spigelman, said:

> […] In the 180 year history of this court there have been numerous judges who have displayed many of the judicial virtues: learning, wisdom, compassion, eloquence, robust independence, impartiality, attentiveness, diligence, common sense, clarity of thought and of expression, administrative skills and strength of character. Few have had all of these qualities and to the high level, that has been manifest by the Honourable Justice Simon Sheller […]

The chief justice remarked upon Simon's 200 plus judgments not including those unreported. All bore the hallmarks of Simon's inimitable judicial voice '[His] command of the language [allowed] all of this to be expressed with force and clarity and in a tone of high sobriety'.

On retirement, Simon prioritised life at home and in the Southern Highlands with Jan, his children and, ultimately, 14 grandchildren.

Simon succeeded over a lifetime in eschewing the loneliness he had experienced as a child. Simon's large family with Jan, Mark, Jane, Sara, Emma and James – a barrister, all survive him. And all of his grandchildren. This is testament to this promise of convivial company. It was a rich and loving family life – to everyone's delight.

Simon died in Bowral on 16 April 2018 and was farewelled at a private funeral in the Southern Highlands. The legal profession gathered at St James King Street on 4 May 2018 to honour his passing. The church was filled with the profession, family and friends joined together in fond recollection of Simon's achievements, both personal and professional.

Kevin Tang

Sir Laurence Street: the very model of a modern chief justice

After a meeting in 1986, the Supreme Court judges of NSW issued their first joint statement. The historic meeting addressed a burning issue: the balance between the judges' cherished independence and their public accountability, especially in view of allegations against High Court Justice Lionel Murphy, District Court Judge John Foord and Chief Magistrate Murray Farquhar.

Sombre judges had slipped through the court's back door, while their chief, the darkly handsome Sir Laurence Street, fondly known as Lorenzo the Magnificent, stopped helpfully for news photographers at the front. Street's historic public statement afterwards brought the government executive and the judiciary into serious conflict, with the judges joined by District Court colleagues and magistrates.

Then premier Barrie Unsworth and attorney general Terry Sheahan wanted to remove from parliament the power to sack judges; they wanted the judiciary to deal with the Foord case.

Street led the revolt that forced a government back-down. The judges accepted a compromise - establishment of the Judicial Commission to investigate allegations of judicial misconduct, but parliament must still wield the ultimate power.

Laurence Lillingston Whistler Street knew the history. The Stuart kings had sacked judges with whom they disagreed. The 1702 Act of Settlement gave judges independence and security of tenure. The Street family is steeped in history. Alys de Streate is in the 1085 Domesday book. Laurence's mother, Jessie, traced her ancestors back to King Alfred (the Great) of England (849-899). John Street shot dead two of the gunpowder plotters seeking to blow up the Houses of Parliament in 1605. In 1686 Sir Thomas Street was the only one of 10 judges to rule against a claim by James II.

Annie Besant, social reformer of the Theosophical Society, was of the extended Street family, as were anti-slavery campaigner William Wilberforce, American painter James Whistler and Edward Lear, most famous for nonsense poems. Laurence's uncle, also Laurence, was killed at Gallipoli. Geoffrey Street fought at Gallipoli and in France, won a Military Cross, became minister for the army and died with nine others, including two more cabinet ministers, in a plane crash near Canberra in 1940.

Another John Street had arrived from England as a free settler in 1822, found land at Bathurst and married Marie Rendell, with Reverend Samuel Marsden officiating. A son, John Rendell Street, MLA, married Susannah, a daughter of William Lawson, one of the first white men across the Blue Mountains; their son became Sir Philip Whistler Street, chief justice of NSW (1926-1934) and father of Sir Kenneth Whistler Street, chief justice from 1950 to 1960.

Kenneth Street married Jessie Lillingston. Both families feared the union would be a disaster. Jessie was accused of being a communist and fought for the peace, women's movements and for Aboriginal rights in the 1967 referendum. Conservative Kenneth dressed for dinner.

When he was appointed chief justice, she went to Europe for six years, including Russia for Joseph Stalin's funeral in 1954. The Menzies government tried to revoke her passport.

The marriage defied the dire forecasts and Laurence, born on July 3, 1926, was one of four children. He became a prefect at Cranbrook, lieutenant in the cadets, debater and school magazine editor.

Joining the RAN at 17, he served in the latter stages of World War II. He said that Jessie had passed on her humanity and four years in the navy gave him 'something of the common touch'. He took second class honours in law at Sydney University and became associate to Sir William Owen in the Supreme Court, before Owen went to the High Court.

Street went to the bar in 1951, married Susan Watt in 1952 and became a junior to Garfield Barwick. He established a large practice, particularly in equity, commercial law and naval matters, taking silk in 1963.

Court observers noticed that his forensic cross-examinations came gently, even to hostile witnesses. Some called him 'Lorenzo the Latin Lover'; he represented the American actor Connie Stevens, who referred to him as 'so handsome I had a mad crush on him'. Street became a judge in equity in 1965 and chief equity judge in 1972. Appointed chief justice of the NSW Supreme Court in 1974, at 47 years, he was unabashed.

He was accomplished at cutting through masses of detail to go to the hearts of matters. He mixed traditionalism with a certain radical touch, legal stability with creativity. Refusing an injunction to ban Hare Krishna activities in streets, he said: 'Manifestations of eccentricities by a person or persons within such a large city lend some colour to that city.'

Street opposed the Whitlam government's establishment of the Family Court, disapproved of federal and supreme courts being under the same roof in the new Queen's Square building in 1977, and clashed with the NSW government over its appointment of judges from lower courts, rather than the bar. Yet he backed social reforms introduced by Frank Walker in Neville Wran's government, such as Aboriginal land rights, community justice centres and Legal Aid.

Describing himself as a 'pragmatic idealist', he disliked controversy but headed the royal commission into allegations that Murray Farquhar had tried to influence a court case against rugby league boss Kevin Humphreys and that Wran may have influenced Farquhar. Wran was cleared, Farquhar gaoled and Humphreys convicted.

Street made suggestions to the Law Reform Commission and championed the establishment of ICAC, although some colleagues believed that judges should be excluded from its scrutiny. He wanted to break impediments that stood between the benefits of the law and the people. He coped with a vast amount of new litigation by streamlining procedures, introducing declaratory orders and referring certain matters to specialist referees.

His last case saw the Court of Criminal Appeal legally recognise sex change operations, with 'a more compassionate, tolerant attitude to the problem of human sexuality'. A person's sex would be decided on their psychological sex as well as genital features.

Justice Michael Kirby spoke at Street's farewell in 1988 of his 'shining capacities as a creative, energetic and imaginative judge … he was swift and efficient, courteous and painstaking. He was equalled by none in his capacity to deliver extempore judgments which marshalled the facts, expounded the law and reached conclusions … He is the very model of a modern chief justice.'

Street thought history was bringing law closer to social justice than in Dickens' time, softening the harshness of black letter law. 'You don't leave your heart behind as a judge.'

He was the first retiring chief justice to take on a new career, as a commercial mediator, and a new wife, Penny Ferguson. He said: 'I've always enjoyed a streak of irresponsibility, both in my values and in my lifestyle. I've never felt constrained in my private life by the cast-iron requirements of society. I got divorced, I remarried, and had a second family of one. I have led a life that has not necessarily always conformed to the strict Victorian standards.'

In his second career he negotiated a settlement between the British National History Museum and Indigenous groups to return the remains of 17 people to Tasmania. He decided there was sufficient evidence to charge the arresting officer in the death of Mulrunji Doomadgee on Palm Island. He inquired into anti-terrorism, casinos and the Children of God.

Sir Laurence Street is survived by Penny, children Sylvia, Sarah, Alexander, Kenneth and Jessie (whose godfather is Prince Charles), 15 grandchildren.

By Tony Stephens

Judge Wendy Sue Strathdee

On Tuesday, 22 May 2018 Wendy Strathdee was sworn-in as a judge of the District Court and the Dust Diseases Tribunal of New South Wales. Elizabeth Cheeseman SC attended the ceremonial sitting and spoke on behalf of the New South Wales Bar. Also in attendance were her Honour's parents, Ian Strathdee QC and Dr Marleen Strathdee.

Her Honour's mother, an ophthalmic surgeon, was a pioneer at a time when being a working mother was not the norm. By all accounts, her Honour's childhood was spent in a household which knew the meaning of hard work, and which valued intellectual achievement and prized the importance of the public service. Her Honour's husband Mr Dominic Priestly SC and her two children were also present to witness this significant day in her Honour's professional life.

Judge Strathdee entered the legal profession in 1988. She was the associate to Judge Conomos and then for some years for Judge Phil Johnston on the District Court. Her Honour was admitted to the New South Wales Bar in 1992. By that time, her Honour was an expert in law and the lore of the court room and the many aspects of a life at the Bar. However, even that did not spare her Honour from a proper period of initiation even appearing before Judge Johnston. Her Honour's pupil master was Peter Mooney SC. Her Honour moved from Garfield Barwick Chambers to Elizabeth Street Chambers over the course of her career at the Bar.

As a barrister her Honour was admired for her friendly pragmatism in cases, her firm but generous nature and her good heartedness in dealing with others in the court. These are significant aspects observed of her Honour in how a barrister practises the Law. Her professional domain was the Dust Diseases Tribunal and Mr John O'Mealey AM (who was also in court) formally remembered her as a regular and skilful advocate before that tribunal.

Her Honour is remembered for dealing with real issues in a case before the court and was held in high regard by her opposition and judges of that court. As is well known, the tribunal sits at any day, any time almost anywhere. The development of the Tribunals practice and procedure and polices are in no small measure due to her and her regular appearance as top counsel in that jurisdiction. She has even been a pioneer sitting as a mediator in this niche area of Dust Diseases. Throughout her Honour's career, and especially during these mediations, her Honour exhibited excellence and extensive knowledge of the area. Her Honour's achievement and accomplishment in this area often draws remarks upon the warmth and sensitivity she exhibited to all concerned in the Dust Diseases procedures. Litigants bore witness to a highly skilled advocate in the most trying of circumstances. Those considerable skills will make her Honour a compassionate judge who will bring significant measures of legal skill and compassion to the court.

Judge Strathdee replaces his Honour Judge Kearns on the District Court.

By Kevin Tang

Debra Maher

Debra Maher was sworn-in as a magistrate of the Children's Court of NSW on 18 June 2018. President Arthur Moses SC spoke on behalf of the NSW Bar.

Present at the ceremony were her Honour's family and friends, in particular her husband, former rugby player turned referee, Wayne Erickson, daughter Whitney, an accomplished opera singer, and granddaughters Lilly and Allegra.

Her Honour is described by former colleagues at Legal Aid as 'feisty, committed, passionate and caring'. She attended Burwood Girls High School and enrolled in a Bachelor of Science degree at the University of Sydney. Her Honour decided to change career path and instead went to work for IBM Australia as a business analyst. Her Honour then heard the call of the law and began work as a paralegal at Baker & McKenzie Solicitors.

In 1994 her Honour completed a Bachelor of Legal Studies at Macquarie University and following her practical legal training she was admitted as a solicitor of the Supreme Court of NSW in February 1995. Her Honour began working as a legal research officer for the Royal Commission into the NSW Police Service, before accepting a position at Hunt Partners from December 1996 to September 1997.

For the next five years her Honour was a solicitor and then senior solicitor at the NSW Office of the DPP, managing many and varied tasks, from Local Court committals, Supreme Court bail lists, conferences with witnesses and victims of crime, as well as appearing as an advocate in District Court short matters.

Since January 2003, until the time her Honour accepted the appointment, she had served in various capacities at Legal Aid NSW – as solicitor in charge at the Drug Court of NSW, acting solicitor in charge of Inner City Local Courts and indictable offences in Parramatta.

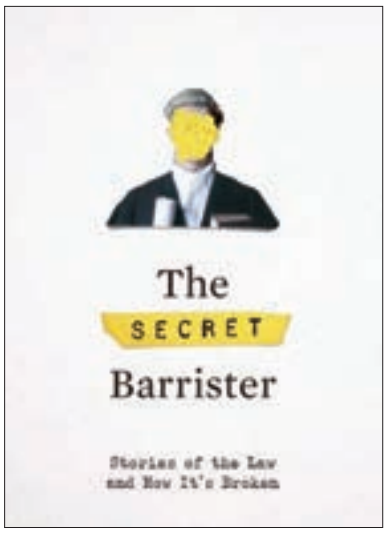
Her Honour has presented and co-written numerous, authoritative conference papers regarding this court, criminal law, the Bail Act, sentencing, and the criminalisation of children in care. She has made a number of submissions on behalf of Legal Aid NSW to inquiries by Law Reform Commissions and parliamentary committees.

Established in 1905 under the Neglected Children and Juvenile Offenders Act, the Children's Court of NSW is the second oldest such court in the world. The court combines the two distinct but complementary jurisdictions of juvenile justice and care and protection.

In his concluding remarks, Arthur Moses SC said:

> I needn't remind those present today that juvenile offending is often the subject of sensationalist reports and commenting in some sections of the media – we are told that children are out of control and need a firm hand. What is true is that young offenders are more likely to suffer socio-economic disadvantage and interrupted schooling. Other common factors include family violence, parental unemployment, child abuse, neglect, physical, intellectual or learning disabilities.
>
> [T]he juvenile system is only as good as the magistrates appointed to this court and the lawyers appearing before this court. It is for that reason that the people of NSW are fortunate that the attorney has appointed a magistrate with vast experience in criminal law and steeped in both the practices and the unique pressures of this court.
>
> The whole community has a stake in your success, not to mention the success of this court, in helping some of society's most disadvantage and troubled youths to make a successful transformation into responsible citizens. I congratulate you and wish you well.

By Kevin Tang



The Secret Barrister: Stories of the Law and How It's Broken

The Secret Barrister is an anonymous blogger who writes about his[1] job: a junior barrister specialising in criminal law in the courts of England and Wales. His book is about day-to-day of life in the criminal courts and the wider problems faced in the English criminal justice system. The SB writes, he says, because he thinks that legal practitioners '… do a stunningly poor job of explaining to people what the law is, and why it matters. Too many of us are content to busy ourselves in our own work, safe in the knowledge that what we do is important, but without feeling the need to deconstruct for the man on the street why [it] … has any relevance to their everyday life. We then wonder why there is an obvious disconnect between the legal system and the people it exists to serve and protect.'

Like medical dramas, criminal law is something we like to watch on television; unlike sickness and accidents, we tend to think that a brush with the courts won't happen to us.

This is one of the points that the SB makes in the first pages of the book. The state of the criminal justice system is not the subject of public debate in the way that health or education is. It should be; exposure to crime is as happenstance as a sudden illness or accident, and quality of service is as dependent on fortune as is access to the best schools. A trip to the Local or District Court has something in common with a trip to the hospital: anguished, expensive waiting. Nothing happens fast, and nothing is really explained.

Most of us make it through the frightening labyrinth of a public hospital because we trust in the doctors who will eventually tend to us. That trust is grounded in their training and their experience. We have confidence that they are qualified to help us, because the government, and our insurers, ensure that they are sufficiently remunerated to keep their skills at a level that will keep us alive. We forgive their busyness and remoteness because we know the demands on their time.

That confidence does not extend to criminal lawyers. Somehow, they are lumped into the rich fat cat class of their commercial brethren, without any real information as to what they get paid, and how.[2] For reasons explained by Emmanuel Kerkyasharian elsewhere in *Bar News*, funding for criminal justice is in crisis in New South Wales, especially when it comes to legal aid. Recent announcements may improve a dire situation,[3] but underfunding of barristers is a clear contributor to the quality of work they can deliver, and that contributes to the stressors on a court system that is already creaking under its own weight.

The SB deals with this issue and more in his book. His description of how the criminal justice system functions in England and Wales is a warning of what the NSW system could become if not properly attended to. The grim maths in chapters 6 and 7 has English criminal practitioners taking between £18.95 and £3 an hour, depending on where the case is heard and when it concludes. There is a disturbing financial penalty for cases that conclude with a plea or discontinuance before trial. Baby barristers will literally pay to work on a circuit brief because the train fare is not covered and is higher than the fee. The obvious solution is to take on more work, leaving less time to dedicate to preparation of any one brief.[4]

Baby barristers will literally pay to work on a circuit brief because the train fare is not covered and is higher than the fee.

The SB brilliantly communicates the vast importance of a functioning criminal justice system to a functioning civil society, and the very real fear that if the community loses faith in state justice they might resort to justice by their own hand. He then demonstrates the extent to which the English system has ceased to function and the miscarriages of justice that occur as a result.

To illustrate the extent of the problem, the SB takes the reader through the various stages of a criminal trial in the UK, giving interesting historical context to each element of the judicial process. This helps to explain why prosecutions proceed in the manner they now do, why this is important to secure fairness to the various participants, and how it goes wrong when the elements are overburdened as they are.

The wrongness is vividly expressed in experiences that will be all too familiar to those acting in the criminal courts. Prosecutors in the Magistrate's Court with a pile of files and a queue of defence lawyers vying for their attention 10 minutes before the hearing, no-one being able to communicate with each other before this. Frustrated, nervous witnesses told to go home and wait a few months because the case is not reached due to lack of judges, or worse, courtrooms. Delays in trials because CCTV evidence can't be played or AV links don't work on the antique court systems.

The SB then goes beyond the Australian experience and describes how the UK justice system has descended into Kafka territory. Error-ridden hearings before unqualified, untrained lay magistrates that are utterly unrepresentative of the communities they are called on to judge. Trials not just going over with stunning regularity because overstacked, understaffed Crown Prosecutors give late disclosure, but being dismissed altogether because the evidence was never gathered in the first place. In the Magistrate's Court, trials being dismissed on the first return because of inflexible case management rules, no matter if it is a mother seeking protection from a domestic abuser.

Savage cuts in funding and outsourcing of everything from the Crown Prosecution Service to victim's services to translators and transcribers to probation service trusts. Prosecution decisions being taken, against counsel's advice and the victim's wishes, because of a need to meet statistical outcomes. Accused persons, denied decent legal aid solicitors because their practices are collapsing, falling prey to vultures who cash the legal aid cheque, do no work and vanish before the trial. Or worse, defendants standing trial for murder without proper representation because barristers are on strike.[5]

This depressing fare is surprisingly digestible because the SB is such a great writer. His accounts are filled with the humanity of those he represents or prosecutes, and the people he works with. He educates us on the good in the criminal law as much as the bad. Chapter 6 contains a passage viscerally celebrating the work of criminal solicitors, without whom, he says, the accused and defence counsel would be lost. The SB's descriptions of the criminal world are frequently hilarious:

'To an extra-terrestrial touching down outside the city Crown Court, our way of resolving disputes where an individual is alleged to have breached our central social

code would be unfathomable. Get two people with plummy accents, stick them in black capes, shove horsehair wigs on their heads, arm them with books of rules weighing as much as a grown pig and use them as proxies to verbally joust in front of a bewigged sexegenerian in a big purple gown, while twelve people yanked off the street sit and watch and try to make sense of it all and decide who's in the right. The winner gets nothing. The loser ends up in a concrete box.'

Ultimately, *The Secret Barrister* is a celebration of our system of criminal justice as much as a lament for what it is becoming. In chapters 8 and 9, the SB explores the many procedural and tactical dilemmas faced in a trial and the feeling counsel often gets that justice is not always achieved in the adversarial system. He then balances this out by considering the alternative: reposing all of the adjudication functions in the State in the manner of the inquisitorial system, and concludes that a system of independent fact finding with a non-State contradictor, with all of its flaws and difficulties, is fundamentally the one that he would prefer.

The Secret Barrister is a little like a horror blockbuster in nerdy book form: a *Jurassic Park*, if you will. Both depict bunch of well-meaning, educated, reluctant heroes shepherding vulnerable people through a landscape of ancient monsters let loose by the greedy cynical rich, and if negotiated correctly, the T-Rex might just save you from the Velociraptor. *The Secret Barrister* might not be quite as entertaining as a Spielberg thriller but it's close, and the dangers it depicts are much more frightening.

Reviewed by Catherine Gleeson

END NOTES

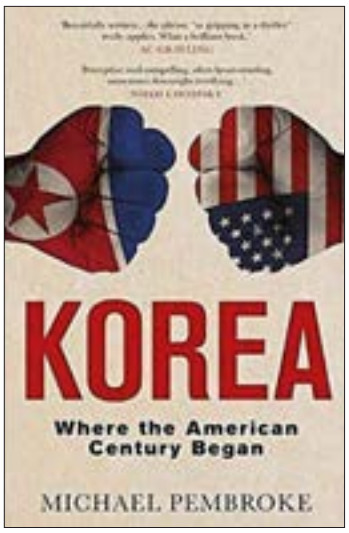
1 We don't know the gender of the SB but as the barrister on the book cover appears to be male, I'll go with that pronoun.

2 A good example is a recent article in the *Sydney Morning Herald* about solicitors being forced to turn down legal aid work because the rates don't meet their practice overheads, entitled 'the $150 an hour lawyers threatening to quit.'

3 The NSW Attorney-General announced on 19 June 2018 that $10 million has been added to a $29 million dedication in the budget to facilitate the early guilty pleas reforms.

4 The impact of this state of affairs on criminal and family barristers was measured in a recent report by the UK Bar Council, with stark results: more than half of these practitioners reported being under too much pressure from their work, when compared with civil practitioners, while barristers across the board reported that they found their work intellectually satisfying. A number of the responses from the Criminal Bar communicated the stress of not being paid properly, or at all, for the work that they do. The Bar Council *Barristers' Working Lives 2017* https://www.barcouncil.org.uk/media/661503/working_lives_-_final.pdf at [2.5].

5 A murder charge was set down for trial at the Old Bailey in September without counsel: Pennick, E 'Murder case first to be hit by barrister action' *Law Gazette* https://www.lawgazette.co.uk/law/murder-case-first-to-be-hit-by-barrister-action/5065517.article 4 April 2018.



Korea; Where the American Century Began

By Michael Pembroke

Success is achieved by a combination of talent and luck. There is no doubt that Michael Pembroke is a talented author and, with the timing of his latest book Korea – Where the American Century Began, he has been lucky.

He began writing this book in 2015, inspired by a longstanding desire to understand the battle of Maryang San in which his father had fought in the Korean war in 1951, but, as he states in the Preface: 'It is a wider account, a cautionary tale, an explanation of the modern era. It is a story of politics and militarism, hubris and overreach'.

By the time Pembroke finished the book in November 2017, Donald Trump had become President of the United States, had ridiculed Kim Jong-un as 'Little Rocket Man' and had threatened to 'totally destroy' North Korea. These developments are incorporated as part of a consistent and worrying narrative: whilst the United States has purported to act as the world's policeman since 1945, it has made mistakes and has not learnt from them. With a modicum of humility and compromise, the world could have been a much safer place.

As Pembroke notes, Korea's abiding problem is its geography. It is squeezed between China and Russia to the north and Japan to the south. A unified Korean kingdom existed from at least the seventh century; and, after the expulsion of Kublai Khan, the Chosun dynasty ruled from 1392 up to a Japanese invasion at the turn of the twentieth century. Britain, Russia, China and the United States were all involved in the events that led to the establishment of a Japanese protectorate in Korea, with each driven by considerations of trade and establishing 'spheres of influence'.

After the Japanese surrender in 1945 and as Russia advanced through Manchuria and then southwards down the Korean peninsula, the United States decided that it had a strategic interest in declaring an artificial division at the 38th parallel in order to halt the Soviet advance; and then in securing and cementing that division by a military occupation. A unilateral decision was made without regard to the wishes and interests of the Korean people. Thus, the ensuing conflicts between the North and the South have been driven not by a desire to destroy or conquer the other, but rather by a wish to re-establish what had been taken away by the United States - a united Korea.

It was the North that moved first (with Chinese and Russian acquiescence), driving down over the 38th parallel in June 1950 and deep into the South. The Americans responded and pushed the North back to the 38th parallel in September 1950 and that is where matters should have rested, three months after they began. Instead, and in spite of warnings from China, the Americans continued over the 38th parallel, up through North Korea and with the intention of crossing over the Chinese border and into Manchuria.

But American indignation and embarrassment led their forces to destroy everything as they retreated: rations, crops, towns and villages; and then a bombing campaign of total destruction was unleashed.

Having lured the American forces deep aattacked and, as Pembroke puts it, 'the nightmare unfolded' with nightly attacks and each worse than the night before as the Americans retreated or, perhaps more accurately, scattered and ran away. The annihilation of the American forces only ceased when the Chinese could not keep up with the American retreat, which left the forces in March 1951 (nine months after they had begun) divided at the 38th parallel, which was of course where they had started. And for the second time, that should have been that.

But American indignation and em-

barrassment led their forces to destroy everything as they retreated: rations, crops, towns and villages; and then a bombing campaign of total destruction was unleashed. It continued for over another two years (including for over a year when the only outstanding issue at the ongoing peace talks was in relation to prisoner repatriation), 'systematically bomb[ing] town by town' and killing about three million mostly non-combatants. It seems likely that biological weapons were deployed; and atomic strikes were only very narrowly avoided. The expressed purpose was to induce 'a more cooperative attitude at the truce talks', but a more accurate description quoted by Pembroke was a 'war by tantrum'.

And so American defeat in the Korean conflict led to its mistakes being repeated in Vietnam and, later, Iraq. The war crime of the American bombing went unpunished and America has continued to refuse to sign various international treaties. President Trump's suggestion that America no longer wishes to be the world's policeman is hardly consistent with its maintenance of military bases around the world and its insistence that peace in Korea can only be achieved by a conflict (military or diplomatic) between the United States and North Korea. It is clear that peace in Korea requires, rather than an increasing involvement of the United States, the encouragement of increasing rapprochement between the North and the South (building on measures such as the unified ice hockey team at the 2018 Winter Olympics and the leaders' recent handshake) and a withdrawal of American forces.

A treaty between the United States and North Korea of whatever type will never be sufficient to ensure peace in the Korean peninsula: Korea should never have been divided and it needs to be reunified.

This is a book that is extremely and consistently easy to read, but with sufficient well-sourced detail to leave the reader better informed on what has become one of the essential topics of the day. I was at various times astonished, angry, worried and in despair at what Pembroke describes as 'the ignorance and intransigence of some men and women'. It was never anything other than enjoyable and thought provoking; and its scope, content and timing is such that it should be read by anyone with an interest in the current situation in Korea or indeed in America's ongoing efforts to shape and dictate events across the globe.

Reviewed by Anthony Cheshire SC

Rather His Own Man - Reliable Memoirs

By Geoffrey Robertson

Each year, I make a point of warning the new readers on the Bar Course that whatever intellectual stimulation they may provide, their own cases are not interesting. Anyone who has ever attempted to entertain a dinner party with tales of equitable estoppel or the second limb in *Barnes v Addy* should, by now, have realised that to be the case, or else lack self-awareness and, most likely, invitations to dinner. Criminal barristers often make better dinner companions since their cases are generally more factually interesting, but the content is not always well-received or appropriate; and the caricature of the ageing silk with his war stories has always been one of the worst offenders.

Geoffrey Robertson is a wonderful exception. He has had an extraordinary and successful career. Although born in Sydney, he made his name in London, arriving only a few years after Germaine Greer, Clive James, Robert Hughes and Barry Humphreys. As such, it would be easy to dismiss *Rather His Own Man – Reliable Memoirs* as the pompous (a word he uses to describe himself) war stories of a tall poppy ex-pat.

That, however, would be completely inaccurate and unfair. These are the rollicking adventures of an exceptional talent with an unwavering commitment to human rights allied with, one suspects, a large dollop of good fortune. Add in a bucket of popcorn and it might even make a good film – I suspect Robertson would choose George Clooney, a personal friend, to play him.

Brought up in Eastwood with a love of tennis (Lew Hoad and Ken Rosewall) and cricket (Alan Davidson, Richie Benaud and Ian Meckiff), Robertson describes his family as 'a middle-class family in a middle-class house in a middle-class suburb, with a Hills hoist in the backyard and a small car in the carport'. They took the Fairfax *Sydney Morning Herald* rather than Packer's *Telegraph*, which was taken by the 'working-class neighbours' or Murdoch's *Daily Mirror*, which was taken by 'those with no class at all', including 'the men in our street…who beat their wives'.

Good Leaving Certificate results, including coming second in the state in history, led to Sydney University, university politics (including as SRC president) and friendship with people such as Michael Kirby, Richard Walsh (the editor of *Oz* magazine), Gareth Evans, John Bannon (former premier of South Australia), David Marr and Jim Spigelman. His position as editor of the Law School magazine *Blackacre* included a successful campaign for the setting up of a new Law and Social Justice course.

These are the rollicking adventures of an exceptional talent with an unwavering commitment to human rights allied with, one suspects, a large dollop of good fortune.

His law career began at Allen Allen & Hemsley in 1966 and included a telephone call from John Kerr (then a judge of the Commonwealth Industrial Court) seeking his assistance in the defence of his son, who had been arrested at an anti-Vietnam rally. Kerr then introduced him, at 'a small dinner party', to the then chief justice of Australia, Garfield Barwick. Talent and the contacts he had made at university propelled Robertson on.

After a bizarre CIA-funded Far-East Student Leader Scholarship in California (including catching up 'with an old friend, Nick Greiner'), a Rhodes scholarship led him to Oxford and then the Bar. He became involved in the successful defence in the *Oz* obscenity trial and by 1974 he was fulfilling his 'boyhood dream to appear, wigged and gowned, addressing a jury beneath the Old Bailey dome on which stands the iconic golden statue of

Lady Justice'. An encounter with a judge in court convinced him to abandon his Australian 'nasal vowel sounds' in order to be able to say 'Fuck Art, Let's Darnce' (as printed on an allegedly indecent T-shirt) and thus be understood.

The war stories follow thick and fast: defending Gay's the Word bookshop on charges of importing indecent literature; defending the managing director of Matrix Churchill, which had been accused of smuggling arms to Saddam Hussein, which it had in fact done, but at the instigation of MI6; defending journalists accused of revealing the government eavesdropping powers of GCHQ; defending *Gay News* on a charge of blasphemy for its poem 'The Love That Dares to Speak Its Name'; defending Peter Wright in the Spycatcher trial; defending the brothel-keeper Cynthia Payne; defending IRA suspects; defending a drug dealer who had been entrapped by the police; defending the *Guardian* from a libel action brought by Mohamed Al-Fayed in the Cash-for-Questions scandal; defending the *Sunday Mirror* from a privacy action brought by Princess Diana; defending Mike Tyson from his exclusion from the United Kingdom; advising the Greek government in relation to seeking the return of the Elgin Marbles from London; representing former Labour party leader Michael Foot in a libel action against Rupert Murdoch personally for a headline that claimed that Foot had been a KGB agent; and acting for Human Rights Watch in upholding the validity of General Pinochet's arrest in London.

Robertson's practice in human rights took him to courts all round the world and included many death row cases, including establishing the important principle that keeping a prisoner on death row for a prolonged period was torture, which meant that the death penalty had to be commuted.

There are various pleas for reform, including a plea for refugees to be welcomed; a proposal to introduce a Magnitsky law so that the overseas assets of tyrants and corrupt officials could be frozen; and a suggestion that Barack Obama should be the next head of the Commonwealth, for which he is eligible by virtue of his father having been born in Kenya.

Robertson's career and his proposals for reform might suggest a rebel, but he is also a part of the establishment. He is a founder and head of Doughty Street Chambers, which has a philosophy of commitment to the legal aid system and a model of half their cases being on full commercial rates in order to support the other half being pro bono. He was appointed as a Recorder (a part-time Judge), a bencher at the Inns of Court and a five year term as an appeal judge at the United Nations War Crimes Court. There are limits to his membership of the establishment: the title to these memoirs derives from the comment of a permanent secretary that torpedoed a proposal to appoint him to an important European judicial position: 'But…he is… rather his own man, isn't he?'

So what has driven Robertson this far and apparently continues to drive him on? It is clear that there is a passionate sense of human rights and justice, but where does that come from? Although able to trace his ancestry back to a possible link with Kaiser Wilhelm, there does not appear to be any clue there. There is a hint in the structure of this book, which begins with the story of his father crash landing his Wirraway aircraft on the roof of a home in the small bush town of Chiltern and ends with the death and funeral of each of his parents.

He is a founder and head of Doughty Street Chambers, which has a philosophy of commitment to the legal aid system and a model of half their cases being on full commercial rates in order to support the other half being pro bono.

Robertson paints an affectionate portrait of his parents, marked and largely defined by the war and the depression. His father's career in the bank eventually left them well off, but his father would still walk miles rather than pay for a taxi for himself and his mother is described by Robertson as being self-effacing and teaching by quiet example and giving to others. He sums up his philosophy as 'I could never do anything of which my mother would disapprove'.

We are probably all shaped by our parents, but the mechanism by which we adopt certain characteristics from them and reject others is seldom clear and is certainly not in the case of Robertson. Thus, while his mother had no time for 'the limelight', Robertson is clearly very comfortable there and it would probably be fair to say that he craves it and delights in it.

A dazzling array of girlfriends, including Bel Mooney (a journalist then married to Jonathan Dimbleby), Jeananne Crowley (an Irish actress), Jennifer Byrne and Nigella Lawson, were followed by marriage in his 40s to Kathy Lette and an introduction to many famous names from the London arts scene. In the final paragraph of the book, he records that in 2017 he and Lette 'decided to uncouple' and how he 'had already taken a skinny dip in the fountain of youth, falling in love with (and, amazingly, being fallen in love by) a much (but not too much) younger professor of law from Eastern Europe'.

That sudden revelation led me back to his self-description as pompous and not suffering fools, traits of which I realised there had been no hint in the book. Although titled *Reliable Memoirs* and no doubt reliable, they are perhaps missing some of the depth of emotional intimate reflection (which generally differentiates a memoir from an autobiography) that might enable the reader fully to understand the man.

That is not to detract from what is a fabulous and enjoyable read that I would recommend to lawyer and non-lawyer alike, but I hope someone out there is planning a full and in-depth biography. In the meantime, this book could perhaps have been titled more accurately (albeit perhaps less catchily): Professional Reflections and War Stories with Hints of What Makes Me Tick.

Reviewed by Anthony Cheshire SC

NSW v QLD Bar Cricket Match

Now in its 45th year, the annual interstate Bar cricket match between New South Wales and Queensland was played this year in Sydney on 17 March. Inaugurated by the Hon I D F Callinan AC QC and the Hon R V Gyles AO QC in 1973, the fixture has been a harmonious blend of competitiveness and camaraderie for several decades and this year's contest was no exception.

Played under a hot sun on the Main Oval at The Scots College on Bellevue Hill against the glorious backdrop of Sydney Harbour, the day was a memorable one for the hosts as NSW secured bragging rights (and the retention of Tub's Club) for another year.

Led by their new skipper, Charles Matthews, Queensland won the toss and elected to bat first. Matthews (32) and Templeton (41) made a very strong start for the visitors, compiling a 50 run opening stand against some testing bowling from Eastman and Docker. The elegant stroke play and general shot selection of the openers was of the highest order and things were looking decidedly ominous until Eastman (1-36) sent down a fast off-cutter that jagged back off the deck to hit the top of Matthews' middle stump. There was a palpable sense of elation and relief at the fall of the first wicket as Matthews was looking extremely dangerous and set for a very big score.

Templeton then combined nicely with the rookie, McCarthy (10), but an unexpected run-out by Khan, followed by a miscued pull-shot from Templeton, saw the visitors contained to 3-85 at drinks.

Khan (2-15) then combined beautifully with Gyles SC (0-18 off 7 overs), whose accurate leg-breaks had the effect of pegging back the visitors' run-rate appreciably. When Williams (17), caught by Bilinsky off the bowling of Allan, and Katter (12), caught by Carroll off Khan, were denied significant scores, it fell to the redoubtable McLeod (28) to force the pace. He was eventually bowled by Docker but not before some very impressive clean hitting to take the visitors' total to 6-157.

There was some doubt about whether this was a 'par' score (given the slow speed of the outfield) but ultimately Queensland had the advantage of runs on the board and NSW had to chase them down.

Following the tea break NSW got off to a shaky start with the perennially destructive Carroll caught off the bowling of Templeton for 0 in the first over. This was by followed by Martin for 2, who was bowled through the gate by Matthews.

Fortunately for the hosts, however, Bilinsky (58 n/o) and Docker (71 n/o) combined thereafter in a satisfying century partnership to take the game away from Queensland. With the end in sight, both batters were retired and Messrs Stowe (8), Gyles (13 n/o) and Chin (5 n/o) saw NSW home with approximately 5 overs to spare.

In the traditional post-match dinner there were some very humorous reminiscences from Neil SC, King SC and Gyles SC, among others, all of which demonstrated the pleasant conviviality and solid friendship that this fixture continues to promote.

Nicholas Bilinsky

Bullfry and the 'tennis circuit'

Bullfry put down the paper of record, and leant back ruminatively in his chair. It was quite clear – the economic demand for the 'top' counsel was a classic example of a 'Thorstein Veblen good' – the more expensive it was (like a fine wine, or a branded watch), the more an eager clientele was prepared to pay for it!

No wonder that they so grossly misapprehended the earnings of the Bar generally! There were, or so it seemed in the warped view of the press and its reading public, only two types of barrister: one who flew all over the country, charging, and receiving, a king's ransom for appearing in court; the other, persistently down on his uppers, who fought creditors and ex-wives while featuring in the gossip sections of the tabloid. The egregious reporting of the 'earnings' of the first type meant an outpouring of public *Schadenfreude* at the financial, and marital, misfortunes of the second.

The Bar is very much like the professional tennis circuit. At the top, the best players compete for public esteem and high daily fees; but below, say, the top 200 advocates across the nation, was a vast legion of more modestly remunerated journeymen and women, going about their business before the lower judicial officers, and administrative tribunals, of the Commonwealth, and states. They never played at Wimbledon – it was all they could do to get a modest outing, if they were lucky, 'unseeded', in the Gundagai Open! A survey conducted in Victoria some years ago had revealed that a very large percentage of the newest entrants to the profession were earning less than $50,000 per annum.

These lesser 'players' trudge from tribunal to tribunal, hoping eventually to be paid.[1] And yet, in 95 per cent of cases it would make little

It is reported that to appear at the Commission, Blenkinsop QC (one of Australia's leading barristers) is charging $25,000 per day from 8 am to 5 pm, and $3,000 for every hour thereafter in what is a 'bet-the-company case.'

The Daily Beast 10 May 2018.

But nothing in this chatter about the Bar is more erroneous than the talk of the tremendous incomes of counsel.

Baron Brampton, *Reminiscences*.

or no forensic difference at all who was briefed to appear! How could that be the case? On the Veblen principle. An anecdote concerning Sir Edward Carson KC explains the matter completely. A solicitor who is stunned by the amount demanded by Carson's clerk in a

The economic demand for the 'top' counsel was a classic example of a 'Thorstein Veblen good' – the more expensive it was (like a fine wine, or a branded watch), the more an eager clientele was prepared to pay for it!

matter in which he was opposed to Sir Rufus Isaacs KC, asks to see him to discuss the fee.

'For a moment or two Carson said nothing. Then got up from his chair, and taking the solicitor by the arm led him to the window. He pulled up the blind to reveal a sight familiar to every inhabitant of the Temple. There were scores of other barristers' chambers, each one with its lighted window, through which could be seen men poring over their books and papers, holding conferences or consultations with their clients, or just idly talking and waiting for the work to come in. These were the gentlemen of the Bar, making their fortunes or with their fortunes to make.

`D'yee see all those rooms?' said Carson. `In every one of those rooms there's a light, isn't there?' The solicitor nodded. `In all of them', Carson went on, `you may assume there's one man, probably two or three, who'll do the case as well as I'll do it myself, and most of them will charge a far more reasonable fee'.

`Oh, no', answered the solicitor, `that's not my point. I wouldn't dream of letting anyone but you do it, with Mr Isaacs on the other side'.

`Well, if you're such a fool as that, after all I've shown you', rejoined Carson, `you'll just have to pay what my clerk asks you to pay'.'

Thus, while the 'average' income of the Bar is immense to a lay reader, it is greatly inflated by a few outriders – the median income of counsel as a class (once the cost of chambers and a secretary had been deducted) is far more modest. This median income was considerably lower than the average because of a few superstars whose fees were the subject of daily envious and fawning comment in the press. What was the relevant standard deviation?

Still, it was all a matter of comparison – when the fees charged by the large firm instructing him, and the salary and shares vouchsafed to the directors in the firing line, were compared with the modest daily demands of even the most expensive of counsel, those fees seemed very reasonable indeed.

Bullfry thought back to his solicitorial youth. Then, fees had seemed lower – indeed, the then pre-eminent counsel 'rationed' their availability – the fee in those far gone days, to use an unpleasant economic concept, was not 'price-elastic' – offering to pay more would not have increased availability.

Thus, it was hard to be overly censorious about the success of the most sought-after counsel when those performing secretarial, solicitorial, and other company functions for the largest corporations were on north of $2.5 million per year – and for doing what? Massaging the corporate message – outsourcing serious legal matters back to the largest law firms where they had been previously deployed – editing and advising on various internal documents. It is unpleasant to have spent one's life working for personally minded-men (and women) for reasons you know to be base – but in the modern world to do so is very handsomely remunerated.

Also, and often overlooked, the emolument of the corporate functionary came in to the relevant bank account each fortnight,

on time, with all necessary and appropriate fiscal deductions made! (Nor were the share options, certain to vest in due course, to be overlooked in the equation.) Contrast that with even the most sought-after counsel. Bullfry had once had a conversation with an old companion, a leading banking junior. Bullfry had rung to congratulate him on his further appearance in a controversial matter.

> 'I'm only doing the further hearing to get paid' said his companion.
>
> 'What do you mean?'
>
> 'Well, I did the first hearing sixteen months ago and the fee note was still outstanding so I said I would appear again only upon condition of payment!'
>
> 'But you were being briefed by Megafirm on behalf of Megalopitan Bank – what's going on?'
>
> 'Megafirm said it sent me a lot of work which I should be grateful to get, and there was a large internal fight in the Bank about which division was to bear the cost of the matter – so I had to wait!'

Henry Hawkins had a conversation about the lack of timeliness of payment at the Bar once with a famous money-lender.

'Why, Mr Hawkins,' said he, 'you seem to be in almost everything. What a fortune you must be piling up!'

'Not so big as you might think,' I replied.

'Why, how many,' he rejoined, 'are making as much as you? A good many are doing twenty thousand a year, I dare say, but – '.

Here I checked his curiosity by asking if he had ever considered what twenty thousand a year meant. He never had.

'Then I will tell you, Lewis. *You* may make it in a day, but to us it means five hundred golden sovereigns every week in the working year'.

Given that there are less than 200 hearing days in the legal year, it is hard for any except tax counsel to earn as much as a successful company secretary.

In the longer run, the skyrocketing earnings inside the largest companies (and delay in payment inherent in the economic realities of the Bar) was likely to reduce it to a 'commercial rump' which was very highly paid, while the remainder subsisted on the 'crumbs' from other forms of practice. Only the largest businesses could afford to pay very high fees (which were, in any event, tax deductible); the company and its solicitors gained the protection of an independent 'expert' view about a matter; and, if questions were raised about the credibility of the adviser, recourse could be had to one of the 'specialist' works which now purported to evaluate the skills of the 'bet-the-company' men (there was no extant category of 'bet-the-company' women because as soon as a woman attained that eminence the Executive would insist on her taking a senior judicial post).

It is vulgar to point it out, but it will likely take her five years (at the least) to reach the income level she enjoyed at the law firm where her success was guaranteed, and the workplace far more congenial to satisfying both demanding professional and domestic obligations.

What did that foretell for the future of the profession? Consider a young woman commencing practice nowadays at the Bar. She has previously worked for some years as a senior associate in a large law firm, acquiring a wide experience in matters commercial. She might, within a couple of years, aspire to a partnership if the risks inherent in that shared liability did not dissuade her. She starts again at the Bar, at the very bottom, as a reader on a good floor – and the Bar is very lucky to get her.

No detailed study has yet been published of her likely *cursus honorum* (and it remains perplexing why there is no detailed information obtained or published on the raw amount of barristers' fees – probably because the truth would be too unpleasant for most who read it. The new Strategic Plan makes no mention of the need to obtain and publish detailed, current, information from barristers on basic matters. Without such information, how can an intending Reader begin to make an informed decision?)

But for our neophyte to succeed ultimately as an advocate (as opposed to a mere producer of detailed memoranda and copious submissions) she will need to make the unpleasant economic choice of appearing in a wide range of unimportant and trivial matters, before tribunals and courts she cannot find (to paraphrase Sir Patrick Hastings) – all the time slowly acquiring the forensic skills to be able, twenty years on, to run the largest and most complex litigation. (It is an open question whether this sort of 'training' work is still available to the junior Bar, on whether it has not already been seized by the cadet branch of the legal profession).

It is vulgar to point it out, but it will likely take her five years (at the least) to reach the income level she enjoyed at the law firm where her success was guaranteed, and the workplace far more congenial to satisfying both demanding professional and domestic obligations.

Now let us suppose she takes a more calculating approach, and decides to stay with the firm and forego the eclat of waiting to be reached before a District Court arbitrator on a cold Wednesday afternoon. Chances are, she can then leap seamlessly across from the firm to join the Megalopitan Bank in some important role – her future is then even more assured, and she has a far greater chance of earning more than all those at the Bar except a very small number at the top of the tennis circuit.

This simple cynical economic reality is the central threat to the continuing independent existence of the Bar as its ageing captains and kings depart.

In the past, the lure of a potential judicial post ('the glittering prizes' of FE Smith) might have provided some vocational attraction. But, once again, the Bar has done itself in its institutional eye. Once the judicial 'gene pool' had perforce expanded to take in senior solicitors (all of whom quickly demonstrated immense expertise in specialised legal areas) the game was up – the notion that to adjudicate you needed to have been constantly in court for twenty years was exposed for the mirage it always had been. As a result, a horde now clamber for some minor judicial or tribunal approach as senility approaches.

At some stage, it may be safely predicted, even payment of the 'top counsel' on the 'tennis circuit' basis will come under downward economic pressure – and where will the Bar be then? *Ou sont les neiges d'antan*?

END NOTES

1 See, Jason Donnelly, 'Five Lessons of a Reader at the NSW Bar' *Bar News* Winter 2012 page 59.

Advocatus - On Manners

My weekends have recently been spent learning first-hand about what Australia calls the 'great outdoors.' It's a brilliant phrase that – an obvious pun on the word 'great' which suggests that there's something very good about venturing outside, but falls back on the alternative meaning that there's simply a lot of outside into which to venture.

I have never been good with puns. And that is why I found myself in the great outdoors taking a crash course in something called bush survival with the (misconceived) expectation that everything beyond the telly, the nail salon and the air conditioning was going to be excellent.

… if you're a registrar and you're wondering who I'm talking about, then that registrar may well be you.

Peak misery took place somewhere called Katoomba. For those unfamiliar, this is in a place called the 'Blue Mountains'. In hindsight, this was another pun that I failed to recognise at the time.

(In the great outdoors, they otherwise usually call a spade a spade. I knew this from my days living in Edgecliff. This was imaginatively named because it is on the edge of a cliff. From there was just a short walk to Five Ways, so named for the number of directions in which the local real estate agents would bend you. I digress.)

I was far from the outer inner east now. Lesson one concerned things that might kill you out here, and they weren't talking about drowning in the spa at Lilianfels.

We started with redback spiders. These are easily recognisable as they are spiders with red on their backs.

With the redbacks, it is only the females that bite. If you are bitten by a redback, our guide drily noted, then that is how you know that it was a female.

A lesson on snake behaviour was next. Apparently most snakes will run away from you if you approach. The exception is brown snakes. Brown snakes will chase you. Brown snakes should therefore be avoided.

One complication is that not all snakes that are brown are brown snakes. A second is that not all brown snakes are brown. Accordingly, the only way to tell if a snake is a brown snake is if it is chasing you.

Further helpful information was subsequently provided as follows:

- At this time of year the snakes are mostly hibernating, probably. Although it has been unusually hot this winter;
- There are three different ways that an emu can attack you: pecking with its beak, head-butting or kicking. These are not mutually exclusive, and they can head-butt and kick at the same time; and
- Big Red Kangaroos will usually run away from you, unless they are very hungry and you are carrying food. Your emergency ration pack sounds like it will be more than sufficient to attract a hungry kangaroo. As this is in your backpack, they will approach from the rear. Keep an ear out for bouncing noises.

In the end, the worst bit was the train trip home. I survived and returned triumphantly to Sydney. I would have said 'returned triumphantly to civilisation' but my first stop was an appearance before a registrar early on the Tuesday morning.

Which brings me to the point of this column. I am not entirely new to this profession. I have felt the wrath of the old judges whose behaviour was charitably blamed on the War and unconvincingly blamed on them being stupid males and not knowing any better. I have seen bad behaviour at the quasi-judicial level – most spectacularly down at the District Court a decade or so ago – but what the particular court I attended dished up on the morning in question still left me feeling about as well as if I had just kissed a brown snake.

In short, I witnessed a quasi-judicial officer variously shout at, belittle, snap at, verbal and threaten to make an example of what were generally inexperienced advocates who were trying to do their jobs. The registrar was rude. The registrar was bad tempered. The registrar caused unnecessary stress to people who work in an already stressful situation. And what shocked me the most was that I thought that registrars like this had been stomped on and kicked out of the system like the unwanted redback spiders that they are.

In advertising these positions, the court looks for employees who 'act with integrity' and 'represent the organisation in an honest, ethical and professional way.' The court had clearly not got what it was seeking.

The simple fact is that practitioners are generally trying to do their best. They may be doing so with limited instructions. They may not all speak with the clarity of a wizened silk. They may be nervous and they may be inexperienced. They may say silly things. They will make mistakes. We all do.

None of that excuses registrars from acting with courtesy and civility, and none of it provides an excuse for rude or belittling behaviour. It is to be hoped that those with authority weed out the poisonous spiders and snakes as soon as possible. Of course, they are not all like that – and it is to be hoped that the great majority are not. But if you're a registrar and you're wondering who I'm talking about, then that registrar may well be you.

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.

Archon's view - An anonymous view from the Bench

List day in the Local Court is the best show in town. The bar table is full, the dock is full, standing room only. The magistrate enters. Lights. AVL. Action!

With 100 matters in the court list, the officers are scurrying, the hubbub is increasing, and the lawyers are circling.

The magistrate peers around the tower of papers.

Who has been cast in the role of Advocate today? Counsel rises confidently with a wide smile and jazz hands. Instantly the magistrate recognises the lawyer from *Chicago the Musical*. Billy Flynn argues 'Margery Jane Osborne is at the crossroads of her life. She is a mother, a daughter, a sister, swept up in a mad, mad world. She didn't choose to punch the victim. The victim fell onto her fist.'

Three lifetimes later it is the turn of Junior Barrister, who was lucky enough, or unlucky enough, to be flicked a brief five minutes before court. After frantically reading the papers, and unable to find their client from the cast of thousands in court, Junior Barrister starts strongly and with great courage, and ends by relying on one of the most famous submissions of all 'In summing up, it's the constitution, it's Mabo, it's justice, it's

law, it's the vibe and aah no that's it, it's the vibe. I rest my case.'

At least it was short.

Later, Marlon Brando shuffles to his feet. Or is it Sylvester Stallone? The lips are barely moving and every now and then counsel actually faces the front. 'Defendant .... with friends ... police..' Was that word 'Monocle' or 'Maniacal' or 'Module'. The magistrate has used up the allowable number of 'Beg your pardons' and 'Can you please speak ups'. Counsel sits down, still in character.

And then drum roll..... the next counsel is clearly a favourite with the wardrobe department. With a lack of black barristers' robes worn in the Local Court, the costumiers can be creative. In this case the word resplendent comes to mind. There are not many opportunities in life where resplendent is the word of choice. The court freezes as if in *The Matrix*. They listen. Then unfreeze. Counsel sweeps from the court.

The court papers are reducing. Then, reminiscent of *Gone With The Wind*, the epic submission begins. 'My client was born in a small country town …At age five she… By the time she was… May I take you to page 54 of the second folder of material which I handed up...'

If only there was an Oscar Night button for the magistrate to press, which causes an orchestra to start playing and then the sheriffs to gently remove the speaker to stage left.

Next.

Matter number 68 has the advocate trained in the '*I trust I make myself obscure*' acting school where the magistrate hears words, knows what the words mean individually, but once said has no idea what the submission actually is. There is a long, dramatic pause followed by counsel saying rhetorically 'If I can be of any further assistance' before sitting down. The magistrate flicks the court papers, nods at the Statement of Facts, outwardly serene, internally wondering if someone rewrote the script and decided it would be a foreign language film.

Counsel from the Ralph Waldo Emerson casting agency is next. Guided by the maxim

> The good lawyer is not the man who has an eye to every side and angle of contingency, and qualifies all his qualifications, but who throws himself on your part so heartily, that he can get you out of a scrape.

Counsel submits 'Your Honour, think of his children, his job, his career, his life. My client's life will be irrevocably changed if this parking ticket stands.'

A few minutes before interval (known to some as lunch, or as magistrates call it 'reading time') John Wayne saunters up to the bar table. The court staff are drooping. The magistrate's blood sugar level is dangerously low and yet there is no urgency felt by Mr Wayne as he speaks sssllloowwly. A pause for dramatic effect. A tumbleweed rolls through the court. One wonders whether film budgets all blew out when John Wayne was cast. They certainly do at court.

As the sun sets but before the final credits roll, Atticus Finch rises. He does not give his

'all men are created equal speech', this is after all the Local Court and there is no jury. He speaks so that 'With his infinite capacity for calming turbulent seas, he could make a rape case as dry as a sermon.'

There is no *Hamlet* bloodbath. No *Blues Brothers* car chase. No denouement. Counsel's submission is almost anticlimactic after a day of high drama and big production numbers.

And yet the submission is succinct, helpful and calm. It is a perfect Oscar moment for this court where the hoi polloi and the flotsam and jetsam of life, face their own tragedy and comedy, and their relief or despair.

It seems fitting that at the end of this last matter for the day, the prosecutor, the lawyer and the magistrate bow. Exeunt.

Archon's View is a new column. It provides an opportunity for a current judicial officer to provide an anonymous view of the Bar.

I have heard of an old 'custom' (mentioned in a Bench and Bar speech a number of years ago) of practitioners challenging each other to incorporate the name of a piece of fruit or some other suitably silly word into oral submissions, legitimately so as to go un-commented upon. Is this to be encouraged?

Could it be true that practitioners of old were so unchallenged by the usual rigours of court advocacy that they had to introduce new ones? Surely you are mistaken! Is it not enough that one must carefully craft and calibrate one's oral submissions to match law, facts and judicial temperament so as to convey a sound and cohesive argument that meets both the needs of justice and that of one's client in a succinct and effective manner? Or if that is not truly the aim of the advocate, why stop at just one word? Surely the wordsmiths of yore could have risen to the challenge of not one, but perhaps three incongruent fruit related or other words to weave into oral submissions?

No! I think it far more likely that the reason that there appears to be a proliferation of oranges, apples, pomegranates and mangosteens in some counsels' oral submissions is a covert challenge, albeit one that is belated and possibly too subtle, co-ordinated by the Illuminati in vengeful remembrance of the day Sir Owen Dixon and his colleagues held[1] that it was a relevant consideration of the commission controlling water irrigation licences to deny transfers of water rights to Italian fruit growers on the basis that all Italians were 'bad farmers of irrigation methods'[2] and that it was 'undesirable' to promote a considerable aggregation of Italians in the area.

There! 'Mangosteen', 'Sir Owen Dixon' and 'Illuminati' all in the one sentence and not at all ridiculous, contrived, contorted or off-point. If that is your aim, consider the challenge now set.

I have read a number of transcripts where counsel is making an application for a judge/ magistrate to recuse themselves on the ground of apprehended bias. In almost every matter, the judicial officer took the application as a personal affront. Is there a form of words that a counsel can use to reduce the chance that a judicial officer will view the application in this way?

The well-known test for recusal for apprehended bias is 'whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide'. Who exactly constitutes the 'fair-minded lay observer' is not exactly clear, although one suspects that during the time of Sir Owen Dixon, such an observer would have looked just like Sir Owen. But still, as imperfect as it is, dispensing justice has, at its core, the fundamental premise that the person doing the dispensing is impartial. This fundamental premise is, perhaps, best expressed by the well-worn aphorism that justice must not only be blind, but must be seen to be blind. This of course presents the ocularly challenged dispenser of justice with an impossible conundrum akin to that of asking Schrodinger also to place himself in the box with his infamous cat. It is no wonder then, that judges perceive such applications as needlessly annoying disruptions to their otherwise faultless dispensation of justice. With this in mind, the correct answer to your question is 'no'. Nevertheless, I suggest that the application be made sensitively, dispassionately, promptly (so as not to constitute waiver) and be based on objectively determinable factors or behaviours supported by authority as grounds for disqualification. And if you can also successfully work the word 'Illuminati' into your oral submissions, do let us know. Recusal applications get bonus points.

END NOTES

1 *Water Conservation and Irrigation Commission (New South Wales) v Browning* (1947) 74 CLR 492

2 We assume the Commission had only a passing familiarity with Roman aqueducts and other Roman inspired methods for controlling water flows since antiquity.

If you have a question you want the Bar's agony aunts to answer send it to: ingmar.taylor@greenway.com.au