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Views expressed by contributors to *Bar News* are not necessarily those of the New South Wales Bar Association. Contributions are welcome and should be addressed to the editor, Andrew Bell SC.

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This issue

The third and final issue of *Bar News* for 2011 contains the usual Christmas smorgasbord of offerings suitable for reading on a plane, at the beach or between overs at the cricket.

Bob Ellicott QC gives a unique insight into the life and career, brilliance and energy of his cousin, Sir Garfield Barwick. Richard Beasley's 'Duty of care on the battlefield' tells the story or, perhaps more accurately, captures the ordeal of two brave soldiers subjected to, on the face of things, surprising criminal charges. As he wryly observes 'Being shot at in armed combat, by someone you have been told is a Taliban insurgent, who you have been ordered to 'target', and who is firing an AK47 at you from close range, at least arguably seems an odd place, time and circumstance for a duty of care to arise.' The military theme is continued in Part 1 of Tony Cuneen's historically significant account of the contribution of over 300 members of the New South Wales Bar who saw active service in the Second World War. David Knoll's short opinion piece 'A blot on

Bolt' is also not to be missed.

There are an unusually large number of notes on recent developments but all are noteworthy. Two, in particular, focus on recent decisions of the Victorian Court of Appeal and the High Court in relation to arbitration. On one view at least, the decisions are a long way removed from the enthusiastic embrace of arbitration disclosed by the New South Wales Court of Appeal, and in the judicial and extra-judicial writings of its President, Justice Allsop, and former Chief Justice Spigelman. It will be interesting to see what legislative response these decisions receive, if any, given that there may now be seen to be a real tension between, on the one hand, recent concerted political efforts to promote Australia and Sydney, in particular, as a centre for regional alternative dispute resolution (in competition with centres such as that flourishing in Singapore), and the degree of willingness of Australian courts to review and interfere with arbitral decisions, on the other hand. The latter phenomenon is unlikely to be welcomed by commercial parties seeking speedy and certain commercial dispute resolution.

Simon Fieldhouse

The cover of this issue of *Bar News* features a recent painting by Simon Fieldhouse whose work is well-known to members of the legal profession. This picture is from a recent exhibition of his paintings entitled '*Phillip Street Impressions*' and a number of other pictures from the exhibition are contained in this issue. Exploring a new style and working in oil rather his customary pen, ink and watercolour,

Simon captures the movements of barristers to and from, and around the precincts of, the Supreme Court as well as the workings of the court itself.

A series of his paintings commemorating the swearing out of Spigelman CJ and the swearing in of Bathurst CJ now proudly hang on the walls of the Sixth Floor Wentworth/Selborne. A whimsical picture of the late Roddy Meagher, admiring Victoria in her Square, is, I understand, to be donated to St John's College. And a multi-panel study of a judge bearing a remarkable resemblance to Whealy JA in various stages of judicial disrobing was quickly and astutely purchased by the subject himself!

On the subject of art, Ralph Heimans' elegant and engaging portrait of Sir Kenneth Jacobs is also featured in this issue, complemented by Sir Anthony Mason's own portrait of, and tribute to, Sir Kenneth, now in his 94th year, which was delivered on the occasion of the portrait's unveiling. Sir Kenneth, is to hang, as it were, in the newly refurbished President's Court.

Simon Kerr SC

The death of a close colleague and friend from the bar is always distressing. When that colleague is as young as Simon Kerr SC was (39 years), the sadness is overwhelming. As Justin Gleeson SC noted in his eulogy, reproduced in this issue of *Bar News*, Simon was the sixth youngest person ever to come to the New South Wales Bar and there can have been few barristers as passionate and committed to the bar, its traditions and institutions as was Simon. I sat in the same pew at

his memorial service as I had shared with him at this year's Opening of Term Church Service at St James. With enormous strength and courage, and within a few weeks of his death he attended Bathurst CJ's 15 bobber in the Bar Common Room. It is impossible to believe that he has left us, and his presence and contribution to the bar's institutional and social life will be greatly and sorely missed. My own and the bar's sincere condolences are extended to young James (son and grandson of barristers) and Simon's family.

Signing off

I have decided that this will be my final issue as editor of *Bar News*. I have held this position for seven years and have served on the *Bar News* committee for more than fifteen years. I have always held the view that *Bar News* can and does play a significant role in the life of the bar, as well as serving as an important journal of record. That is one of the reasons why pieces of

historical interest and significance have been given such prominence.

To have served for a considerable time as editor of *Bar News* has been a great honour and privilege and a role that I have at all times greatly enjoyed. I am proud of the very high quality the publication has attained. This has only been possible with the substantial input of all of those who have served on the *Bar News* committee over the years as well as those who have contributed articles, notes, opinion pieces, reviews, cartoons and drawings over the years. Serial contributors such as Ash, Beasley, Webster, Gleeson, Moses, Stoljar, Chapple, Graham, O'Donnell and Tony Cuneen, as well as Sir Anthony Mason and Justices Heydon, Kirby, Spigelman, Allsop and Rares on the judicial side have ensured that the quality of the contributions has always been first rate. Perhaps the greatest source of personal pleasure, however, has come from the opportunity to encourage

(but never to edit - well 'hardly ever') Aitken and Poulos QC in their brilliant collaboration that is 'Bullfry'. 'Bullfry at the end of Dinner' which appears in this issue is up there with the best, and any resemblance of any of Bullfry's 'boon companions' to senior members of the inner bar is, I am almost certain, entirely coincidental.

For almost the entire duration of my involvement with *Bar News*, Chris Winslow of the Bar Association has been responsible for the production of the publication. My debt to, and respect for, him is immense. The Bar Association and its members should be very grateful to have as one of the senior staff a person of such intelligence, civility and skill.

It remains to wish all members 'Happy reading and happy holidays' and to wish my successor as editor the best of luck in the role.

Andrew Bell SC
Editor

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State government must reform personal injury laws

By Bernie Coles QC



The advent of spring brings with it the annual senior counsel selection process, and on Thursday, 3 November I had the honour to attend the presentation ceremony for new silks. Chief Justice Bathurst presented this year's silks with their scrolls at what was a warm family occasion in the Bar Common Room. The twenty four barristers appointed as senior counsel this year comprise a cross-section of the great talent at the New South Wales Bar, with a broad range of experience and expertise. Their well-deserved appointment has been particularly well received.

I would also like to highlight the extensive and invaluable cooperation from the large number of respondents from the Senior Counsel Consultation group to whom considerable thanks are due. I would also like to extend my thanks to the other members of this year's committee, the senior vice-president, Phillip Boulten SC, Barry Toomey QC, Angela Bowne SC and Richard Button SC for devoting their time and energy to what is always an extensive and intensive process.

Over the past few months, the

association has been active on a number of important issues of public policy. Following the conviction of Mark Standen on drug conspiracy charges by a Supreme Court jury in August, the association made a public call for an inquiry into the New South Wales Crime Commission. The civil liberties implications of aspects of the commission's operations have been a matter of longstanding concern. The association called for a full public inquiry into the operations of the commission and into cases in which Mr Standen had been involved. The state government has since announced the establishment of a Special Commission of Inquiry into the New South Wales Crime Commission to be conducted by the former District Court Judge David Patten.

In accordance with its established policy in relation to New South Wales personal injury laws, the association has been active of late in drawing attention to the excessive profits made by motor accidents insurers under the Motor Accidents Scheme, in order to emphasise that there is scope to provide those injured in motor accidents with better access to compensation for non-economic loss. The association's position is that there should be a single consistent regime for the award of personal injury damages in this state, based upon the system which applies to Civil Liability Act claims. The association will continue to take opportunities to highlight the plight of injured people under our current patchwork of inconsistent and in some cases arbitrary personal injury laws, and we are calling on

the relatively new state government to take heed.

The New South Wales Law Reform Commission has been given two important references by the attorney general, references in which the association is taking a keen interest. The Hon Greg Smith SC MP has asked the commission to inquire into and report upon bail laws in this state, as well as the law of sentencing. It is the view of the Bar Council that current laws operate indiscriminately in creating various presumptions against bail, and the association has submitted to the commission that 'the association supports a significant shift in emphasis in the Bail Act. There are good public policy reasons for a set of legislative amendments, the effect of which is to reduce the numbers of people being held in custody on remand'.

Similarly, the commission's current reference on sentencing laws provides an opportunity for the government to bring greater consistency and certainty to our sentencing laws. The Criminal Law Committee has been heavily involved in both references, and the association will continue to pursue these inquiries in the interests of the better administration of criminal justice in New South Wales.

In September the association's Oral History Project was launched in the Common Room. The aim of the project is to preserve the rich history of the New South Wales Bar through recorded interviews with retired barristers in order to provide an audio record of their memories and reflections upon practice at the bar. The project was developed in conjunction with a similar initiative

of the Women Barristers Forum which features featuring audio interviews and photographs of the women who practised at the Sydney Bar during the years to 1975.

The general bar project to date comprises audio interviews with Chester Porter QC, the Hon Margaret Beazley AO, the Hon Kenneth Carruthers QC, the Hon John Slattery AO QC, Derek Cassidy QC, Ian Barker QC and Priscilla Flemming QC. Excerpts of these interviews have been produced with accompanying photographs and transcripts in the form of icons which now appear on the oral history section of the association's website. Speakers at the joint launch of both projects included the chair of the WBF Julia Baird SC,

the Hon Margaret Beazley AO and Chester Porter QC.

I am pleased to advise that the Bar Council has approved \$25,000 in additional funding for the two projects, to enable further interviews to be conducted. I commend the project to you, and recommend that you visit the Oral History page on the association's website to get a full appreciation of the work that has been done in preserving the NSW Bar's heritage.

This edition of *Bar News* includes a range of material from pieces on aspects of law and practice in evidence to defamation to military justice to this year's Garfield Barwick Address delivered by the Hon R J Ellicott QC.

This edition will be the last *Bar News*

published under the editorship of Dr Andrew Bell SC, and I would like to extend my sincere thanks to Andrew for his efforts as editor of *Bar News* since 2005. One of the highlights of Andrew's tenure has been the introduction of special editions focusing upon discrete areas of law such as expert evidence and criminal law. These editions have spurred an extraordinary amount of interest among readers, and I congratulate Andrew on his contribution over the past six years.

I would also like to take this opportunity to thank the Bar Council, executive director and staff of the association for their efforts during the year and wish all of you a very Happy Christmas and enjoyable holiday season.

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Middle row (from left): William Potter, David Scully, Jeff Rose, Lorna Sprotson, Clyllyn Sperling, Louie Christoff, Brendan Green, Benjamin Pierce, Timothy Little, Vivien Carty, Robert Carey

Front Row (from left): Laura Thomas, Fiona Roughley, Benjamin Jacobs, Kassie James, Sam Pararajasingham, Greg Smith, Bridgette Styles, Jane Seymour, Elizabeth James, Yvette Guo



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Letter to the editor

Dear Sir

I read with interest in the criminal law special edition of *Bar News*, the article 'The development of the regional criminal bar' by Messrs Walsh and Nash, in particular their reference to circuit court closures. I found myself agreeing with so many of the points raised – the effect of a withdrawal of services, the absence of a deputy sheriff, the loss of ceremonial openings of sittings and the absence of a senior judicial presence. The action of the recently retired chief justice in taking sittings of the Court of Criminal Appeal to country centres delighted me!

Many years ago, when I was under-secretary of justice, there would be proposals to close a country court house on the basis there was insufficient work to justify its continued existence – and many were closed, I regret to confess. I learnt, however, that a closure did

great harm to that country centre and citizens. The clerk of petty sessions was agent for so many state and federal agencies and his withdrawal from a town meant the citizens lost such local services, and had to travel to other centres. Also, the closure enabled banks and others to follow suit and close. It was better to reduce the number of days the courthouse was open, rather than to close it altogether. Similarly, I found it was not necessary to abolish a country District Court, merely do not proclaim any sittings unless a need arises. That way, the town remains a District Court town – a status symbol.

Of course, some judges themselves at times controlled the sittings in certain towns and did not attend. I recall the late, dear old Sammy Ross would sit in Gundagai, however for some time had not moved on to

Tumut for the District Court sittings there later in the week. Eventually, one of the local solicitors phoned me and said the judge had not been there for ages and there was work to be done.

I checked with the clerk of the court and indeed there were a number of matters in the list, although he doubted they would proceed. Nonetheless, discreetly, I called upon his Honour and mentioned that the 'natives' in Tumut were restless. He assured me that all would be well and phoned me a few weeks later from Tumut to report he had been through the list and there now were no matters remaining.

They were the days.

Trevor Haines AO

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The failed art of sentencing offenders

By John Nader QC

This should be understood to be a sincere criticism of the Court of Criminal Appeal of NSW (the CCA). It implies no disrespect or discourtesy to any members of that court.

Disagreements about what the law ought to be should be an exercise of reason, a dialectic, where contending views should be clear of hostile emotion. My request therefore is not that others agree with my contentions but that they make an effort to understand them as I will, theirs.

Since the mid 1970s, certain sentencing practices have become entrenched: at first by judicial action and more recently by legislation.

My present purpose is to persuade the CCA that those practices are inappropriate and that that court's traditional role should be reinstated. It should return to being a truly appellate court. Sadly, many of the judges who sit on the CCA, by reason of their relative youth, have no personal recollection of those older traditions.

The CCA, in quite a short time, has developed practices which involve treating trial judges almost as if they were clerks whose task it is to follow check lists and to take into account matters that are laid down therein by the parliament and by the CCA. I submit that this is demeaning for sentencing judges whose independence has, in effect, been taken away over time both by the CCA and the parliament. A monster has been created that makes judicial life extremely difficult in just covering the prescribed matters, and takes the judges' minds away from the main game.

The CCA should be jealous of

appellate traditions because it has power which is easily, even if inadvertently, misused without sufficient reflection on its consequences. The CCA has only to treat a rule of judicial practice as a rule of law in a particular case after which judges must apply it or fall into appellable error.

In this way the CCA can create a legal regimen that goes beyond what appellate courts were intended for. It is a dangerous process, even when applied in good faith. It is not possible to emphasise enough how our basic judicial processes, in the most important forensic jurisdiction, depend for their value and respect on a profound knowledge of our traditions and the reasons that gave rise to them. No court would make exceptions to the rule of law, but it may not be in breach of any promulgated law if it did so. Powerful tradition saves the rule of law and many other embedded legal values.

One might well ask how much judicial independence a judge possesses whose role has been reduced to little more than checking and complying with lists of matters prepared by others.

The chief reason why I protest against this tendency is that it betrays a lack of understanding of the judicial role. It seems to have been overlooked that judges have, by right of their office, independence in their judicial functions, extending to independence from other judges: we know it as judicial independence. One might well ask how much judicial independence a judge possesses whose role has been reduced to little more than checking and complying with lists of matters prepared by others.

In the belief that it is all right to interfere with the traditionally broad discretion of trial judges, the CCA, by a process like acquisitive prescription, has taken from them the right to exercise the authority for which they were appointed to judicial office.

Of course, judicial independence does not extend to significant errors of law, nor should it. There are cases where judges run off the rails of legal correctness and where the error can truly be said to be an error of law requiring correction. It should be for those cases that the CCA exists.

This process of eroding judicial discretion has not been gradual and subtle. It started shortly after September 1974 when Reginald Marr became solicitor general for NSW – the second law officer of the state – and has continued unabated.

Marr succeeded Harold Snelling, an outstanding QC considered for appointment to the High Court.

He had been solicitor general from 1953. He ceased to hold that office in 1974 when Marr became solicitor general. Marr held office as solicitor general until March 1978.

Crown appeals were very rare in Snelling's time. They were confined to cases that cried out for review.

Marr was succeeded by Gregory Sullivan from February 1979 to February 1981 and Mary Gaudron February 1981 to February 1987. The taking of Crown appeals then passed to the director of public prosecutions,

appointed in July 1987.

The enactment of the *Crimes (Sentencing Procedure) Act 1999* formally removed the direct responsibility of the CCA for diminishing the status of trial judges and passed it to the New South Wales Parliament. But, the criteria set forth in that Act largely follow the matters that had previously been defined by the CCA, and one can safely assume that the influence of the CCA on the parliament, whether direct or indirect, was significant. No improper motive is suggested. However, whether undue supervision of judges comes from legislation or the CCA does not lessen its unacceptable effects.

Crown appeals were very rare in Snelling's time. They were confined to cases that cried out for review.

It is presently accepted as non-contentious that the *raison d'être* of all criminal penalties is, either directly or indirectly, to provide peace, order and protection to the general community by minimising the incidence of crime: at least to the extent that it is within the power of the criminal law to do so.

Another generally accepted principle of criminal sentencing is that the form and severity of penalties should not at all be motivated by vengeance or retribution.

These propositions are ultimately matters of fashion but they are accepted in these times as axiomatic. It was not always so and what may be the received opinion in times to come we cannot now know. It would be unjustified to think that our present opinions are objectively speaking any

better – or more right – than past opinions, or that in time to come our present opinions will not be seen as other than inappropriate.

But, I think that a third factor, not now openly accepted, should be frankly considered by the courts: namely, punishment, as such. Punishment was once recognised as the chief reason for sending offenders to prison. The failure to accept it presents an hindrance to developing a more complete rationale for criminal punishments.

Should criminal courts be able to factor into sentences, where appropriate, a finding that the crime in all of its circumstances warrants a punishment component with no other justification than that the offender should be punished? I am referring to punishment, *per se*. There is a tendency for us, modern, enlightened people, to think of punishment as in itself cruel and something that we have moved beyond. This should be a matter for serious debate.

Of the reasons for imprisoning offenders, the chief one remaining that is countenanced by the courts is deterrence from committing crime directed either to the general community or to the offender at bar himself.

It is an ongoing debate whether the commission of even a few kinds of crimes might be deterred by the prospect of imprisonment. I am inclined to agree with those criminologists who say that prison sentences have little if any effect on the incidence of crime.

The basis of prison sentences should not be locked in legislative concrete but left to the wisdom of experienced

judges to determine in the light of their perception of general community standards. If juries can be asked to apply community standards from time to time, why not judges?

The CCA frames its appeal reasons so as to give the sentencing process the look of being scientific. It has been fashionable for sociologists to do just that (think of Lombroso whose ideas were accepted by intelligent judges not so long ago), and the sentencing process is part of the broad world of sociology. The process of sentencing offenders is not only not scientific, but it is incapable of its nature of being truly scientific. But, in an age in which science and technology are seen as life's *sine qua non*, it seems to be accepted that the sentencing process should be scientific – that if we fail to make it so, the very process of sentencing offenders may fall into general disrepute. But the sentencing process has none of the marks of a truly scientific process, such as experimental verification or measurable objective criteria.

I have not lost sight of the fact that there are some offenders whose history is such that they must be imprisoned for the protection of the public from their crimes; offenders who on their history, are very likely to offend again with severe effects on the community. This is not imprisonment as punishment of the offender but as direct protection of the public. It is a highly contentious matter.

However, these are complex questions to which there are no simple answers and my broad propositions are not without exceptions, but I think not many.

As the sentencing process now operates it has a superficial

appearance of being scientific and therefore of getting correct answers. But on a closer look at the process it can be seen that it is utterly non-scientific. It is for that reason that there can never be justification for nit-picking through remarks on sentence for technical errors that invalidate the sentence passed.

No matter what technique is devised the sentencing process must follow a process that begins with a starting point selected by the sentencing judge. The starting point must be a number that cannot be fixed by reference to any exact criteria. It must be the estimate of a judge made by reference to very imprecise criteria. In order to make this estimate he or she may have regard to a range of sentences imposed in the past for similar crimes passed on persons in like circumstances. That is always problematical in any event because past sentences themselves have been determined by earlier cases and so on: older cases propping up those that follow.

Having arrived at a starting number, the judge must then adjust it by taking into account the many factors dictated by the parliament and the CCA. The judge must say specifically that he or she has taken the factors into account, or he or she will be deemed not to have done so. Some of the directives are precise, such as a percentage of a number used in the sentencing process to be discounted for pleas of guilty in varying circumstances. There is no lack of precision in the arithmetic. But still, the concluding number, arrived at after applying all of the mandatory criteria, is still no more scientifically determined than the number the judge first decided on.

It follows that even after all of the taking into account of specified factors, aggravating and mitigating, and applying any of the prescribed arithmetic, the end of the process is still as unscientific as its beginning.

So why perpetuate what is objectively speaking a farce? Why not concede that it is not possible to devise a scientifically precise sentencing process? Should the courts not now look for a different one – one that is admittedly not scientific but which is most likely to produce a fair result and that will reinstate the sentencing judges to their proper status. Sentencing judges should apply their common sense and experience in the light of all relevant matters that impinge on them, including the impressions made by the offender in the sentencing hearing and by witnesses who may testify and by the numerous other factors that may operate on the judge to create an impression on his or her mind in an almost inexpressible way.

Why not concede that it is not possible to devise a scientifically precise sentencing process?

On a related issue, the CCA frequently fails to recognise that judges while summing up to a jury can, from experience, detect and understand the body language and expressions on the jurors' faces and are able to see whether a point made in the summing up is fully understood. This is something that an appeal judge does not detect having only

the written transcript of the judge's address to the jury.

But heads of jurisdiction should understand that, if sentencing judges are restored to their proper status, they will have to appoint men and women with experience of criminal law and practice, and whose opinions in matters of sentence would command respect. There were once many such and I am sure that there are still a considerable number. The chairmen of Quarter Sessions and later the chief judge of the District Court understood well what I am saying. The criminal courts should not continue to be a jurisdiction where any judge at all is regarded as good enough to preside. Judges can be educated into the jurisdiction gradually by the careful grading of the difficulty of cases allocated to them. A chief judge should take an active role in this. A wise judge is much more valuable than a clever one.

This also applies to the judges rostered to sit on the CCA. It is not helpful to the matters raised here to appoint a person who from admission to practice has been almost exclusively in jurisdictions quite unrelated to the criminal jurisdiction and then to be called upon to pass judgment on the sentencing opinions of an experienced sentencing judge. That is true no matter how brilliant the appeal judge may be.

What I have so far said leads to my ultimate proposition: namely, that judges should be relied upon to pass sentences on the basis of the impression of a case on them, and their knowledge of what is sometimes called 'the tariff, for a class of offence, without being required to analyse with particularity how they reached

their conclusion. If they cannot be relied on to reach a reasonable conclusion in that way they ought not to be sitting in the criminal jurisdiction.

For an experienced sentencing judge, it should be enough to make general comments explaining why he or she reached certain conclusions determinative of the sentence passed. Such comments should not be subjected to critical textual analysis by the CCA. Prison sentences should be appealed only if they are so grossly out of kilter with the generality of sentences for similar matters as to bespeak error; or if the magnitude (or lack thereof) of the sentence would shock an ordinary member of the public; or perhaps if the judge's reasons are manifestly inconsistent with the sentence passed.

mind precisely what quantum (added to or subtracted from a sentence) was attributable to a particular factor.

I suggest that the CCA should rely upon criminal judges (who should generally have considerable experience as criminal law practitioners) to use their wisdom and instinct to reach their conclusions. Some may remember that in the 1960s, 1970s and 1980s, there were a number of judges who had been police officers and who became barristers and then judges. In general they were highly respected as outstanding judges in the criminal courts. Notwithstanding that their careers started as policemen, they showed as much appropriate compassion in their work as any judges did. I repeat in this context that experience and wisdom are of

I think that we should remember that the sentencing of offenders is an art rather than a science. If this seems to be a radical proposition, I remind you, that it was in fact the very process that had continued for many years at least until the mid 1970s when the present appeal practices had their origin with the appointment of a new solicitor general and a chief justice who, understandably, relied on him for guidance.

Finally, I suggest that the very large number of Crown appeals should itself send a warning that all is not well. Crown appeals should be exceptional and few.

The criminal courts should not continue to be a jurisdiction where any judge at all is regarded as good enough to preside.

Judges may, but should never be compelled to quantify how much of a prison sentence is due to any particular factor taken into account. It should be assumed that an experienced judge will have taken into account all relevant matters such, for example, as a plea of guilty in all of its circumstances or the amount of pre-meditation leading to the crime. Not mentioning any significant and relevant matter in remarks on sentence should not, as it can now, lead to a finding by the CCA that the judge failed to take the matter into account. A judge may not quantify even in his or her own

greater value in that kind of work than intellectual achievement of a more abstract kind.

I suggest reading Shimon Shetreet's *Judges on Trial* (1976). It was said of this book in a biographical note:

Prof. Shetreet's book *Judges on Trial: A Study of the Appointment and the Accountability of the English Judiciary* (1976) was relied upon by the House of Lords in the Pinochet Case in January 1999 and this and other works have also been relied upon as well in numerous highest court cases in other Countries Canada, Australia, New Zealand and India.



Reflections on concurrent expert evidence

The following paper was delivered by the Hon Justice Peter Garling at the Australian Insurance Law Association Twilight Seminar Series on 17 August 2011.

Introduction

Concurrent expert evidence in the Common Law Division of the Supreme Court of NSW can no longer be regarded as a radical or dangerous experiment to be looked upon with suspicion.

It is now, and has been for some years, the norm. It is a usual and integral part of the management of any case by the court, so as to ensure that only the real issues in the proceedings are addressed and resolved, and this in a just, quick and cheap manner: *s 56 Civil Procedure Act 2005*.

Contrary to the early doomsayers around the time when the use of concurrent evidence became formalised in 2005 with the introduction of the Uniform Civil Procedure Rules, the sky has not fallen in. The adversarial process continues to thrive and barristers and solicitors have not become irrelevant. Experts have not newly become argumentative advocates and cases continue to be settled or heard in a conventional manner.

Advantages

That there are advantages of concurrent expert evidence over other evidence-taking methods is undoubted. Debate remains as to what they are and the extent of the advantage.

I venture to suggest that the advantages which are identified will vary from individual to individual. Those identified advantages will depend upon the particular piece of litigation, or pieces of litigation in which the individual has been involved. No doubt it also depends upon the role in the proceedings of the observer and their perception.

As a barrister, I saw a number of advantages, principally:

- a concentration of the process of cross-examination of experts which reduced the time spent in the process of cross-examination, including the preparation for it;
- being able to rely upon one or other expert to do some of my work in confronting the other expert with the defects in their opinion; and
- being able to blame either an expert or the process when unfavourable evidence was given in the course of cross-examination.

From my perspective as a judge, I see different advantages. They include;

- the whole process, including the joint conference and joint report, generally narrows the issues which remain in dispute to a significant extent;
- the evidence of each expert on a particular issue is taken together so that when considering the evidence for the purpose of writing a judgment, opinions on similar issues are easily identifiable and little room for doubt exists as to what the opinion is;
- extreme expert opinions and 'pseudo-experts' have become very rare; and
- there are considerable time savings in the hearing component of a case in which expert evidence is taken concurrently.

Contrary to the early doomsayers around the time when the use of concurrent evidence became formalised in 2005 with the introduction of the Uniform Civil Procedure Rules, the sky has not fallen in.

Practical disadvantages

I have encountered some practical disadvantages with concurrent expert evidence.

The first is that it is often difficult, if not impossible, to find a time when a number of busy experts can confer together to prepare a joint report. There are a number of possible ways to deal with this, including:

- openly disclosing to the expert at the time of retainer the essential steps in which they will be required to participate;
- ensuring that arrangements for joint conferences are made at an early stage with more than adequate time to find a suitable conference time;
- while less desirable than personal meeting, the use of audio-visual links, including Skype facilities and teleconferencing, provide significant flexibility in the arrangements for a joint conference;
- combining the joint conference, the joint report and the evidence into a single multi-day session can, in exceptional cases, prove useful.

The second disadvantage, and one which I suspect

is likely to diminish over time, is that judges are not uniform in their approach to the conduct of the concurrent evidence session. Some judges prefer to control and conduct the concurrent session themselves. Others leave it almost entirely to counsel to conduct the examination. The extent of counsel's participation, and the need for counsel to prepare, will vary accordingly. The answer to this dilemma is to explore with the trial judge, at the earliest opportunity, how he or she intends to conduct the session. Ground rules can be explored and adequate time reserved for preparation.

The third disadvantage is said to be that the conduct of a cross-examination about credit is, practically speaking, very difficult. That is so, but I do not regard this necessarily as a disadvantage. In fact, I see this, generally speaking, as an advantage. Experience suggests that by the time that experts have participated in the process of joint conference, joint report and concurrent evidence, with careful adherence to the Code of Conduct, issues of credit rarely arise.

But if they do, then such an issue can be dealt with in an entirely conventional manner by organising the concurrent expert evidence session so that some issues, such as those relating to credit, are not dealt with during the concurrent session, but are dealt with at the conclusion of the session, on an individual basis, in an entirely conventional manner.

Developments in practice

Although the Supreme Court Practice Note – Gen 11: Joint Conference of Expert Witnesses has been in effect since 17 August 2005, in my experience little, and certainly not adequate, attention is paid by practitioners to the requirements of clauses 6-11 (inclusive) of the practice note. Those clauses deal with the documents which are to be provided to experts in advance of the joint conference.

Justice Allsop, when a member of the Federal Court of Australia, described expert evidence in this way:

...the taxonomy of expert evidence [as] of fact, assumptions, reasoning process and opinions [is] an accepted (indeed necessary) framework...

ACCC v Liquorland (Australia) Pty Ltd [2006] FCA 826 at [840].

The first development which requires comment is this.

In my experience, because of inadequate attention to these clauses of the practice note, in the course of my management of cases, I insist upon the following approach to the documents to be provided to each expert:

- an index of the documents, together with a paginated folder of the documents which is to be put before each expert participating in the joint conference and the giving of concurrent evidence;
- a complete list of the factual assumptions which are agreed, or else for which each party contends, as the appropriate basis for the joint expert opinion; and
- the questions which each party contends are appropriate for the experts to be asked to answer.

Some short explanation of these is necessary. Although it may be self-evident that the experts should have the same material, often, and surprisingly, they do not. It is obviously necessary that they each have access to all the same material upon which to express the joint opinion. It is not always necessary, and often irrelevant, for the experts to be given copies of pleadings. Experts usually are not engaged to form conclusions about pleadings. As the practice note says, statements of witnesses can be provided. However, it is necessary in the event that statements of witnesses are provided for the parties to formulate an assumption about those statements which the experts are to be asked to make. Unless that is done, there is a real risk that the experts will engage in the interpretation of statements, choosing for themselves which part of the statement to accept and which to reject. This process is not always clearly revealed in the joint expert report.

A complete list of the factual assumptions, which are either agreed or else for which each party contends, does seem on its face to be rather tedious. However, as Justice Allsop has made plain, with few exceptions, experts do not determine facts. Experts are asked to express opinions upon the basis of facts which are proved otherwise than by the expert. There will be some exceptions to this. If an expert is retained to establish the facts, for example, of a forensic accountant's report based on documents which are provided, then it may be necessary to ask the experts to assume the correctness of those facts which are found. The mere fact, without more, that an expert has found the facts

does not of itself mean that they are correct.

I do not expect in cases before me that all of the factual assumptions will be agreed, although I would hope that a good number of them could be. Where agreement is not reached or is incomplete, I permit parties to put alternate assumptions of fact to the experts. The experts are then asked to assume the facts in version A or version B and express their opinions accordingly. In this way one avoids a debate between the experts about factual findings, which are ultimately a matter for the court.

The questions that the experts are to be asked to answer are critical to the successful outcome of concurrent evidence sessions. It is very easy to ask a question which says something like ‘Was the defendant negligent?’ This however wholly misunderstands the role of the expert. The experts who are bringing to bear their knowledge and experience of common professional or industry practice generally accepted as appropriate, ought properly be asked whether, if the relevant assumptions are made, what the defendant

What I have noticed as a progressive development is that counsel have become more astute to invite the experts themselves to join issue with the other expert and identify the differences or features which would support one view or the other.

did accorded with professional practice which was common at the time. Alternatively, experts might be asked whether what the defendant did accorded with common industry practice. But experts should not ordinarily be asked to express opinions about, or answer questions which require them effectively to express opinions on, matters of law.

There are some important ramifications of the way in which documents of this kind tease out the issues to be considered by experts.

If in a typical personal injury matter, one party wishes to show surveillance film, and obtains an expert opinion about that surveillance film and the way in which it affects the conclusions of their expert, then

that surveillance film will need to be made available to all experts for their viewing at or prior to the joint conference. Alternatively, a very careful set of assumptions of fact needs to be fashioned which a party is satisfied will be proved by the surveillance film.

In my experience, effort in preparing and settling the documents to which I have just referred is rewarded by sensible expert opinion.

The second matter which in practice has become a more regular feature of the process, is the techniques which are being used to facilitate and support the holding of an expert conference. This is particularly important where there are more than two or three experts who need to confer and produce a joint report, but it is equally applicable where there are only two or three experts.

There are a number of important techniques which have come to prominence. They include:

- the provision of appropriate meeting facilities including technological capacity to enable the experts to adequately discuss all of the matters necessary. The ability to project electronic files from an expert’s computer onto a larger screen so that all experts can view and discuss the content of the electronic files is a considerable advantage;
- the provision of secretarial assistance to experts to prepare the report. Particularly where time is limited, it can be of considerable benefit to the experts to have an administrative assistant provided whose job is to record the questions, record whether there is any joint opinion and if so what it is, and to record the differing opinions. This is to be encouraged provided that the administrative assistant does no more than provide administrative assistance and does not seek in any way to participate in the substance of the conference; and
- the use of an independent chair to oversee and ensure the conduct of the conference and the proper and adequate expression of each person’s opinion. The chair is then responsible for ensuring that the joint report is prepared, signed and submitted. The independent chair should not participate in answering the questions in the joint report. The independent chair should be a person who has the respect of the experts and who has

some knowledge of the process sufficient to enable them to ensure the efficient discharge of the task of joint meeting. Sometimes it is necessary to have a chair who is knowledgeable in the expert area. However, more often than not, an entirely independent chair is desirable.

The third development in practice which I have observed has been a better understanding among counsel and experts as to how to conduct and participate in examinations of experts in concurrent sessions. Experience shows that counsel is both a questioner of the experts, and also a manager of the process (subject to the supervision of the presiding judge). By that I mean this, that in the conduct of the concurrent evidence session it will obviously be necessary for counsel who asks a question of one or other witness, to give each other witness an adequate opportunity to also respond to the question asked. What I have noticed as a progressive development is that counsel have become more astute to invite the

experts themselves to join issue with the other expert and identify the differences or features which would support one view or the other.

This development is, as I said, a maturing of the process and of the participants in it. It is in fact what the process is designed to achieve.

Conclusion

I detect a greater familiarity among experts and lawyers with the process of concurrent expert evidence. It is essential that the whole process, by which I mean the adequate briefing of experts with appropriate documentation, assumptions and questions; sufficient time being allowed for a joint conference to occur with such assistance as may be necessary; and then the giving of evidence concurrently; all combine to provide the court and the parties with an efficient way to determine the real issues in dispute.

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From hack to senior junior – is nothing sacred?

By David Ash

The barrister's path to success is well-recognised and well-trod: red-faced, then red-bagged, then red-gowned; 14 years' genuflection, 14 years' stage direction, 14 years' vivisection. But is this the only path? What is success? And can the rest of us look forward to getting old?

Yes. And we can by aspiring to no more than an invisible appendage.

'SJ', or 'senior junior', requires no points of professional education and no approbation. It requires no peer approval and is safe from judicial review. It does not even require respect. Even better, it bestows anonymity, the Jesuits having nabbed the publicity for themselves. There is no 'Find a senior junior' on the bar's collegiate – and, now with photos, convivial – website.

However, things are never as simple as they seem. Can it be true, for example, that the only prerequisite for this invisible appellation is age, wrapped in that most elegant of euphemisms 'experience'? Is one disqualified by incompetence? In short, can a hack and ever a hack ever become a senior junior? To this we now turn.

The word 'hack', like many words, is well-known and less learnt. It can be one who is used to doing servile work for hire, or a prostitute, or a common drudge. Each of these descriptions may describe an effective junior or an ineffective one; it really depends on one's own frailty when playing the timeless game of 'Self-Description'.

As far as I can discover, hack was first used to describe lawyers in *Tom Jones*:

... there was likewise present another person, who stiled himself a lawyer, and who lived somewhere near Linlinch, in Somersetshire. This fellow, I say, stiled himself a lawyer, but was indeed a most vile petty-fogger, without sense or knowledge of any kind; one of those who may be termed train-bearers to the law; a sort of supernumeraries in the profession, who are the hackneys of attorneys, and will ride more miles for half-a-crown than a postboy.

The pedant might suggest that this is not even descriptive of lawyers. To the contrary, the argument will run, there is sufficient context to show that Fielding was at pains to distinguish a lawyer on the one hand and a hackney on the other.

Ultimately, though, I think the use of the word 'in' in 'supernumeraries in the profession' must be taken as



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displaying an outrage of paradox and not an oxymoron of unintent. There is support for this when we read later that 'Unluckily, a few Miles before [Sophia] entered that Town, she met the Hack-Attorney...'

Then, of course, there is the delicate question of whether Fielding was referring to advocates at all, or was limiting his slight to what we know now as the other branch of the profession.

The question is not without difficulty. Fielding was writing in 1749, almost two decades before Blackstone commented on the one hand 'An attorney at law answers to the procurator, or proctor, of the civilians and canonists', while on the other 'Of advocates, or counsel, there are two species or degrees; barristers, and serjeants'.

'SJ', or 'senior junior', requires no points of professional education and no approbation. It requires no peer approval and is safe from judicial review.

Was Fielding writing in more general terms, as though he were in the US today, where attorney and counsel know no division? When Shakespeare made Edward IV's widow the victim of a direct access brief from Richard III (his cause being her daughter, herself widow of Edward V, lately killed at the client's direction), he had the client say:

Therefore, dear mother, – I must call you so, –
Be the attorney of my love to her:
Plead what I will be, not what I have been...

That the brief could have been returned under our rules is not to the point. When one remembers that 'hack'

was also a word for what we today call a taxi and that Fielding qua barrister if not qua writer was bound by the cabrank rule, we have to be comforted by his later use of the word, in *Amelia*, when 'She took a Hack, and came directly to the Prison.' She should have used an attorney.

Ultimately, I think the utter bar is entitled to exercise self-deprecation: provided we know our limitations, Hack House is no Chambers of Horror. That said, we must appreciate this is not a view held by anyone else. Let us move on the supposition that a hack is by description and no more, incompetent. And so, back to the original question. Can a hack – in the pejorative sense – ever be a senior junior?

In the days before Tom Brown's school days, I think that they might have. To Shakespeare again, in *Love's Labour's Lost*, when the bard posits the existence of a senior junior who might be good, or bad, or both:

This senior-junior, giant-dwarf, Dan Cupid:
Regent of love-rhymes, lord of folded arms,
The anointed sovereign of sighs and groans,
Liege of all loiterers and malcontents,
Dread prince of plackets, king of codpieces,
Sole imperator, and great general
Of trotting paritors!

Again, though, we have the unhelpful distraction of intraprofessional division. Was Shakespeare using 'paritor' in its narrow sense, a summoner in the ecclesiastical courts, for Milton that 'hell pestering rabble of Sumners and Apparitors'? Or was he again – via the direct access brief – acknowledging a place in the law for the advocate barrister, as Carlyle would 200 years on:

In no Piepowder earthly Court can you sue an Aristocracy to do its work, at this moment: but in the Higher Court, which even it calls 'Court of Honour,' and which is the Court of Necessity withal, and the eternal Court of the Universe, in which all Fact comes to plead, and every Human Soul is an apparitor, – the Aristocracy is answerable, and even now answering, there.

What of today? Is the senior junior defined by age alone, or is it age and competence?

In an online Australian resource, it is said 'Sometimes the expression senior junior is used to indicate that a junior barrister is very experienced'. However, this resource was written by a (well-regarded) silk, begging



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the question, is the expression sometimes not?

A similar English resource defines 'senior junior' as '[A] barrister who has not yet become a QC, but who has been working successfully for some years'.¹ I cannot accept this. The 'yet' seems rather to presuppose a senior junior has no right not to take silk, and the last clause evidences the danger of adverbs. My doubt is fortified by another entry, 'Con', which is defined as '[A] meeting in chambers between a barrister and clients.' Con indeed. Whither the attorney?

What of today? Is the senior junior defined by age alone, or is it age and competence?

The suggestion that experience of itself is sufficient without more is put firmly by 'Michael' on a *Sydney Morning Herald* blog, 'Is it time for the legal fraternity to join the 21st century?'²

I'm a 'senior junior' barrister, as are all barristers after 7 years in the profession who have not taken silk.

As there has been some discussion about fees, I charge \$2,500 a day...

The blog is now closed, but that should not stop anyone recalling the views of other bloggers:

Horsehair wigs are very expensive and the longer more elegant varieties can run into the thousands of dollars. Personally I would only support their removal if they were replaced by some other form of ceremonial headpiece such as a 3-foot tall wizard's hat, pointed mitre or at least something jewel encrusted.

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And from ‘Tom’ (a hackney of yesteryear with time to burn and puns to churn):

This just sounds like another attempt by a few neig-sayers to buck the trend and stirrup trouble in a profession where barristers are already more than saddled with unbridled responsibilities. Maybe it’s time for Phar-reaching reform, but I for one don’t believe there’s anything odd or lame about the wigs, and to suggest the Court has gone colt on how its own should dressage, well - I think they’re full of Shetland.

‘Michael’'s certitude is given legislative support from the UK. Regulation 17 of *The Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005* gives a table of rates of remuneration for legal representatives. The table distinguishes three beasts, ‘queen’s counsel’, ‘senior junior counsel (of at least 10 years’ standing)’, and ‘junior counsel (of less than 10 years’ standing)’. (Interpretation avoids absurdity. The second beast must be ‘senior junior counsel (being junior counsel of at least 10 years’ standing)’.)

In New South Wales, the other branch at first glance opts for age alone, when it advises in ‘Working with Barristers’:³

Queen’s Counsel and Senior Counsel wear silk gowns and are often known as ‘silks’ or ‘leaders’, as opposed to ‘juniors’ or ‘junior counsel’. Indeed in reality there is a middle category of barrister who is sometimes called a ‘senior junior’ meaning one who has considerable experience but has not been appointed or not sought appointment as a senior counsel.

At first glance only; I think it clear ‘considerable experience’ in this context is fairly regarded not so much as a euphemism for ‘great age’ but as a politic synonym for ‘competence’. (In turn I must accept what

is obvious to any true hack, that I have used ‘politic’ as a euphemism for ‘euphemism’.)

The strongest indication that mere age, experience, call it what you will, is not sufficient for ‘senior junior’ comes from two sources. First, Victorian Legal Aid’s ‘Talented Junior Counsel Program’:⁴

The success of this program depends upon the active and enthusiastic involvement of experienced senior trial advocates who are prepared to commit to developing the next generation of trial advocates.

VLA will fully fund the services provided by Juniors through the Talented Junior Counsel Program. There will be no fee sharing.

We are looking to recruit approximately 20 senior advocates as Lead Counsel for the program with a mix of Senior Juniors and Silks.

It reads too much into the plain language of the document to infer that only Smith TJC and not Smith Hack will one day be Smith SJ, but one can detect a barrier to entry.

The second source is the courts. In a 2009 matter, there was a direction by an appeal court to its registrar to approach the state’s professional association; the direction was for the purpose of seeking ‘the assistance of senior junior counsel or senior counsel who practises in these kinds of matter.’⁵ It can hardly be supposed that an intermediate court could have intended that a hack as commonly understood was within the purview of the direction, the more so when senior counsel by definition are competent.

Some years ago, in ‘Junior Junior – baby barrister blogger’, *Justinian* observed:⁶

The NSW bar website posts a listing of chambers available for sale or licence.

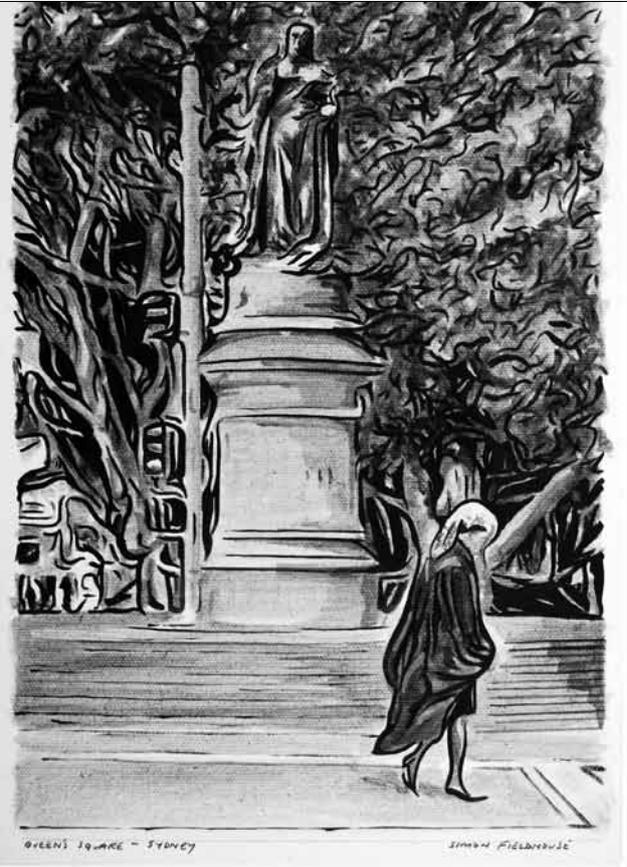
A picture of the room would be nice. It can be difficult to visualise what 1.5m² looks like.

Some rooms are described as suiting a ‘senior junior’. What does that mean?

Perhaps it has a window? Does this suggest I might be over-reaching myself to hope for a window?

I’ve come to realise that Santa is probably far too busy to be wandering around the legal precinct of Sydney, checking out chambers for me.

Yes, Virginia, some things are sacred. Ultimately, a senior junior is not an aging hack. The senior junior has



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more than mere experience. In a world where privacy may soon be protected by the law of tort, the senior junior offers not merely experience, but competence of a most private kind. Who can ask for more? And how would we know if they did?

Endnotes

1. www.natashacooper.co.uk/glos.html [accessed 22/10/2011].
2. blogs.smh.com.au/newsblog/archives/your_say/014565.html?page=2#comments [accessed 22/10/2011].
3. www.lawsociety.com.au/idc/groups/public/documents/internetcontent/026515.pdf [accessed 22/10/2011].
4. www.legalaid.vic.gov.au/rc_TJCP_factsheet.pdf [accessed 22/10/2011].
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A blot on Bolt

By David Knoll AM

Pat Eatock (sitting in wheelchair) with supporters after the case. Photographer Trevor Pinder / Newspix.

In *Eatock v Bolt* [2011] FCA 1103 a well-known newspaper columnist argued forcefully in a series of articles and opinion pieces that persons who had, for example, an Aboriginal maternal grandmother but whose other grandparents were not Aboriginal and who did not 'look' Aboriginal, ought to not be entitled to claim either Aboriginal identity or financial benefits targeted to Aboriginals. One might anticipate the rejoinder that such qualifications were sufficient for the original harm to have been applied to earlier generations of relatively fair-skinned Aboriginal Australians.

Add that the columnist argues not only that such people are not really Aboriginal but also that when such people make financial claims they do so to keep an unjustifiable 'industry' rolling, or that they chose an Aboriginal identity in order to further their careers. All the plaintiffs gave unchallenged evidence to the

effect that they had identified as Aboriginal since their childhood, and had upbringings in which they identified culturally as Aboriginal, and that they were recognised by their communities as Aboriginal.

Imagine also that some of those persons had become quite proud of their Aboriginal roots and sought to identify as Aboriginal, and were humiliated and offended by the newspaper columnist. Say also that the words used were unarguably offensive. It is trite common law that freedom of expression is not merely a freedom to speak inoffensively,¹ but can they sue under the anti-vilification provisions contained in Part IIA of the *Racial Discrimination Act 1975* (Cth)? If they can, ought not an opinion piece in a general circulation newspaper by a regular columnist be exempt?

Section 18D of the *Racial Discrimination Act 1975* exempts from being unlawful, conduct which

has been done reasonably and in good faith for particular specified purposes, including the making of a fair comment in a newspaper.

It is the issue of exemption that has drawn the most comment on the decision of the Federal Court of Australia, constituted by Mr Justice Bromberg, in *Eatock v Bolt*.²

In that case Bromberg J followed the decisions of full Federal Court in *Bropho v Human Rights & Equal Opportunity Commission*³ and *Toben v Jones*,⁴ and conducted a sensible, structured analysis of the facts against the statutory requirements.

In *Toben v Jones*, the full Federal Court accepted that Australia has a public interest in punishing the dissemination of ideas based on racial superiority or hatred, and that there is no public interest in promoting them. The court ruled that reasoned, fairly expressed, policy debate is permissible, but sweeping, public derogatory generalisations about any racial group are impermissible. Bromberg J held that Mr Bolt's opinion piece fell on the wrong side of that dividing line.

Bromberg J fully recognised the need to allow the exemption to do its work in preserving the right to express abhorrent views, and observed that: 'Where rights and freedoms are in conflict, the impairment of one right by the exercise of another is often subjected to a test of proportionality.'⁵

His Honour accepted that: 'The fair comment defence at common law extends to protect opinions, even those that reasonable people would consider to be abhorrent'.⁶ Part IIA

thus does not necessarily operate to prevent the publication of ideas which reasonable people would consider offensive or insulting even if race is a factor.

So why did Mr Bolt and the Herald and Weekly Times fail?

His Honour found that:

... Mr Bolt and HWT made no specific submissions as to why, if the Court was to make a finding of s 18C conduct on the basis of the imputations upon which Ms Eatock relied (or similar imputations), that conduct ought nevertheless be excused pursuant to s 18D.⁷

Bromberg J concluded after a detailed and careful analysis of the evidence as follows:

In my view, Mr Bolt was intent on arguing a case. He sought to do so persuasively. It would have been highly inconvenient to the case for which Mr Bolt was arguing for him to have set out facts demonstrating that the individuals whom he wrote about had been raised with an Aboriginal identity and enculturated as Aboriginal people. Those facts would have substantially undermined both the assertion that the individuals had made a choice to identify as Aboriginal and that they were not sufficiently Aboriginal to be genuinely so identifying. The way in which the Newspaper Articles emphasised the non-Aboriginal ancestry of each person serves to confirm my view. That view is further confirmed by factual errors made which served to belittle the Aboriginal connection of a number of the individuals dealt with, in circumstances where Mr Bolt failed to provide a satisfactory explanation for the error in question.⁸

On this basis, Mr Bolt was found not to have written in good faith. His Honour added:

Insufficient care and diligence was taken to minimise the offence, insult, humiliation and intimidation suffered by the people likely to be affected by the conduct and insufficient care and diligence was applied to guard against the offensive conduct reinforcing, encouraging or emboldening racial prejudice. The lack of care and diligence is demonstrated by the inclusion in the Newspaper Articles of the untruthful facts and the distortion of the truth which I have identified, together with the derisive tone, the provocative and inflammatory language and the inclusion of gratuitous asides. For those reasons I am positively satisfied that Mr Bolt's conduct lacked objective good faith.⁹

The error made by Bolt in asserting that the plaintiffs could choose to be Aboriginal, or not, and then to base his opinion upon a faulty premise, was found by the court to preclude reliance on the fair comment exemption. A fair comment must be based on an accurate factual premise, and Mr Bolt's comments were not. While it shouldn't be against the law to make mistakes, in this case all the mistakes seemed to be in one direction, heightening the polemical effect of the message Bolt was conveying about the plaintiffs and their race.

The case also serves as a salient reminder that freedom of speech cannot in a truly democratic society include freedom to vilify on the basis of peoples' race. In his famous 'Essay on Liberty', English philosopher John Stuart Mill recognised that liberty is measured not by the freedom exercised by one person, but rather by the freedoms exercised by us all. That

concept is central to the Australian ethos of a fair go. It underpins anti-vilification laws including Part IIA of the *Racial Discrimination Act 1975* (Cth).

We need to remember that there is a practical difference between words that may offend a majority group, faith or culture, one with social power and which can defend itself, and attacks directed at a less powerful minority, one fearful of the majority's reaction. Vilification degrades the humanity of members of the minority group in the eyes of the majority, whether that outcome is intended or not.

The test of a healthy democracy is not only the freedom of each individual to do as they please, but also the protections put in place to protect the weaker members of society against abuses of those very freedoms. That is the principle which the decision in *Eatock v Bolt* upholds.

Endnotes

1. *R (on the application of Gaunt) v Office of Communications (OFCOM)* [2011] EWCA Civ 692 at [22] (Lord Neuberger MR).
2. [2011] FCA 1103.
3. (2004) 135 FCR 105.
4. [2003] FCAFC 137; (2003) 129 FCR 515.
5. [2011] FCA 1103 at 349.
6. [2011] FCA 1103 at 353.
7. [2011] FCA 1103 at 360.
8. [2011] FCA 1103 at 405.
9. [2011] FCA 1103 at 425.

Invalidating the Malaysian Solution

Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship (2011) 122 ALD 237

This high-profile decision of the High Court deserves attention not only for its significance within the current political climate but also for the administrative law and statutory construction principles addressed within it.

The facts giving rise to the litigation are well-known and may be briefly stated. On 25 July 2011, Australia and Malaysia entered into an agreement under which asylum seekers arriving illegally into Australia by sea would be transferred to Malaysia, where assessment of their claims for protection as refugees would be carried out. The purported source of power for the plaintiffs' removal from Australia to Malaysia in this case was s 198A of the Migration Act. Section 198A(1) provided that an officer may take an offshore entry person (as defined) from Australia to a country in respect of which a declaration is in force under subsection (3). Subsection (3)(a) relevantly provides as follows:

- (3) The Minister may:
 - (a) declare in writing that a specified country:
 - (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
 - (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and
 - (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
 - (iv) meets relevant human rights standards in providing that protection;...

On 25 July 2011, the minister for immigration and citizenship declared Malaysia to be a country under s 198A(3)(a).

The plaintiffs' case

In the proceedings, the plaintiffs claimed that s 198A(1) was the sole source of power under which the Commonwealth of Australia could remove them from Australia to Malaysia, and that that power depended upon the minister making a valid declaration under s 198A(3). They claimed that the declaration purportedly made under s 198A(3) was not validly made because the four criteria set out in s 198A(3)(a)(iv) to (iv) are jurisdictional facts which did not exist, or alternatively,

that they are facts the existence of which the minister had to be satisfied before making a declaration, and that he was not so satisfied because he misconstrued the criteria. They also claimed that the exercise of the discretionary power conferred by s 198A(1) miscarried in relation to the plaintiff M70 and would miscarry in relation to the plaintiff M106 because his discretion was, or would be, unlawfully fettered by a ministerial direction dated 25 July 2011 to all officers exercising that power, and the decision-maker failed or would have failed to consider the individual circumstances of M70 in relation to his liability for prosecution in Malaysia for an offence against Malaysian immigration law.

Finally, M106 (a minor) submitted that the minister's statutory responsibilities as his guardian under s 6 of the *Immigration (Guardianship of Children) Act 1946* (IGOC Act) required that the minister consider the exercise of his powers under ss 46A and 195A of the Migration Act to allow M106 to apply for a visa, and also submitted that the minister's consent in writing was required pursuant to s 6A of the IGOC Act before M106 could be removed from Australia.

Four separate judgments were delivered, Heydon J being the sole dissenter. The majority granted the relief sought by the plaintiffs.

French CJ

After examining the legislative history of s 198 and s 198A of the Migration Act, French CJ addressed the contention of the defendants that, contrary to the plaintiffs' submission, s 198(2) was an additional source of the Commonwealth's power to remove the plaintiffs to Malaysia. That subsection provides that an officer must remove as soon as reasonably practicable an unlawful non-citizen (as defined) who meets the conditions set out at paragraphs (a) to (c) therein. The defendants argued that s 198A could limit the power conferred by s 198(2) only if both provisions were properly characterised as conferring the same power, on the basis that when a specific power in a statute is granted prescribing the mode of exercise and the limits within which it must be observed, it excludes the operation of general provisions which might otherwise be relied upon.¹ French CJ found the principle underpinning that submission must be applied subject to the particular text, context and purpose of the statute

to be construed.² His Honour accepted the plaintiffs' submissions that the mechanism of which s 198A formed part was a specific one pertaining to offshore entry persons whose claims are not to be considered in Australia, differing from the mechanism under s 198.³

His Honour rejected the plaintiffs' submission that the criteria set out in s 198A(3)(a) were jurisdictional facts. His Honour found that the absence of clear language in the statute meant that the section should not be construed as conferring upon courts the power to substitute their own judgment for that of the minister.⁴ His Honour did find, however, that the minister did not properly construe the criteria under s 198A(3)(a) in failing to focus upon the laws in effect in Malaysia, as opposed to what the minister described as the 'practical reality'.⁵ His Honour found that the minister was required to ask himself questions about whether access and protection are provided, and human rights standards are met, by reference to the domestic laws of Malaysia and its international legal obligations, finding that the terms used in the statute were indicative of 'enduring legal frameworks'.⁶ His Honour did not address the other contentions of the plaintiffs, but agreed with the reasons in the joint judgment in respect of M106's argument concerning the IGOCT Act, and the orders proposed by the joint judgment.

The joint judgment

In a joint judgment, Gummow, Hayne, Crennan and Bell JJ first addressed the plaintiffs' contention that s 198A was the sole source of the minister's power to remove them. Their honours emphasised the importance of context in considering the duty and power to remove persons from Australia under s 198 read in light of s 198A. Two considerations in particular were held to be relevant: the fact that the Migration Act contains provisions directed to the purpose of responding to Australia's international obligations under the Refugees Convention and Refugees Protocol,⁷ and relevant principles of international law concerning the movement of persons from state to state.⁸ Bearing in mind these two considerations, their honours found that the proper construction of the two provisions was that the power conferred by s 198 must be confined by reference to the restrictions set out in s 198A, reinforced by the legislative history of both provisions.⁹

In addressing the plaintiffs' submission that the



Photo: Department of Immigration and Citizenship.

declaration was invalidly made, their honours found it necessary to consider only whether the access and protections set out in s 198A(3)(a)(i) to (iii) are those which the country is legally bound to, but does not, provide.

Their honours found that the criteria in s 198A(3)(a) (i) to (iv) are jurisdictional facts, and to read otherwise would pay insufficient regard to the text, context and evident purpose of the provision, which pointed to the need to identify the relevant criteria with particularity.¹⁰

Their honours rejected the defendants' argument that the matters described in those subparagraphs go to the practical reality of the protection afforded by a country.¹¹ On the contrary, their honours found that a country 'provides access' to effective procedures for assessing the need for protection of asylum seekers, and provides the relevant protections if its domestic law provides such procedures or if has binding international law obligations to that effect.¹² The majority rejected the defendants' submission that the fact that s 198A was enacted with a view to declaring that Nauru is a country specified for the purposes of s 198A and that it was known before that enactment that Nauru was not a signatory to the Refugees Convention or Protocol, meant that the provision did not require countries so declared to be signatories. Their honours noted that such a submission merely put forward the hopes or intentions of those promoting the legislation, but found that 'those hopes or intentions do not

bear upon the curial determination of the question of construction of the legislative text'.¹³ Secondly, their honours found that the arrangements made with Nauru were distinguishable from the present fact scenario, particularly because in the case of the Nauru proposal, Australia was to carry out the assessment and provide the access and protections in question (rather than Nauru).¹⁴

Their honours therefore found that the jurisdictional facts necessary to making a valid declaration under s 198A(3)(a) were not, and could not, be established, and therefore the minister's decision was made beyond power. Their honours also found that removal of M106 without consent by the minister under s 6A of the IGO Act would be unlawful, and the power to take a person to another country under s 198A(1) could be exercised only if that taking was not otherwise unlawful.

Heydon J

Heydon J, in dissent, found that a removal under s 198A(1) did not depend upon a valid declaration under s 198A(3), for several reasons.

First, there is no express provision in s 198A(3)(a) that the validity of the declaration depends upon proof of the four conditions as a matter of fact, and the language of the power ('may declare') points to a view that the process of assessment is for the minister personally, provided he takes into account the four conditions.¹⁵

Secondly, the statutory language does not refer to legal obligations, but rather connotes notions of practicality.¹⁶ His Honour stated that what matters is 'the achievement of results in fact, not the identification of formal structures conforming to the ideal standards of an Abbé Sieyès which may or may not achieve them'.¹⁷ Thirdly, his Honour noted that a decision under s 198A(3)(a) pertains to matters within the province of the executive, and it is not for courts to intrude into those dealings, unless it could be shown that the minister had not decided that what he declared was true, after asking the correct questions. Only then could he be accountable to courts of law.¹⁸ Fourthly, the subject matter of the four conditions suggested that the subject matter of the declaration was for ministerial judgment.¹⁹ Fifthly, the continuing law surrounding the legislation was relevant, and suggested that the meaning of s 198A(3) turned upon a test of 'practical reality and fact'.²⁰

Heydon J unreservedly rejected the plaintiffs' argument that the word 'protection' in s 198A(3) included Article 33 protection against removal of claimants for refugee status to a country where a person fears persecution on a Refugees Convention ground, describing their contention that 'protection' was a legal term of art, as 'so ambitious a submission as to cast doubt not only on its own validity, but also on the validity of other arguments advanced to support the construction of s 198A which the plaintiffs advocated'.²¹ His Honour also found that the true interpretation of s 198A(3) depends upon the meaning of the words as they were used at the time of its enactment, and that language had at that time applied to the Republic of Nauru, despite the fact that it was not party to the relevant treaties and its domestic law did not contain any protections for asylum seekers. His Honour noted that the Statement of Principles agreed between Australia and Nauru did not refer to international law obligations, nor did it say that Australia would meet the s 198A(3) criteria rather than Nauru.²²

His Honour also rejected the plaintiffs' submissions that the minister asked the wrong questions,²³ that s 198A(1) was incorrectly applied,²⁴ and that the minister fettered the discretion of officers under s 198A(1).²⁵

Finally, his Honour rejected the IGO Act arguments of the second plaintiff (although not before noting that they were very detailed and sophisticated arguments²⁶), finding that the minister is not obliged to consider exercise of the powers under ss 46A and 195A of the Migration Act, that the powers conferred by s 6 of the IGO Act do not extend to interference with the minister in carrying out his specific statutory functions under the Act,²⁷ and that s 6A does not apply to the operation of any other law regulating the departure of persons from Australia, including s 198A.²⁸

Kiefel J

In considering the purpose and context of s 198A(3)(a), Kiefel J found that a central question was whether, and to what extent, that provision 'reflects a continuing commitment to Australia's obligations under the convention'.²⁹ Although her Honour noted that obligations arising under the convention do not automatically have the status of a domestic law, her Honour found that provisions of the Migration Act reflect an acceptance of those obligations.³⁰

Her Honour found that s 198(2) expressed a general power of removal, and s 198A(1) expressed a particular power, directed to a particular set of circumstances, where the country to which an asylum-seeker is to be sent is taken to be assessed as to whether it meets the criteria in subsection (3). Accordingly, s 198(2) could not be relied upon, unless each plaintiff's status as a refugee is considered and rejected.³¹

In the view of Kiefel J, s 198A(3)(a)(i) required that the declared country itself recognise refugee status and provide protection against persecution, and the legislature intended that the minister have this level of assurance before making such a declaration, by reason of Australia's obligations under the convention.³² Her Honour found that a practical assessment of a country's ability to protect and provide for refugees cannot replace the requirement that the country has obliged itself to make such recognition and protection through its laws.³³ Her Honour preferred this construction as it most closely accorded with the fulfilment of Australia's convention obligations.³⁴

Her Honour found that the facts necessary for the making of a declaration under s 198A(3)(a) did not exist, and thus there was no power to make the declaration. Her Honour also found that the minister did not address the correct questions, and the decision was therefore attended by jurisdictional error.³⁵ Her Honour agreed with the joint reasons in respect of the IGOC Act argument.³⁶

By Victoria Brigden

Endnotes

1. The defendants' submissions referred to *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 and *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 589.
2. At [50].
3. At [52] – [56].
4. At [58].
5. At [65].
6. At [65] – [66].
7. Their honours referred to *Plaintiff M61/2010E v The Commonwealth* (2010) 85 ALJR 133 at 139 – 140.
8. At [91].
9. At [95] – [96].
10. At [109].
11. At [121] – [123].
12. At [125] – [126].
13. At [128].
14. At [128].
15. At [161].
16. At [162].
17. At [162].
18. At [163].
19. At [163].
20. At [165].
21. At [166] – [167].
22. At [169].
23. At [171] – [175].
24. At [176] and following.
25. See [188] – [190].
26. At [192].
27. At [195].
28. At [198].
29. At [211].
30. At [218].
31. At [237] – [239].
32. At [243].
33. At [245].
34. At [246].
35. At [256].
36. At [257].

Admitting expert evidence

Dasreef Pty Ltd v Hawchar (2011) 277 ALR 611; (2011) 85 ALJR 694; [2011] HCA 21

Mr Hawchar suffers from silicosis. Prior to such diagnosis in 2006, Mr Hawchar was employed by the appellant (*Dasreef*), as a stonemason for which Mr Hawchar spent a considerable amount of time cutting sandstone and inhaling amounts of airborne dust.

Following Mr Hawchar's diagnosis, Mr Hawchar commenced personal injury proceedings in the Dust Diseases Tribunal of New South Wales and relied upon the expert opinion evidence of Dr Basden. As qualified as Dr Basden was as a chartered chemist, chartered professional engineer and retired academic, he had no experience in quantifying the silica dust levels experienced by stonemasons.

In the report produced by Dr Basden, Dr Basden made statements to the effect that the amount of silica in Mr Hawchar's breathing zone would have been 500 or 1000 times greater than the permissible levels (the Estimate). However, as described by Dr Basden, the Estimate was 'only a ballpark [figure]' and was not intended to form the basis of a numerical opinion in respect of Mr Hawchar's exposure to respirable silica. Mr Hawchar's estimation was not supported by any calculations, testing or relevant literature.

Despite this, the primary judge sought to calculate the levels of silica dust to which Mr Hawchar was exposed by relying upon the Estimate given by Dr Basden. This led to a finding that Mr Hawchar's exposure to dust while working for *Dasreef* exceeded the relevant Australian standard.

In the Court of Appeal, *Dasreef* challenged the admissibility of Dr Basden's evidence. This challenge was rejected.

Decision

The issues before the High Court relating to the admissibility of Dr Basden's 'expert opinion' were:

1. Whether Dr Basden expressed an opinion about the numerical or quantitative level of exposure to respirable silica; and
2. Whether that was an opinion based on specialised knowledge based on Dr Basden's training study or experience.

Such questions necessitated a consideration of s 79(1) of the Evidence Act.

The joint judgment of the majority (French CJ,

Gummow, Hayne, Crennan, Kiefel and Bell JJ) recognised that Dr Basden did not express an opinion about Mr Hawchar's numerical or quantitative level of exposure to respirable silica. While the Estimate was numerical, it was not, and was not intended to be, an assessment which could form the foundation for a time weighted average level of exposure in respect of Mr Hawchar. This was not, however, how the primary judge or the Court of Appeal took his evidence and instead relied upon Dr Basden's evidence as an opinion about the quantitative level of exposure encountered by Mr Hawchar.

As the majority had held that Dr Basden did not give the relevant opinion, the court, then, considered issue two as a hypothetical question. The court sets out what would have had to be shown in order for Dr Basden to proffer an admissible opinion about the numerical or quantitative level of Mr Hawchar's exposure to silica dust. That is, it would have been necessary for the party tendering his evidence to demonstrate (at [35]):

- [F]irst, that Dr Basden had specialised knowledge based on his training, study or experience that permitted him to measure or estimate the amount of respirable silica to which a worker undertaking the relevant work would be exposed in the conditions in which the worker was undertaking the work.
- Secondly ... to demonstrate that the opinion which Dr Basden expressed about Mr Hawchar's exposure was wholly or substantially based on that knowledge. [Bullet points added]

The first step establishes that the witness is an expert in the subject area (that is, such an individual *could* give a relevant expert opinion) and the second step establishes that the expert has utilised this expertise with respect of the opinion evidence in the specific circumstances of the relevant case (that is, the individual *has* given a relevant expert opinion). The majority emphasised that while the admissibility of opinion evidence is to be determined by application of the requirements of the Evidence Act (at [37]):

... it remains useful to record that it is ordinarily the case, as Heydon JA said in *Makita*, 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'. The

way in which s 79(1) is drafted necessarily makes the description of these requirements very long. But that is not to say that the requirements cannot be met in many, perhaps most, cases very quickly and easily. That a specialist medical practitioner expressing a diagnostic opinion in his or her relevant field of specialisation is applying 'specialised knowledge' based on his or her 'training, study or experience', being an opinion 'wholly or substantially based' on that 'specialised knowledge', will require little explicit articulation or amplification once the witness has described his or her qualifications and experience, and has identified the subject matter about which the opinion is proffered.

As Dr Basden's evidence did not demonstrate how his opinion was based upon his training, study or experience the court held that there was no footing on which the primary judge could conclude that a numerical opinion expressed by Dr Basden was wholly or substantially based on specialised knowledge based on training, study or experience.

It was observed by the majority that a failure to demonstrate that an opinion expressed by a witness is based on the witness's specialised knowledge based on training, study or experience is a matter that goes to the *admissibility* of the evidence, not its weight (at [42]). The general rule with respect to any objections to admissibility of opinion evidence should be dealt with as soon as possible and preferably as soon as the objection is made (at [19]):

As a general rule, trial judges confronted with an objection to admissibility of evidence should rule upon that objection as soon as possible. Often the ruling can and should be given immediately after the objection has been made and argued. If, for some pressing reason, that cannot be done, the ruling should ordinarily be given before the party who tenders the disputed evidence closes its case. That party will then know whether it must try to mend its hand, and opposite parties will know the evidence they must answer.

Based upon these principles, a party critical of an opposing party's expert would be wise to oppose its tender on the basis of inadmissibility than to allow its tender with the intention of seeking to persuade the court that little weight should be placed upon it (due to a lack of specialised knowledge, for example). A party seeking to rely upon an expert report would be wise to ensure that the evidence illustrating the expert's specialised knowledge, training, study or experience is

in evidence prior to the tender of the experts report.

It is noteworthy that Mr Hawchar sought to establish that the above analysis reintroduced 'the basis rule' (a rule by which opinion evidence is to be excluded unless the factual bases upon which the opinion is proffered are established by other evidence). The majority clarified that this analysis does not seek to introduce the basis rule. It is upon this issue (that is, the status of the 'basis rule') where the majority judgment and the judgment of Heydon J may be contrasted. This is discussed below.

Counsel of perfection? Defending *Makita*

In *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354 the Full Federal Court made some observations concerning expert evidence adduced at the trial. Branson J quoted at [85] of Heydon J's judgment in *Makita* and described his Honour's approach as 'a counsel of perfection' (at 356, [7]). According to her Honour, in the context of an actual trial, the issue of admissibility of expert opinion evidence may not be able to be addressed in the way outlined by Heydon J. Weinberg and Dowsett JJ observed (at 379, [87]) that it would be very rare indeed for a court at first instance to reach a decision as to whether tendered expert evidence satisfied all of Heydon J's requirements before receiving it as evidence in the proceedings, and said that more commonly, once the witness's claim to expertise is made out and the relevance and admissibility of the opinion evidence is demonstrated, such evidence is received.

In *Dasreef*, Heydon JA held that in respect of the admissibility of expert evidence the following three common law requirements must be satisfied in order to bring the evidence within s 79 of the Evidence Act:

1. First, the 'assumption identification' rule: the expert has to identify the 'facts' and 'assumptions' on which the expert's opinion is based;
2. Secondly, the 'proof of assumption' rule: the 'facts' and 'assumptions' must be proved before the evidence is admissible; and
3. Thirdly, the 'statement of reasoning' rule: there must be a statement of reasoning showing how the 'facts' and 'assumptions' are related to the opinion so as to reveal that that opinion was based on the expert's expertise.

The second requirement is, in substance, ‘the basis rule’ (if one adopts the language of the Law Reform Commission’s interim report on evidence¹) and, as such, Heydon J’s judgment may be contrasted with that of the majority. In respect of Heydon J’s view that the basis rule subsists under s 79 despite the Law Reform Commission’s interim report, he observed (at [109]):

The Commission’s reasoning has misled both itself and some of its readers. A decision to refrain from including what was thought to be a rule which does not exist at common law does not demonstrate abolition of a rule which does in fact exist at common law. The Commission wrongly thought that there is no proof of assumption rule at common law. On that hypothesis, as the Commission correctly saw, the question was whether it should recommend that the legislature should enact one, and it decided not to make that recommendation. In fact there is a proof of assumption rule at common law, and the question for the Commission thus should have been whether to recommend that it be abolished by legislation. To abolish it by legislation would have called for specific language. The Commission’s misapprehension of the common law, and hence of its task, has resulted in a failure to have enacted specific language ensuring that s 79 tenders need not comply with a proof of assumption rule.

Heydon J addressed, directly, Branson J’s views in *Sydneywide Distributors* (at [100]):

Branson J’s view that s 79 tenders need not comply with an assumption identification rule is not, apart from one passage in this Court, specifically supported by the authorities in any jurisdiction. Almost all courts in which the question has been considered have revealed disagreement with her Honour’s view

Ultimately, Heydon J ruled Dr Basden’s evidence inadmissible on the same basis as the majority. That is, that Dr Basden had not demonstrated how his opinion was based upon his training, study or experience.

In the end, the inadmissibility of Dr Basden’s evidence did not assist Dasreef. The court held that the evidence was sufficient to uphold the finding of liability in Mr Hawchar’s favour despite the limitations of Dr Basden’s evidence. As with respect to the significance of the decision, Heydon J’s judgment raises questions with respect to the status of the ‘basis rule’, however, the suggestion that the rule subsists appears to have been resolved by the majority. In any case, the majority judgment provides us with the leading authority on the admissibility of expert evidence and the application of the exception to the opinion rule and the correct interpretation of s 79(1).

By Joanne Little

Endnotes

1. The Australian Law Reform Commission, Evidence, Report No 26, vol 1, 1985 p.417 [750].



Video link evidence and foreign government consent

Joyce v Sunland Waterfront (BVI) Ltd [2011] FCAFC 95; (2011) 195 FCR 213

Where the Federal Court proposes to take evidence of a witness in a foreign country by video link, the court's discretion is not hampered by any need to consider questions of sovereignty or comity between nations, such as whether the foreign government consents, at least absent any law of the foreign country forbidding the procedure. That was the conclusion of the full court of the Federal Court (Keane CJ, Dowsett and Greenwood JJ) in *Joyce v Sunland Waterfront (BVI) Ltd*.¹ The court overturned the decision of the primary judge (Logan J), who had declined to permit evidence by video link where the foreign government indicated it did not consent.²

The facts

In proceedings in the Federal Court, the applicants claimed damages for misleading or deceptive conduct and deceit against a number of respondents. The claim concerned land in Dubai in the United Arab Emirates (the UAE) forming part of a development called 'The Dubai Waterfront'. In essence, the claim was that the respondents misrepresented that the purchase of the land had to be negotiated through certain of the respondents. The applicants had paid a 'consultancy fee' equivalent to over AUD13 million allegedly on the strength of the misrepresentations.³

One of the respondents, and a necessary witness in the proceedings, was an Australian citizen, Mr Joyce. He had been the managing director of the Dubai developer. He wished to give evidence in the Australian proceedings. However, at the time those proceedings were commenced, he had been charged with criminal offences in the UAE concerning the same transaction. He was granted bail but surrendered his passport and his bail conditions prevented him from travelling to Australia to participate in the Australian proceedings.

Attempts were made to arrange a mechanism by which Mr Joyce's evidence could be taken in the UAE by the primary judge or by video link to Australia. The evidence before the court was that no UAE law prohibited either procedure. The court enlisted the assistance of the Department of Foreign Affairs and Trade (DFAT) to communicate with the UAE Government about the situation and the applicants' solicitors also made inquiries.

Initially the UAE government had no objection to the primary judge's travelling to the UAE and taking

evidence 'on commission' and orders were made to that effect.⁴ However, the UAE Government subsequently stated that it did not consent to this course. In these circumstances, the primary judge vacated the orders concerning receipt of evidence in the UAE, dismissed motions concerning the taking of evidence by video link, adjourned the trial and stayed the proceedings.

Decision of the full court

The full court overturned the primary judge's decision.

The parties accepted that, given the attitude of the UAE government, it was not practicable for a judge, examiner or commissioner to visit Dubai for the purpose of taking evidence and that the only option was that evidence be taken by video link. The Federal Court is empowered to take evidence by video link by s 47A(1) of the *Federal Court of Australia Act 1976* (Cth).

The primary judge had considered that taking evidence by video link would be an assertion of Australian judicial power on the territory of the UAE. He referred to previous first instance decisions to the effect that it would be a breach of the UAE's sovereignty to do so without its consent.⁵ He said that those concepts were given content in relation to the exercise of judicial power by the notion of 'comity', noting that in *CSR Ltd v Cigna Insurance Australia Ltd*⁶ a majority of the High Court had approved the following explanation by the Supreme Court of the United States in *Hilton v Guyot*:⁷

'Comity', in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

The full court rejected the primary judge's conclusions.

The court observed that the definition of 'comity' in *Hilton v Guyot* concerned recognition by one nation *within its own territory* of the sovereign acts of another nation, and that it contemplated the possibility of derogation from this recognition by a nation's domestic laws. The court also noted recent statements in the High Court⁸ and Federal Court⁹ sceptical of the usefulness of the concept of comity in the context of judicial power.

The court noted that 47A did not in terms require a foreign state's consent and concluded that it overrode any obligation of comity which Australia may have had in that regard. The court saw 'no justification for imposing upon the exercise of the discretion conferred by s 47A, a requirement that the other state consent to the taking of evidence in that way.'¹⁰

The court accepted that 'if the law of a foreign state prohibits a person within its borders from participating in such a process, then problems might arise'.¹¹ But there was no evidence that this was so here. The court considered that, in the absence of such a prohibition, even if the government of the UAE opposed evidence being taken by video link, where such evidence was voluntarily given, that did not impinge upon state sovereignty:¹²

[T]he rules relating to sovereignty and comity do not limit individual rights and freedom of individual citizens. Provided that the law of the relevant nation does not forbid it, an Australian citizen, whilst present in a foreign country, may speak on the telephone to somebody in Australia, be it his or her mother, lawyer or, we suggest, a court sitting to determine a matter in accordance with the law of Australia. The concepts of sovereignty and comity focus upon the relationship between states, not the relationship between an individual citizen and a state, whether it be that of which he or she is a citizen or another.

The court accepted that to take evidence in a foreign country in person without permission was an infringement of sovereignty. The court therefore endorsed the practice of approaching DFAT where a court proposes to take evidence in foreign country in person, with a view to obtaining the foreign government's consent. On the other hand, the court said that, whether, when a judge proposed to take evidence from a witness in another country by video link, DFAT should be involved was a matter for the judge: there might be cases where aspects of foreign law or foreign relations make that desirable but it would generally not be necessary.

Implications and observations

The full court's approach is consistent with perhaps a less deferential and even sceptical approach to questions of comity and foreign relations in recent years. In *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*,¹³ the full court granted leave to serve originating process in Japan on a Japanese

company alleged to have killed whales in the Australian Whale Sanctuary adjacent to the Australian Antarctic Territory. The primary judge had refused leave because, among other things, the proceeding might upset the diplomatic status quo under the Antarctic Treaty and be contrary to Australia's interests connected with its claim to sovereignty to the Australian Antarctic Territory. In *Habib v The Commonwealth*,¹⁴ the full court permitted the continuation of a claim against the Commonwealth for complicity in alleged acts of torture committed on the applicant by officials of the governments of Pakistan, Egypt and the United States. The court held that the claim was not precluded by the act of state doctrine and that that doctrine cannot, consistently with the Constitution, preclude an action against the Commonwealth based upon an allegation that the Commonwealth has exceeded its executive or legislative power.¹⁵

The approach of the full court to s 47A may be compared with that in England under the Civil Procedure Rules. There, in case of doubt, the party arranging video link evidence is required to make enquiries with the Foreign and Commonwealth Office 'with a view to ensuring that the country from which the evidence is to be taken raises no objection to it at a diplomatic level'.¹⁶

While the reasons of the full court directly concerned s 47A of the Federal Court Act, that provision has analogues in other jurisdictions, including New South Wales.¹⁷ It seems likely that those provisions will be approached in the same way as the full court approached s 47A, at least at first instance. This approach is one reason why it may be more attractive to take the evidence of a person overseas by video link than in person.

Having said this, there are conflicting views among trial judges as to the degree to which evidence by video link is a satisfactory substitute for evidence given in person.¹⁸ Further, there is a practical difficulty with taking the evidence of witnesses overseas by video link, or indeed on commission or examination by a person appointed by an Australian court: the process depends on the witness's willingness to participate, as the witness cannot in practice be compelled to answer questions.¹⁹ The only way in which to overcome this problem is to enlist the aid of the foreign country's courts via a letter of request.²⁰

By Perry Herzfeld

Endnotes

1. [2011] FCAFC 95.
2. *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 9)* [2011] FCA 832.
3. *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 2)* (2010) 267 ALR 46 at [1]–[4] per Logan J (FCA).
4. See *Foreign Evidence Act 1994* (Cth), s 7; *Federal Court Rules* (Cth), O 24 r 1 (now see *Federal Court Rules 2011* (Cth), Div 29.2).
5. *Yamouchi v Kishimoto* (2002) 12 NTLR 32 at [16] per Thomas J (NTSC); *Bell Group Ltd (in liq) v Westpac Banking Corporation* (2004) 208 ALR 491 at [118] per Owen J (WASC).
6. (1997) 189 CLR 345 at 394–396 per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.
7. (1895) 159 US 113 at 163–164.
8. *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at [90] per Gummow and Hayne JJ: ‘comity is ‘either meaningless or misleading’; it is ‘a matter for sovereigns, not for judges required to decide a case according to the rights of the parties.’
9. *Habib v The Commonwealth* (2010) 183 FCR 62 at [37] per Perram J (FC): ‘No doubt comity between the nations is a fine and proper thing but it provides no basis whatsoever for this Court declining to exercise the jurisdiction conferred on it by parliament.’
10. [2011] FCAFC 95 at [60].
11. [2011] FCAFC 95 at [61].
12. [2011] FCAFC 95 at [63].
13. (2006) 154 FCR 425.
14. (2010) 183 FCR 62.
15. Perram J said that a previous full court decision, *Petrotimor Companhia de Petroleos SARL v The Commonwealth* (2003) 126 FCR 354, which treated the act of state doctrine as going to whether there was a ‘matter’ within the meaning of the Constitution, was plainly wrong. He also said in *dicta* that the *Moçambique* rule (that an Australian court will not determine ownership of foreign land) would be similarly inconsistent with the Constitution in relation to a claim which asserted that the Commonwealth had exceeded its legislative or executive power.
16. ‘Practice Direction 32 — Evidence’, Annexure 3 at [4], available at <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/menus/rules.htm>.
17. *Evidence (Audio and Audio Visual Links) Act 1998* (NSW), ss 5B, 5D. See also, e.g., *Evidence (Miscellaneous Provisions) Act 1958* (Vic), ss 42E.
18. See, e.g., *Australian Medical Imaging Pty Ltd v Marconi Medical Systems Australia Pty Ltd* (2001) 53 NSWLR 1; *Australian Securities and Investments Commission v Rich* (2004) 49 ACSR 578 (NSWSC); *Campaign Master (UK) Ltd v Forty Two International Pty Ltd (No 3)* (2009) 181 FCR 152; *Corrigan v Commvault Systems (Australia) Pty Ltd* (2011) 192 FCR 71.
19. The full court adverted to this difficulty: [2011] FCAFC 95 at [65].
20. See *Foreign Evidence Act 1994* (Cth), s 7(1)(c) and State equivalents, e.g., *Evidence On Commission Act 1995* (NSW), s 6(1)(c); *Evidence (Miscellaneous Provisions) Act 1958* (Vic), s 9B(1)(c). See generally *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd* (1987) 14 FCR 461; *Director of Public Prosecutions v Alexander* (1994) 33 NSWLR 482 at 486 per Hunt CJ at CL.



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Entry of orders in the court's computerised record system

Several recent decisions of the New South Wales Court of Appeal have highlighted the need for practitioners to be aware of the impact of the new computerised record system in New South Wales courts upon the entry of orders in those courts (in the system known as JusticeLink).

In *Cyril Smith & Associates Pty Ltd v The Owners-Strata Plan No 64970 (No 2)* [2011] NSWCA 245 the Court of Appeal delivered a separate judgment setting out the orders made, having already found in favour of the appellant.¹ The court had allowed the appellant an opportunity to identify which orders it wished to overturn in view of the complexity of the proceeding being appealed from in the Supreme Court, as numerous parties and cross-claims had resulted in a number of different orders in that proceeding.

Although Basten JA delivered the leading judgment (Bathurst CJ and Young JA agreeing), the judgment of Young JA is noteworthy for the comments made by his Honour in relation to the entry of orders in the court's computerised system. His Honour noted that the court experienced difficulties in formulating the appropriate orders in this case because the orders were entered in the Supreme Court by reference to short minutes of order rather than by entering the words of the orders. By way of example, his Honour said it was inappropriate to enter judgment as 'Orders 1 – 4 in Short Minutes initialed by Judge on 1/1/2011'. His Honour also noted that another consequence of the computerised system was that handwritten short minutes were no longer appropriate.

His Honour described the appropriate process for the entry of orders, particularly in a busy list such as the Commercial List. His Honour stated that the party seeking entry of the orders should provide the associate with both a hard copy and electronic copy of the short minutes, so that the former could be left on file and scanned for any appeal book and the latter could be used by the associate to enter the order electronically to avoid confusion as to the terms of the order.

In *Tarrant v Statewide Secured Investments* [2011] NSWCA 248, the Court of Appeal heard an application for leave to appeal from a Supreme Court judgment refusing to set aside an earlier judgment of the court. In the course of his Honour's judgment, Basten JA (McColl JA agreeing) referred to some 'disturbing' aspects of JusticeLink in relation to the entry of orders.

In the case at first instance, judgment was given on 14 May 2009 and, following a correction made to the judgment sum on 17 June 2009, the parties understood the orders to have been entered and proceeded upon that basis.

However, what was entered in JusticeLink on 18 June 2009 was the record 'Orders in accordance with SMO' and a note of a stay. The orders themselves were never formally entered.

In the course of his Honour's judgment, Basten JA (McColl JA agreeing) referred to some 'disturbing' aspects of JusticeLink in relation to the entry of orders.

Under s 133(1) of the Civil Procedure Act, a judgment or order may not be enforced until it has been entered in accordance with the Rules. Rule 36.11(1) provides that a judgment or order is to be entered. Subrule (2) provides that 'unless the court orders otherwise, a judgment or order is taken to be entered when it is recorded in the court's computerised court record system'. Subrule (2A) further provides for the procedure when the court directs that a judgment or order be entered forthwith. In that case, there was no record of the court ordering 'otherwise', nor of directing the entry of judgment forthwith, but the orders had never been recorded in the court's computerised court record system.

Basten JA held that it was appropriate that the Court of Appeal rectify the informality attending the orders of 17 June 2009, since the parties had acted on the basis that the judgment had been entered and the judgment had been enforced in part. The court directed that the orders be taken to have been entered on 17 June 2009 and further directed that the direction be taken to have effect as at that date, pursuant to rule 36.4(3).

In *Mills v Futhem Pty Ltd* [2011] NSWCA 252, the Court of Appeal heard an application for leave to appeal from the dismissal of a motion of the defendant in the District Court for a stay of the enforcement of orders related to terms of settlement filed in the District Court in November 2008.

The District Court's computer record (which predated

JusticeLink) read, as at 16 December 2008 in respect of the terms of settlement '[P-D1] Judg't Terms of Settlement entered: add to Completed SB348 CML'. The paper file contained the Terms of Settlement which listed 16 December 2008 both as the 'date made or given' and the 'date entered' and bore the court's seal (but no signature of the registrar). There was also contained on the paper file a handwritten entry on 16 December 2008 in the following terms 'Judgment for plaintiff in accordance with Terms of Settlement filed'.

It is clear from these decisions that it is no longer appropriate for orders in New South Wales courts to be entered by reference to short minutes, without setting out the orders in full, or by handing up handwritten short minutes of order.

Allsop P (Beazley JA and Handley AJA agreeing) found that the orders had not been entered (at [34]). In so finding, his Honour found that it was clear that at no time had there been an entry into the court's record system of the full terms of the terms of settlement, and the entry in the computerised court record system did not amount to what is contemplated by rule 36.11(2) of the UCPR.

His Honour stated (at [27]):

The proper construction of r 36.11 is, it seems to me, that unless a court orders otherwise for r 36.11(2) or unless a court directs, in the manner set out in r 36.11(2A), entry under the Rules is not effected otherwise than by recording in the court's computerised court record system contemplated by r 36.11(2). Recording the orders means just that: setting them out. There is no recording of the orders if all that is stated is that some orders exist. It would undermine the integrity of a computerised record system to have mere references to pieces of paper in files treated as a recording of the judgment or order in the computerised record system. In my view, that is not what the rule means. To the extent that the record in the computerised system might be seen as some form of incorporation by reference, it does not record the judgment or orders. One cannot even ascertain the amount of the judgment in order 1. One can put the two together, by looking at the file, but that is not adequate.

Lessons to be taken from these cases

It is clear from these decisions that it is no longer appropriate for orders in New South Wales courts to be entered by reference to short minutes, without setting out the orders in full, or by handing up handwritten short minutes of order. These decisions also highlight the importance of ensuring that the terms of the orders are entered in full on JusticeLink.

Justice Peter Young AO, writing extra-judicially in the *Australian Law Journal*, 'Current issues' (2011) 85 ALJ 615 at 617 to 618 addressed this issue, and in particular, the decision in *Mills* and suggested that if a case is settled with a number of paragraphs in the terms of settlement, at least in a motion list or other heavy list, the lawyers should present a hard copy for the judge to initial, then have the terms re-engrossed and emailed in electronic form to the associate to be placed in the court's computer system.

Practitioners are now also able to view orders made online via the JusticeLink database.

By Victoria Brigden

Endnotes

1. *Cyril Smith & Associates Pty Ltd v The Owners-Strata Plan No 64970* [2011] NSWCA 181.

Redeemable preference shares under the Corporations Act

Weinstock v Beck [2011] NSWCA 228 (17 August 2011)

In *Weinstock v Beck* the NSW Court of Appeal addressed a narrow but significant point of corporations law on which there was no direct authority. Under the *Companies Act 1961* (NSW) and the *Corporations Act 2001* (Cth) a company may only issue shares that are liable to be redeemed if the shares are ‘preference shares’: 1961 Act, ss 61(1) and 66(1); 2001 Act, ss 254A(1) and (3) and 254J. In *Weinstock* the court held, by majority, that shares with *potential* preferential rights that lack effective content because there are no lower-ranked shares on issue will nonetheless be ‘preference shares’ and, accordingly, may be made redeemable. Although the decision related to shares issued under the 1961 Act the court’s reasoning is equally applicable to shares issued under the 2001 Act.

Background

The issue arose in the context of a dispute about the validity of a purported redemption of shares by LW Furniture Consolidated (Aust) Pty Ltd (company). The Company was incorporated in 1971. Its Memorandum and Articles of Association provided for its authorised share capital to be designated into four classes of preference shares classified ‘A’ to ‘D’ and ten classes of ordinary shares. The only shares allotted were ‘A’, ‘C’ and ‘D’ class preference shares.

The ‘C’ and ‘D’ class shares were styled ‘Redeemable Preference Shares’ and the rights of the two classes provided for by the Articles of Association were identical. The shares carried rights of return of capital after the ‘A’ and ‘B’ class shares and ‘in priority to all other shares in the capital of the company’ as well as dividend rights. The ‘C’ and ‘D’ class shares were liable to be redeemed at par by the company upon the death of the holder.

In 2004 the company purported to redeem, at par, 8 ‘C’ class shares issued to Ms Hedy Weinstock, then recently deceased. One of Ms Weinstock’s executors commenced proceedings challenging the validity of the purported redemption. The par value of Ms Weinstock’s shares was \$8 whereas the executor claimed that the true value of her shares on winding up would be over \$7 million.

The executor contended that Ms Weinstock’s shares were not ‘preference shares’ issued in accordance with

s 61(1) of the 1961 Act (and therefore liable to be redeemed) because, at the time they were issued, there were no ‘other shares’ on issue by the company over which they took preference. Properly characterised, the shares were ordinary shares that could only be cancelled under a reduction of capital or a share buy-back. Hamilton AJ accepted that contention and held that the redemption was invalid.

Reasoning

A majority of the Court of Appeal (Giles JA and Handley AJA, Young JA dissenting) held that the shares were properly characterised as ‘preference shares’ issued under s 61(1) of the 1961 Act and the redemption was valid. Handley AJA, with whom Giles JA agreed, reasoned as follows.

First, the logical consequence of the executor’s argument was that Ms Weinstock’s shares were never validly issued, not that they should be treated as being validly issued but non-redeemable. The executor’s submission required that the directors of the company be taken to have issued ‘C’ class shares with different rights to those set out in the Articles of Association, yet the directors had no power to amend the Articles of Association by themselves to permit the issue of such shares. The process contended for bore some analogy to rectification of the Articles of Association for mistake, which would not have been available had it been sought (at [129]–[132]). Whether shares were preferential was properly determined by reference to the Articles of Association and not the state of the Company’s share register (at [146]).

Secondly, there was a distinction between the rights attached to shares and the practical content or enjoyment of those rights (at [134]). ‘C’ and ‘D’ class shareholders had preferential rights under the Articles of Association but until ordinary shares were issued those rights were ‘potential’, in the sense that they had no effective content. Handley AJA pointed out that potential preferential rights were not unusual, for instance, a preferential right to a dividend is potential in the sense that it is dependent on the company earning divisible profits (at [149]).

Thirdly, the decision of Barrett J in *Re Capel Finance* (2005) 52 ACSR 601, on which the executor relied, was

distinguishable. In that case, Barrett J stated that it was not possible for preference shares to exist 'except as a result of a process of differentiation from shares which are not 'preference shares''. However his Honour was addressing a situation where no provision was made for even *potential* preferential rights. He did not consider the situation where the articles conferred preferential rights on the holders of the relevant shares but those rights lacked effective content (at [138], [144]).

Young JA, in dissent, considered that preference shares were shares which had preferred rights over another class of share on issue, such that if there is no other class of share on issue, there cannot be any preference shares (at [75]). His Honour accepted the executor's argument that unless the expression 'preference shares' were interpreted in this way, there could be a situation in which the only issued shares of a company were redeemable, circumventing the basic rule against the reduction of capital (at [23]).

Discussion

The case was argued on the basis that the 1961 Act was the relevant statute because it was in force at the time the shares were issued (see [111]). However, the majority's reasoning applies with equal force to redeemable preference shares purportedly issued and redeemed under the 2001 Act (see ss 9, 254(1) and (3), 254J and 254K). Young JA observed that the provisions of the two statutes relating to redeemable preference shares were the same in substance (at [26]–[29]). For the time being, the decision should probably be regarded as governing the position under the 2001 Act as well.

An application for special leave to appeal has been filed by the executor.

James Hutton

Verbatim

It is difficult to say that the present system works well: counsel sometimes show little foresight of what issues will really influence decision, and legislators send many disputes to new tribunals, always with the expressed hope of simpler process. Notice of what is to be debated is basal to fairness at the hearing. As the court passed to a modern system and contemporary language a great opportunity was marred by lapse in the perceived value of definition of issues and the attention the Profession has given to it. The production of clear issues to which the hearing is addressed has come to seem less imperative. Sometimes a case is presented as a formless narration, in the manner of James Joyce. My experience since 1972, including experience on the Bench, has led me to regret the

inattention of the Profession to ascertainment and definition of issues: many do not seem to understand the concept, let alone use or value it.

The concluding paragraph of the Hon. J.P. Bryson QC's masterly lecture 'Common Law Pleadings in New South Wales and how they got here' which was delivered on 30 August 2011 under the sponsorship of the New South Wales Bar Association, the Francis Forbes Society and the Selden Society. The full text of the lecture is available on the Supreme Court website under the link 'speeches by former judges'.

Publication of defamatory rumour

Cush v Dillon; Boland v Dillon (2011) 279 ALR 631; [2011] HCA 30

The High Court has unanimously dismissed an appeal brought by Amanda Cush and Leslie Boland in a decision which highlights the strength of the defence of common law qualified privilege.

The facts

Ms Amanda Cush was the general manager of the Border Rivers–Gwydir Catchment Management Authority (CMA), a statutory body. Mr Leslie Boland and Mrs Meredith Dillon were members of the board of the CMA. The case arose out of a statement made by Mrs Dillon to Mr James Croft, the chairperson of the board, that ‘it is common knowledge among people in the CMA that Les and Amanda are having an affair’ (statement).

The background to the statement is that in January 2005, a rumour started circulating within the CMA that Ms Cush and Mr Boland were having an affair. The rumour appeared to have originated as a result of an employee’s dissatisfaction with the outcome of a grievance lodged against Ms Cush. The grievance was dealt with by a ‘Grievance Committee’, constituted by members of the board, including Mr Boland, which recommended that no further action be taken against Ms Cush. The employee informed Mrs Dillon that he considered that the grievance had not been dealt with impartially because he believed Ms Cush and Mr Boland were having an affair. Various other matters led to the rumour gaining strength.

On 30 March 2005 Mr Randall Hart, the regional director of the Department of Infrastructure, Planning and Natural Resources (department), which department had certain responsibilities for the CMA, telephoned Mrs Dillon. Mr Hart contacted Mrs Dillon to have a confidential discussion regarding some allegations that had been made to him concerning Ms Cush. During the course of that conversation the subject of the rumour was raised.

Following that conversation, Mr Hart prepared a memorandum to the director-general of the department regarding the allegations against Ms Cush, which concerned approvals of inappropriate travel, allowance and expense claims and the circumstances surrounding the non-appointment of an Indigenous officer to the CMA. The memorandum also referred to ‘corporate governance matters’ relating to the board, although did not refer to the rumour. The memorandum

recommended that the allegations against Ms Cush be referred to the department for investigation.

It was in this context that Mrs Dillon arranged the meeting with Mr Croft at a café in Moree. Mrs Dillon informed Mr Croft of her conversation with Mr Hart and that he had raised a number of concerns about the CMA with her. Mrs Dillon discussed with Mr Croft the complaint regarding the appointment process of the position of Indigenous officer and issues of corporate governance and staff management. Mrs Dillon informed Mr Croft that Mr Hart was looking into the question of the board’s reaction to the issue concerning Ms Cush. The statement was made during this meeting.

First instance proceedings

Ms Cush and Mr Boland sued Mrs Dillon for defamation. Mrs Dillon denied the publication was made as alleged and relied upon the defences of statutory and common law qualified privilege. At first instance the jury found that the statement was made as alleged by the plaintiffs and that it conveyed the following defamatory meanings:

As against Mr Boland:

- That as a member of the board of the CMA he was acting unprofessionally by having an affair with the general manager of that organisation; and
- That he was unfaithful to his wife.

As against Ms Cush:

- That as the general manager of the CMA she was acting unprofessionally by having an affair with a member of the board of that organisation; and
- That she was undermining the marriage of Mr Boland and his wife.

It was accepted by Mrs Dillon that the statement was not true and that she did not believe it to be true at the time that she made it.

Elkaim DCJ found that any privilege that may have attached to the statement had been lost on account of malice on the part of Mrs Dillon. His Honour did not make a determination as to whether the occasion was in fact a privileged occasion. His Honour based his finding as to malice on the fact that Mrs Dillon had previously spread the rumour and that she had no belief in the truth of the statement at the time she made it. In

relation to the defence of statutory qualified privilege, his Honour found that Mrs Dillon's conduct was not reasonable in the circumstances, and accordingly the defence failed. The plaintiffs were each awarded \$5,000 in damages plus costs.

Court of Appeal proceedings

On appeal Bergin CJ in Eq, with whom Allsop ACJ and Tobias JA agreed, found that Elkaim DCJ had erred in failing to find that the publication had occurred on a privileged occasion.

Further, her Honour held that Elkaim DCJ's finding that Mrs Dillon had spread the rumour was based upon evidence which was hearsay and inadmissible. His Honour's finding of malice therefore rested upon Mrs Dillon's lack of belief in the truth of the statement, which was not by itself sufficient to destroy the privilege. The Court of Appeal set aside the orders of Elkaim DCJ and ordered a new trial limited to the issue of malice.

The High Court's decision

The High Court emphasised the importance of reciprocity of duty and interest, as a hallmark of the common law defence of qualified privilege. French CJ, Crennan and Kiefel JJ agreed with the Court of Appeal that Elkaim DCJ had erred in failing to determine whether the occasion of the statement being made was a privileged one. Their honours stated that the question of malice cannot be considered 'in isolation independent of a determination of whether there was present in the circumstances a duty or interest which would support the privilege'.¹

French CJ, Crennan and Kiefel JJ agreed with Bergin CJ in Eq's explanation of the duty which arose and which justified the making of the statement, as follows:

The rumour of the affair was intrinsically intertwined with the concerns [Mrs Dillon] raised with Mr Croft about the nature of the relationship between members of the Board and staff members and the complaints about the grievance process. That a Regional Director of the Department had become aware of the rumour was a new dimension to its existence, elevating it to an importance that imposed a duty on [Mrs Dillon] to convey its existence to the Chairperson. Equally the Chairperson had a reciprocal interest in receiving the information. To allow the Chairperson to remain ignorant of the rumour when it had been raised by staff of the CMA and discussed between a Board Member and a Regional Director of a Department

that had certain supervisory functions over the CMA would have been in breach of the Board member's duty to inform the Chairperson of information relevant to matters that were clearly to be the subject of investigation by the Department and possibly by ICAC.²

Gummow, Hayne and Bell JJ also agreed that there was sufficient reciprocity in Mrs Dillon's duty to make the statement and Mr Croft's interest in receiving the information to render the occasion a privileged one.

The respondents accepted that an occasion of privilege, to communicate the existence of the rumour, arose. However, they contended that Mrs Dillon went too far in that she conveyed the rumour as a fact through the use of the phrase 'common knowledge'. French CJ, Crennan and Kiefel JJ disagreed, stating that it could not be said that the communication of the fact of an affair was less relevant to the occasion of qualified privilege than the existence of a rumour. The error in the statement did not deny the privilege.

French CJ, Crennan and Kiefel JJ agreed with Bergin CJ in Eq's findings in relation to malice. Their honours stated that a lack of belief in the statement as true by itself would not be sufficient to destroy the privilege. The correct question is whether some foreign or improper purpose to the privilege caused Mrs Dillon to make the statement.

Heydon J held that the respondents were drawing too sharp a distinction between 'rumour' and 'common knowledge'. The appeal was dismissed with costs.

Conclusion

As the High Court has stated,³ as a matter of public policy, in some circumstances the freedom of communication may assume more importance than an individual's right to protection of their reputation. The court's decision that the publication of a rumour, which was not believed to be true, was made on a privileged occasion serves as a reminder of the value of the defence and the manner it may be utilised to protect communications where there is a sufficient reciprocity of duty and interest.

By Lyndelle Brown

Endnotes

1. *Cush v Dillon; Boland v Dillon* (2011) 279 ALR 631 at 636.
2. *Ibid; Dillon v Cush; Dillon v Boland* [2010] NSWCA 165 at [52].
3. *Ibid* at 635. See also *Aktas v Westpac Banking Corporation* (2010) 24 CLR 79 at [22].

Enforcing a foreign arbitral award: not as straightforward as it seems?

IMC Aviation Solutions Pty Ltd v Altain Khuder LLC [2011] VSCA 248 | *Altain Khuder LLC v IMC Mining Inc & IMC Mining Solutions Pty Ltd* [2011] VSC 1

The (slightly) unusual facts

In 2007, an Australian company, IMC Mining Solutions Pty Ltd (IMCS), entered into discussions with a Mongolian company, Altain Khuder LLC (Altain) about the provision of mine operation services in Mongolia.

Further to those discussions, on 13 February 2008, IMC Mining Incorporated (IMCM), a British Virgin Islands company, entered into a contract – the ‘Operations and Management Agreement’ (OMA) – with Altain in respect of the services. The OMA was executed by IMCM. IMCS was not a party to the OMA. However, IMCS was involved in the project as a sub-contractor,¹ had a common director with IMCM – Mr Stewart Lewis – and the companies shared an office.

The OMA contained an arbitration clause in the following terms:

The resolution of any and all disputes under this Agreement shall first be addressed through good faith negotiations between Altain Khuder LLC and IMC Mining Inc. All disputes between Altain Khuder LLC and IMC Mining Inc arising under this Agreement shall be referred to and considered by arbitration in Mongolia according to Mongolian or Hong Kong law.

On 12 May 2009, following termination of the OMA by Altain,² Altain commenced arbitration proceedings in Mongolia.³ In its written claim Altain identified the respondent in the arbitration as IMCM and claimed damages. The claim did not identify IMCS.

On 16 June 2009, IMCM executed a power of attorney in favour of a Mr Bevan Jones in which he was appointed as IMCM’s agent and, among other things, was given responsibility for ‘submitting explanations to the client and others’. In turn, Mr Jones executed two powers of attorney in favour of Mongolian lawyers on relevantly similar terms. IMCM provided two written responses to Altain’s claims both of which were signed by Mr Jones. Neither of those responses referred to IMCS.

On 7 July 2009 the arbitral tribunal heard an application by Altain for removal of the arbitrator nominated by IMCM. On 10 July 2009 the tribunal issued an interim award removing the arbitrator and directing that a new arbitrator be appointed. Neither the application nor the award referred to IMCS.

Following a preliminary hearing in the arbitration, on 24 July 2009 the tribunal issued a document setting

out various matters that were discussed and agreed at the preliminary hearing.⁴ Again, the document did not refer to IMCS. On the same date, IMCM filed a counter claim in the arbitration. The counter claim did not refer to IMCS.

On 7 September 2009, the Australian lawyers for IMCS wrote to the tribunal indicating that it did not stand behind IMCM and that it considered that IMCM may not have sufficient assets to meet any award made against it. It stated that IMCS did not agree to provide support for IMCM. Following receipt of this letter, the tribunal held a hearing at which it was informed that the Mongolian lawyers representing IMCM no longer represented the company.

A week later, at the hearing of the arbitration on 15 September 2009, neither IMCM nor IMCS was represented. On the same day the tribunal rendered an award finding in favour of Altain for \$6.2million plus costs. The award described the defendant as ‘IMC Mining Inc of Australia’. IMCS was not referred to in the award apart from in the last two sections. First, the tribunal made factual findings relating to IMCS’s failing to direct IMCM concerning project costs and expenditure reports and in the course of that made a finding that Mr Lewis, a ‘management member’ of IMCS signed the OMA on behalf of the IMCM and this showed that IMCS ‘has been involved in the project implementation from the very beginning’ (although the exact significance of this finding is unclear). Second, the tribunal made an award not only against IMCM but also ordered that ‘IMC Mining Solutions Pty Ltd of Australia, on behalf of IMC Mining Inc. Company of Australia, pay the sum charged against IMC Mining Inc. Company of Australia pursuant to this Arbitral Award’.

Subsequently, the award was confirmed by the Khan-Uul District Court in Mongolia. The order referred to IMCM as the defendant and otherwise referred to the award made by the arbitrators. Neither IMCM nor IMCS took steps to have the award reviewed in the Mongolian courts.

Altain sought enforcement of the award in Victoria against both IMCM and IMCS.

The judgment of Croft J: onus of proof is on the award debtor

The enforcement application came before Croft J, the arbitration list judge of the Supreme Court in Victoria. Altain sought and was given orders *ex parte* enforcing the award – pursuant to the terms of *International Arbitration Act 1974* (Cth) (IAA) and the New York Convention on the Enforcement of Foreign Arbitral Awards 1958 (Convention) – subject to the defendants' right to challenge such orders.⁵

IMCS challenged the orders of Croft J. It argued that the award should not be enforced on a number of different grounds, all of which relied upon the same underlying facts – namely, that IMCS was not a party to the arbitration agreement and did not participate in the arbitration. Five of the grounds were a number of the familiar ones identified in Article V(1)(a)–(e) and Article V(2)(a)–(b) of the Convention for resisting the enforcement of an award (sections 8(5)(a)–(e) and 8(7) of the IAA).⁶ The one ground that IMCS did not pursue under Article V(1) was that contained in Article V(1)(b) (s 8(5)(b)): namely, that the arbitration agreement was invalid. The reason for this was that in addition to its Article V grounds IMCS argued that the award was not binding pursuant to s 8(1) and 8(2) of the IAA and that Altain, as the award creditor, had the onus of proving, pursuant to those sections, that IMCS was a party to the arbitration agreement.

Altain disputed that the award should not be enforced for any reason under Article V (or s 8(5)) but that question involved resolution of the straightforward issue of whether IMCS had shown that one of the grounds was made out. The interesting point of difference between the parties was the proper construction of s 8(1) of the IAA and which of them bore the onus of proving whether IMCS was a party to the arbitration agreement (and to what standard).

Altain argued that, for the purposes of enforcing an award, the IAA (and, by extension, the convention) only requires an award creditor to provide an authenticated copy of the award and the arbitration agreement pursuant to s 9(1).⁷ Once it did so, the award creditor was entitled to have the award enforced subject only to any argument that the award debtor could raise that the award should not be enforced under one or more of the grounds set out in s 8(5) and s 8(7).⁸ It followed that the onus was on the award debtor in this

case to show that it was not a party to the arbitration agreement and that this was an available ground for resisting enforcement under the Act. In addition, Altain argued that IMCS held a 'heavy' burden in proving one of the grounds under s 8(5) or s 8(7) bearing in mind the 'pro-enforcement bias' and 'pro-arbitration environment' of the IAA and the NYC.⁹ Altain relied upon a number of decisions of foreign courts that had taken the position argued by Altain.¹⁰

IMCS argued that the sections relied upon by Altain merely provided mechanistic requirements in relation to proof of the award and the arbitration agreement. Rather, the critical provisions were s 8(1) and 8(2) of the IAA. Section 8(1) provides that a foreign award is 'binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made'. According to IMCS, s 8(1) created a jurisdictional threshold for any award creditor requiring the creditor to show that the award debtor was a party to the arbitration agreement and, by extension, that it was properly subject to the terms of the award being enforced. It followed that it was the award creditor, Altain, that had the onus of showing that, IMCS was a party to the arbitration agreement. Altain challenged this, arguing that, consistently with international jurisprudence and the terms of the convention, s 8(1) created no threshold and should be construed subject to the application of s 8(3A) and s 9(1).¹¹

His Honour accepted the submissions of Altain. In particular, he relevantly found:

1. Section 8(1) does not create any jurisdictional threshold requirement that the award creditor is required to meet. An award creditor must meet the requirements of s 9(1) and once it does so it is entitled to enforcement subject to the defences open to the award debtor. This was consistent with international authority and with international commentary.¹²
2. Section 8(5)(b) was the proper ground under which a party can challenge any award where that party claims that it was not a party to the arbitration agreement pursuant to which the award was made.
3. The onus of proving any of the grounds for resisting enforcement was placed on the award debtor. Further, the burden was 'heavy' and any evidence

should be 'clear, cogent and strict' in meeting that burden.¹³

4. The ruling of a court in the seat of the arbitration (i.e. the supervisory jurisdiction) may create an issue estoppel or other form of estoppel for the purposes of enforcement.¹⁴
5. In addition, on the evidence available to the court,¹⁵ IMCS had failed to prove:
 - a. That the arbitration agreement was not valid and binding on IMCS under Mongolian law. His Honour relied on the evidence of an Altain employee who attended the hearings.
 - b. The evidence supported the conclusion that IMCS and IMCM were operating as a common enterprise or 'relationship of legal responsibility' and given this it was more probable than not that IMCS was aware of the arbitration proceedings.
 - c. It was open to the arbitral tribunal to find that the arbitration agreement applied and extended to IMCS. IMCS was therefore bound by the arbitration agreement. IMCS failed to prove that it was not a party to the arbitration agreement or the proceedings and on that basis failed to establish defences under s 8(5)(d), 8(5)(e) and s 8(7)(b).

The Court of Appeal reverses the findings and the onus

IMCS appealed all of the findings of Croft J. The Court of Appeal, comprising their honours Warren CJ, Hansen JA and Kyrou AJA, allowed the appeal and set aside the entirety of the orders made against IMCS. In doing so, the majority in the court (Hansen JA and Kyrou AJA) also made factual findings in relation to whether IMCS's defences under s 8(5) were made out. They found that they were. Warren CJ delivered a concurring judgment based on different reasoning from the majority. Her Honour did not feel the need to re-examine the factual issues and only addressed the matters of principle raised.

The majority rejected the analysis of Croft J in relation to onus and threshold. In doing so, they relied upon a distinction between what they described as those matters that had to be proved by the award creditor on a 'prima facie' basis and those matters that had to

be proved by the award debtor. They concluded that:

1. The relevant sections of the IAA (s 8(1) and s 8(2)) place an 'evidential onus' on the award creditor of satisfying the court, on a *prima facie* basis, that it has the jurisdiction to make an order enforcing a foreign award. Section 9(1) operates to assist the creditor in discharging the evidential onus.
2. In satisfying the evidential onus, the award creditor must show three things: first, that a foreign award has been made granting relief to the award creditor against the award debtor; second, the award was made pursuant to an arbitration agreement; and, third, the award creditor and the award debtor are parties to the arbitration agreement.
3. In most but not all cases, compliance with s 9(1) will discharge the evidential onus. In this case, the provision of the arbitration agreement and the award were insufficient to discharge the evidential onus (the arbitration agreement on its face did not show that IMCS was a party to the agreement).
4. In circumstances where a judge was not satisfied that the evidential onus under s 8(1) had been met by the provision of the material required under s 9(1) then – notwithstanding the procedure provided for in the Rules of the Victorian Supreme Court – it was inappropriate for the matter to proceed *ex parte* and the issue should be dealt with *inter partes*.

However, the majority concluded, contrary to IMCS's submissions, that the award debtor had the *legal onus* of proving that it was not a party to the arbitration agreement. The resolution of this issue turned upon the proper construction, and interaction between, sections 8(1), 8(3A), 8(5) and 8(7) of the IAA.

Section 8(3A) states that the enforcing court 'may only refuse to enforce the foreign award in the circumstances mentioned in subsections (5) and (7)'. The section follows the prefatory language of Article V of the Convention and was modified in the recent amendments to the IAA to remove any doubt that the enforcing court does *not* have a residual discretion to refuse enforcement of an arbitral award (thereby nullifying one highly unsatisfactory aspect of the decision in *Resort Condominiums International Inc. v Bolwell* [1995] 1 Qd R 406).

The majority concluded that IMCS had the legal onus, and that s 8(3A) was not subject to the jurisdictional requirements of s 8(1) as IMCS had contended, because:

1. The terms of s 8(3A) were clear and unequivocal and if the parliament had intended that it was to be subject to s 8(1) it could have said so.
2. If s 8(3A) were subject to s 8(1) then it would create two anomalies: first, it would, notwithstanding the terms of s 8(3A), place the legal onus on the award creditor in certain circumstances – specifically, proving that the award debtor was a party to the arbitration agreement – but place the legal onus for all other grounds of resisting enforcement on the award debtor; second, it would raise the issue of whether someone was a party to an arbitration agreement to a threshold jurisdictional issue but not raise other, seemingly equally important, matters to the same level, such as the validity of the agreement or whether a party had received proper notice of the agreement.
3. The natural meaning of the phrase ‘the arbitration agreement is not valid’ under s 8(5)(b) was sufficiently wide to include the issue of whether someone was properly a party to the arbitration agreement.
4. Bearing in mind the conclusion noted in (3) above, it would create both duplication and inconsistency to read the IAA as requiring that legal onus of proving that someone was a party to the arbitration agreement be placed on the award creditor under s 8(1) while at the same time placing the legal onus on the award debtor under s 8(5)(b).¹⁶

In contrast, Warren CJ did not accept any distinction between an evidential onus and a legal onus. Her Honour’s conclusion was the s 8(1) placed the legal onus on this issue on the award creditor. In particular, her Honour found as follows:

1. Altain’s construction rendered s 8(1) as superfluous. The proper construction of s 8(1) was that it required the award creditor to show that there was a ‘purported or apparent’ arbitration agreement, that the award creditor and award debtor were parties to the agreement and the award was made against the award debtor in pursuance of the arbitration agreement.

2. Section 8(1) cannot be read as subject to s 8(3A). Section 8(3A) circumscribed the grounds upon which an award debtor can resist enforcement but only once an award creditor has discharged some preliminary burden.
3. An award debtor must be able to resist enforcement of an award on the basis that it was not a party to the applicable arbitration agreement. Section 8(5)(b) referred to whether the agreement is valid not whether a person is a party to that agreement. As such, it cannot be construed so as to cover arguments about whether IMCS was a party to the agreement. That must be left to the operation of s 8(1).
4. Section 8(1) operates to establish the elements of a cause of action for which the award creditor bears the legal onus of proof (on the balance of probabilities). The issue of the ‘partyhood’ of an award debtor is treated differently from the other bases on which an award debtor may resist enforcement under Article V and for which the award debtor bears the onus of proof.
5. This regime reflects a ‘sensible policy decision’ by the legislature to place the onus on the award debtor to ‘impugn the agreement or the award’ where the documents presented appear regular on their face but to require the award creditor to explain any apparent irregularity on the face of the documents. There is a difference between a question relating to *prima facie* irregularity (which is for the award creditor to explain) and a question relating to irregularity that is not readily apparent on the face of the documents (which is for the award debtor to explain).

Comment

The purpose of the New York Convention is to facilitate the enforcement of foreign arbitral awards by providing for a simple process of enforcement subject to certain minimal grounds on which enforcement can be resisted. In this case, four judges of the Victorian Supreme Court came up with three different answers about how a central part of the enforcement process works. The result is unsatisfactory conceptually but also in the uncertainty that it creates about the approach that the courts may take – in Victoria at least – in relation to enforcement.

One of the more troubling aspects of this case (and there are many) is the approach that all of the judges (with the exception, to a limited extent, of Croft J) took to the New York Convention.¹⁷ While paying lip service to its role the judges paid little concrete attention to it in determining the case. That is curious given that one of the objects of the IAA is to give effect to the Convention and the Act requires an enforcing court to have regard to this: s 2D(d); s 39(1)(a)(i). The approach taken by the Court of Appeal is in marked contrast to, for example, the approach taken – in principle at least – by Foster J in *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 (at [21]).

A brief perusal of the language of the convention suggests that placing any onus on an award creditor in these circumstances was unlikely to have been intended. Article III states that each contracting state ‘shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon under the conditions laid down in the following articles’. Article IV then states that ‘to obtain the recognition and enforcement mentioned in the preceding article’ (i.e., Article III) [emphasis added] the award creditor must provide a duly authenticated award and ‘the original agreement referred to in Article II’ where Article II refers to an arbitration agreement ‘under which the parties undertake to submit to arbitration...’

Article IV is not entirely straightforward. It contemplates the provision of both the award and the arbitration agreement ‘under which the parties undertake to submit to arbitration’. Given that the purpose of Article IV is enforcement of an award, the arbitration agreement can have no relevance to that process other than its relationship to the award. That explains the draftsman’s use of the language in s 8(1) of the IAA linking the binding nature of the award on the parties ‘to the arbitration agreement *in pursuance of which it was made*’ [emphasis added] – a form of statutory expansion on what is implicit in Article IV. What Article IV does not explicitly deal with is a situation where a party is not a signatory of the arbitration agreement but, for whatever reason, becomes subject to a finding or an order in a subsequent award. That is the situation that confronted the court in this case. It is a situation that, while reasonably rare, is hardly wholly exceptional in practice.

If the correct construction of Article IV is the statutory formulation in s 8(1) then that suggests that the absence of a party from an arbitration agreement must necessarily affect the view that a court takes in relation to an award, even where that award makes an explicit finding and an order against a particular party. This is one explanation for the conclusion of the court. The court was confronted with just such an award: one that named a party but where there was no link with the arbitration agreement.

The problem of how to deal with this type of award was solved by the drafters of the English Arbitration Act 1996 by stating that an award will be recognised as binding ‘on the persons as between whom it was made’. That approach is consistent with the purpose of the convention and the underlying issues of policy. The court in this case had no such statutory support. Croft J resolved the problem by taking a well-established proposition (in other countries at least) – that Article V(1)(b) related to situations where a party argued that it was not a party to the arbitration agreement – and concluded that this could not be read consistently with the contention that an award creditor had to prove the matters referred to in s 8(1).

That is correct (as is the approach in *Dardana*, that his Honour followed) but it doesn’t really help: the problem is that the award seeks to bind a party for reasons *independent* of the arbitration agreement. Ordinarily, where an award makes an order against a party then that order will relate to a party to the arbitration agreement; where it makes an order against a party simply on the basis that the party is a third party without any consideration of how that party can be bound by the award then it would be apparent that such an award contravened Article IV(1)(b) (by reason of the linkage with Article II). However, in most cases where a third party (a third party to the arbitration agreement, that is) has been made subject to an award it will be on some legal basis that has nothing to do with the arbitration agreement. In this context, there is no award binding ‘on the parties to the arbitration agreement in pursuance of which it was made’. It is binding for some other, usually non-contractual, reason.

The Court of Appeal sought to deal with this dilemma with a narrow interpretation of what Article IV was designed to do on the basis of the words in s 8(1). It

is clear that the Court of Appeal was concerned by the absence of IMCS from the arbitration agreement and this fact then determined all that followed given the terms of s 8(1). But, for the reasons noted above, the answer to that question does not answer the question – at least not entirely – of whether the award should bind the party in question. It also leaves open whether s 8(1) is a proper reflection of the purpose of Article IV and, properly construed, the overall purpose of the Convention. Article III – which to a limited extent, s 8(1) is designed to follow – leaves matters of procedure to the domestic law of the enforcement jurisdiction. The real difficulty in this case is that Article IV does not clearly address the issue and s 8(1) appears to narrow what might otherwise be a broader interpretation of Article IV.

Given this, the Court of Appeal's conclusion was understandable; unfortunately, it was, it is submitted, also incorrect as a matter of principle. While Article IV does not explicitly address the problem at hand it is clear that the prefatory words indicate that what is intended is the simple presentation of a valid agreement to arbitrate and a valid award as the basis for enforcement. The documents speak for themselves and there is no need to go behind them. The purpose of the convention is to make enforcement akin to an administrative procedure where the entire onus is placed on the award debtor. That should apply equally in a case like this given the presence of an award naming a party against whom enforcement is sought. It is anomalous to read Article IV in any contrary fashion. Such an outcome does not disadvantage the award debtor; it merely places the onus, as it is for everything else, of proving that the award should not be enforced.¹⁸

In this case, that involved not an examination of the arbitration agreement but rather the conduct of the parties and of the arbitration. One further troubling feature of this case is that the type of award that seeks to bind a party that is not a party to the original arbitration agreement must do so on the basis of very clear evidence and legal principle. Insofar as one can tell from the material referred to in the judgments the award in question was poorly reasoned, poorly expressed and singularly failed to identify the basis upon which it purported to make findings against a party that was neither a party to the original arbitration agreement nor, seemingly, a party whose conduct or

corporate structure could be said to have provided a basis for a finding against it. The reliance placed by Croft J on evidence that both opinion and hearsay evidence further compounded the difficulties of the original award.

The result is a mess. One view of this case might be that, broadly, the first instance judge came to the wrong answer but for the right reasons and that the Court of Appeal came to the right answer but for the wrong reasons. The Court of Appeal judgment may prove to be the arbitral equivalent of *Junior Books v Veitchi*: a peculiar case on its facts that may have been correct in its particular circumstances but has unacceptable policy implications for the development and operation of the law. The best way to solve the problem in this case is not by judicial correction but by further statutory modification. The case is also another fine example of what happens when an arbitral award, so often characterised as floating in the transnational firmament, falls to earth and becomes subject to the terrestrial preoccupations of an enforcement court.

By Jonathan Kay Hoyle

Endnotes

1. IMCS entered into a contract with IMCM described as a 'Consulting Services Agreement' in which IMCS undertook to perform some of IMCM's obligations under the OMA.
2. On 5 March 2009, Altain sent a letter to IMCM purporting to terminate the OMA with immediate effect (following on from a letter directing IMCM to cease work allegedly due to IMCM's 'default actions').
3. The arbitration was commenced with the Mongolian National Arbitration Centre.
4. Mr Bevan Jones was present at the hearing and there was a factual dispute in relation to whether he was present on behalf of both IMCM and IMCS or just IMCM.
5. The defendant was given 42 days from the date on which the orders were served to file proceedings contesting the enforcement. This approach is mandated by the Rules 9.04 and 9.05 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008 (Vic)* and *Practice Note No2 of 2010 (Arbitration Business)*. A similar approach exists in other jurisdictions.
6. Roughly speaking, the award was not enforceable because: (a) IMCS had not received proper notice of the arbitration; (b) the award dealt with a difference not contemplated by or falling within the terms of the submission to arbitration.
7. Along with some miscellaneous requirements concerning translation (if needed) and certification that the country where the award was made is a signatory to the New York Convention: s 9(3).
8. These provisions mirror the provisions of Article V of the New York Convention.
9. Altain argued that, in any event, IMCS was estopped denying the validity of the award given its participation in the proceedings and its failure to challenge the award in the courts of the seat of the arbitration (i.e., Mongolia).

10. Notably, *Dardana v Yukos Oil Company* (2002) 2 Lloyd's Rep 326; *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd* (2006) SGHC 78; *Sarhank Group v Oracle Corporation* 404 F 3d 657.
11. Section 8 (3A) provides that 'The court may only refuse to enforce and award in the circumstances mentioned in subsections (5) and (7)'. Section 9(1) provides that 'in any proceedings in which a person seeks the enforcement of a foreign award by virtue of this Part, he or she shall produce' an authenticated copy of the award and the 'original arbitration agreement under which the award purports to have been made or a duly certified copy'.
12. The judge relied upon commentary from Gary Born in *International Commercial Arbitration* at [2795].
13. His Honour further held that an award debtor is not entitled to re-litigate matters already dealt with by the arbitral tribunal by re-opening issues heard by the arbitrators.
14. IMCS was estopped because the judge found that the evidence disclosed that Mr Bevan Jones appeared at the preliminary hearing on behalf of both companies (and thereby, IMCS in any event submitted to the jurisdiction of the tribunal), the tribunal determined that it had jurisdiction to make the award against IMCS and IMCS raised no objection by seeking to have the award set aside.
15. The nature, extent and admissibility of the evidence placed before Croft J became a significant issue. Relevantly, Altain relied upon two affidavits sworn by Mr Batdorj, who was a representative of Altain, and an expert opinion of Professor Tumenjargal. A large number of objections were raised by IMCS to the Batdorj affidavits but these objections were ultimately not dealt with by Croft J. Despite this, Croft J proceeded to rely upon the evidence although it is unclear whether counsel for IMCS did not ultimately press its objections. IMCS relied upon affidavits from Mr Lewis and Mr Jones.
16. This reasoning, in relation to legal onus at least, is consistent with the analysis of the English Court of Appeal in *Dardana* and with the implicit recognition of this point by the UK Supreme Court in *Dallah Real Estate and Tourism Holding Company v The Government of Pakistan* [2010] UKSC 46.
17. Croft J did refer to Gary Born's analysis of the Article IV provisions of the Convention but did not undertake any examination of the Convention himself as an exercise of statutory construction and legal analysis.
18. One further difficulty of the case is that it is hard to see how a distinction between the 'evidential onus' and the 'legal onus' in relation to s 8(1) will operate. It is doubtful that Article IV is properly read merely as an 'aid' to proving a requirement elsewhere in the Convention. In addition, it is difficult to see what the difference between an 'evidential onus' (as formulated by the majority) and a 'legal onus' (as formulated by Warren CJ) is likely to be.

Appeals against arbitral awards

Westport Insurance Corporation v Gordian Runoff Limited [2011] HCA 37

In *Westport* the High Court dealt with important questions in relation to the availability of appeals against arbitral awards pursuant to the (now repealed) section 38 of the *Commercial Arbitration Act 1984* (NSW) (CAA) and the requirement to give reasons for an award.

Background

Gordian Runoff Limited (Gordian) underwrote directors' and officers' liability policies for FAI Insurance Limited on the basis that it covered claims made and notified within seven years (FAI Policies). It obtained reinsurance for its policy portfolio from Westport Insurance Corporation (Westport) on the basis that the reinsurance covered policies under which claims were made and notified within three years.

Westport refused indemnity under the reinsurance treaties for claims made on the FAI Policies (all but one of which was made and notified within three years), contending that the reinsurance did not respond to the seven year policies, even where claims were made and notified within three years. The reinsurance treaty

was governed by New South Wales law and required any arbitration to be conducted in accordance with the CAA. The dispute was referred to arbitration before a panel of three arbitrators on the basis of detailed pleadings, extensive evidence on which witnesses were cross-examined, and a full transcript.

Gordian claimed that Westport was not entitled to refuse indemnity for claims made and notified within three years by reason of s 18B of the *Insurance Act 1902* (NSW) (IA), which provides that, where the circumstances in which an insurer is bound to indemnify are defined so as to exclude or limit liability on the happening of particular events or the happening of particular circumstances, the insured shall not be disentitled to indemnity by reason only of the limitation or exclusion if the loss was not caused or contributed to by the happening of the events or circumstances giving rise to the limitation or exclusion, unless in all the circumstances it is not reasonable for the insurer to be bound to indemnify.

The arbitrators, in an award giving reasons amounting to 96 paragraphs, held that the reinsurance treaties did not cover the FAI policies, but s 18B of the IA applied to prevent Westport from refusing cover for claims made and notified under the D & O policies within three years.

Appeal against the award

Westport challenged the award on two bases, first, on the construction of s 18B of the IA, and second, on the sufficiency of the reasons given for the award.

Section 38(5)(b) of the CAA precluded a grant of leave to appeal unless the court was satisfied that there was a manifest error of law on the face of the award or strong evidence of an error of law and a prospect that the issue would add to the certainty of commercial law.

Section 29(1) of the CAA provided that the arbitrators were required to 'include in the award a statement of the reasons for making the award.' The Act was otherwise silent on the content of the reasons to be given. Westport challenged the award on the basis that the reasons for the award given by the panel were not sufficient. It contended that the reasons did not explain why, having regard to the proviso to s 18B, it was reasonable in all the circumstances that it be bound to indemnify Gordian.

The primary judge heard the application for leave to appeal the award under s 38(5) of the CAA together with the appeal. The judge granted leave to appeal and set aside the award on the basis that the period of cover provided for in the reinsurance treaties was not a 'limitation' or 'exclusion' attracting the operation of s 18B of the IA.

The Court of Appeal held that the application for leave should not have been heard together with the appeal. In doing so, Allsop P made the following pertinent observations on the context and purpose of s 38 (at [109]):

Set against a background of the keen recognition that permitting the conduct of substantive arguments on appeal before granting leave would open up for review more arbitration awards than would occur if only truncated argument on leave were permitted, a clear legislative and contextual policy can be discerned that assists in appreciating that except in special, indeed exceptional, cases an application for leave should be dealt with and finalised before the hearing of the appeal. The

relevant tasks on a leave application provided for by the text of s 38 also make it important to deal with leave first. The very assessments contemplated by s 38(5)(b)(i) and (ii) are directed to questions that are interlocutory in character and ones that should in terms be answered before full argument about the asserted error of law as an ultimate decision.

For Allsop P, the danger in hearing the leave application concurrently was that it invited full argument on the error question prior to leave being granted, thus broadening the scope for judicial review of awards.

The Court of Appeal allowed the appeal and made an order refusing leave to appeal the award.

Allsop P held that there was no error of law in the failure of the arbitrators to give detailed reasons in relation to the proviso to s 18B. The president followed the judgment of the English Court of Appeal in *Bremer Handelgesellschaft mbH v Westzucker GmbH (No 2)* [1981] 2 Lloyd's Rep 130 at 132–133 that the required content of arbitral reasons were not equivalent to those required in reasons for judgment, and that arbitrators need only 'set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is.' According to Allsop P, the question posed by the proviso was a matter of evaluation after consideration of all the evidence and required no further explanation.

The decision of the Court of Appeal stood against the dicta of the Victorian Court of Appeal in *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346 at 364–365 that the requirement for reasons in the Victorian equivalent to s 21(1) of the CAA imported, in complex cases, a standard of reasoning equivalent to that of judicial reasons.

Basis for appeal: identification of error of law

In the High Court the majority highlighted the distinction, drawn in s 38 of the CAA, between the identification of an error of law for the purposes of considering an application for leave to appeal (in s 38(5)(b)(i) and (ii)) and the 'question of law arising out of an award' that provides the subject matter of an appeal after leave has been granted (in s 38(2)).

In relation to the first stage, the majority overruled *Natoli v Walker* (1994) 217 ALR 201 at 215–217 and

223 insofar as that decision characterised ‘manifest error’ for the purposes of s 38(5)(b)(i) as being limited to simple errors rather than an erroneous conclusion on a complex question of law open to competing arguments. In *Natoli*, a manifest error was characterised at 223 as being ‘plain in the sense of being obvious [or] manifest in the sense that there was little or no doubt that error it was.’

The majority characterised ‘manifest error’ as ‘the existence of an error [being] manifest on the face of the award, including the reasons given by the arbitrator, in the sense of apparent to that understanding by the reader of the award.’

The majority accepted, in any event, that the two questions on the appeal were both potential errors from which strong evidence arose from the reasons themselves, and which were likely to add substantially to the certainty of commercial law, so as to attract s 38(5)(b)(ii).

Adequacy of reasons

The majority held that provisions of the CAA making awards final and binding, empowering arbitrators to order specific performance and providing for enforcement of an award and supervision of the conduct of arbitrators by the court, carry with them the result that the giving of reasons for an award is no mere matter of private contract, but is important for the operation of the statutory regime for the making and enforcement of arbitral awards. The majority observed:

No doubt it is true to say that the provision of an award under the Arbitration Act lacks distinctive hallmarks of the exercise of judicial power, namely the maintenance of public confidence in the manner of its exercise and in the cogency or rationality of its outcomes, and the operation of the appellate structure and of the case law system. However, it is going too far to conclude that the performance of the arbitral function is purely a private matter of contract, in which the parties have given up their rights to engage judicial power, and is wholly divorced from the exercise of public policy.

Kiefel J expressed the view that the requirement to give reasons satisfied the ‘public element’ of the arbitral process, namely the court’s supervision of the arbitration by means of an appeal.

The majority held that, because the provision of reasons

is necessary to enable identification of any error of law by the arbitrator so as to enliven the jurisdiction of the court to grant leave to appeal against the award in s 38(5)(b) of the CAA, the failure to provide reasons may amount to a manifest error of law on the face of the award for the purposes of s 38(5)(b)(i).

The majority held that the Victorian Court of Appeal in *Oil Basins* placed an ‘unfortunate gloss’ on the terms of s 29(1) by requiring a judicial standard of reasoning. The majority accepted (because the parties did) that the correct description of the standards required was as stated by the English Court in *Bremer*, and commended the Victorian Court’s observations that the standard of reasons required will depend on the circumstances of the particular arbitration, so that disputes relating simple, factual issues may only require rudimentary reasons, but disputes involving more complex questions of law require more detailed reasons.

The majority held that in the circumstances of the present case, it was necessary to explain why each of the requirements of s 18B was satisfied, including why the proviso to that section did not apply. The majority accepted that the reasons did not identify the factual findings relevant to whether the proviso applied. For that reason, the failure to provide adequate reasons was an error that warranted leave on the basis of s 38(5)(b)(i) and (ii).

The construction of s 18B

The majority held that s 18B was never engaged in relation to the FAI Policies, because the FAI Policies fell outside the terms of the reinsurance treaties, and did not fall within the cover provided for by the treaties to the extent that they covered claims made and notified within the three year period. The reinsurance treaties contained no provisions excluding or limiting liability by reason of the circumstance that the FAI Policies had a seven year period because there was no liability to exclude.

In light of the above, the majority declined to grant special leave in relation to a further contention that the loss in this case was not caused or contributed to by the fact of the FAI Policies having a seven year reporting period where claims were made within the three year period covered by the reinsurance treaties. The Court of Appeal had held that the arbitrators were in error on this ground, but that there was no manifest error

of law on the face of the award or strong evidence of any error, because an argument to the contrary was tenable.

The majority accepted Allsop P's finding that the event or circumstance causing or contributing to the loss was the existence of a policy with a seven year reporting period, rather than the existence of claims made under that policy within the three year period. In light of the majority's construction of s 38(5)(b)(i), this was a manifest error of law on the face of the award.

Kiefel J observed that s 18B did not in terms prevent an exclusion or limitation contained within the scope of the cover. Because the FAI policies were the source of the loss and attracted the exclusion or limitation contained within the reinsurance treaties, s 18B(1) did not apply.

Notice of contention

Gordian sought to contend that the Court of Appeal's decision should be set aside on additional grounds, being factual matters relevant to the construction of the three year limit in the reinsurance treaties. The majority observed that the subject matter of the appeal was limited by s 35(2) to the errors of law complained of by the applicant for leave. While it may be open to a respondent to resist an application for leave on the basis that the award may be supported on other grounds 'caution would be required of the Supreme Court lest there be defeated the policy of the Arbitration Act that the parties be held to their bargain to accept the findings of fact by the arbitrator.'

Keifel J (with whom the majority agreed) held that the notice of contention point must fail on the proper construction of the correspondence forming part of the agreement.

Heydon J dissented. His Honour held that leave to appeal was not required, nor was it open, on a point of contention. Section 38 provides for appeals against awards, not against points arising from the reasons for the award. It does not undermine the finality of arbitral awards for the party resisting an appeal to raise other questions in support of the award.

The arbitral panel had applied s 22 of the CAA, which required an arbitration to be determined according to law, but if the parties agree, by reference to considerations of general justice and fairness, in

interpreting the treaty. Heydon J held that s 22 did not permit the arbitral panel to disregard the usual rules of contractual construction. Properly construed, the reinsurance treaty for the relevant year was not limited to policies with a three year reporting period. It was therefore unnecessary for Heydon J to consider Westport's appeal grounds.

... the legislature has decreed that rights of appeal are to be further circumscribed than under the former s 38. This reflects the policy that the function of arbitration is to encourage finality and respect for the award the parties have contractually undertaken to obtain.

Consequences

The CAA has now been repealed and replaced with the *Commercial Arbitration Act 2010* (NSW). The new Act applies the UNCITRAL Model Law to domestic commercial arbitrations with some modifications. Significantly:

- section 31(3) of the new Act now provides that 'the award must state the reasons upon which it is based', a requirement that does not appear to differ materially from that contained in s 29(1);
- section 34A(1) now provides for a restricted right of appeal on questions of law arising from an award, subject to the agreement of both parties and the leave of the court;
- section 34A(3)(c) replaces the requirements in s 38(5)(b) so that leave is to be granted only where: (i) the decision of the tribunal on the question is obviously wrong, or (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt.

In this context, the decision of the High Court may be of diminished significance in some respects. A number of observations may be made.

First, the legislature has decreed that rights of appeal are to be further circumscribed than under the former s 38. This reflects the policy that the function of arbitration is to encourage finality and respect for the award the parties have contractually undertaken to

obtain. Expansive constructions of the requirements of s 34A do not sit well with the legislative policy of the section.

Second, and in that context, the legislature has again left open the content of the obligation to give reasons in s 31(3). The High Court's decision in *Westport* that the content of the obligation to give reasons is to be tailored to the circumstances of the particular arbitration would be of continued significance. One outcome of this is that the availability of a 'reasoning' ground of appeal is very much at large (subject to the requirements of s 34A(3), which base the entitlement to leave on the decision being 'obviously wrong' or 'open to serious doubt' as opposed to containing errors). Whether these descriptions encompass inadequacy of reasons may be arguable.

Third, the High Court's construction of 'manifest error' in s 38(5)(b)(i) may or may not survive its replacement in s 34A(3)(c)(i) with 'obviously wrong'. On the one hand, the notion of obviousness incorporates the notion adopted by the majority that the error must be apparent to the reader of the award. On the other, 'obvious' does appear to comprehend some qualitative notion that excludes arguable doubt about the correctness of the award.

This approach serves to defeat one mischief that may arise from the construction adopted by the High Court. Identification of an 'apparent' error may, in complex or uncertain cases, invite a detailed examination of the reasons to identify whether the award is wrong in the sense complained of, with the result that the appeal is effectively determined at the leave stage. This attracts the consequences Allsop P identified in observing that leave applications should not be heard together with the appeal.

Finally, it appears from the structure of s 34A of the new Act that a respondent to an appeal application would be entitled to raise points of contention, but that the court should exercise caution in accepting them. This option may be material to the decision of a respondent to agree to an appeal for the purposes of s 34A(1)(a), if it has not done so in advance of the arbitration.

By Catherine Gleeson

Commonality requirements in US class actions

Wal-Mart Stores, Inc. v Dukes et al, Supreme Court of the United States, 20 June 2011.

Introduction

Rule 23(a)(2) of the United States Federal Rules of Civil Procedure provides that a plaintiff seeking orders permitting an action to proceed as a class action (known as class certification) must prove that there are questions of law or fact that are common to the class the plaintiff is seeking to represent. That obligation is known as the 'commonality' requirement of any class action proceeding in the federal courts. It was central to the Supreme Court's June 2011 decision in *Wal-Mart Stores, Inc. v Dukes et al*, No., 10-277, in which the court had to decide whether one of the largest class action proceedings ever brought in the United States was entitled to class certification.

The Plaintiffs' Case

The named plaintiffs (respondents in the Supreme Court proceedings) were three current or former Wal-Mart employees purporting to represent some 1.5 million current or former female employees of Wal-Mart. Led by employee Betty Dukes, they sought on behalf of themselves and the class, declaratory and injunctive relief, punitive damages and back pay as compensation for Wal-Mart's alleged violation of Title VII of the Civil Rights Act of 1964, which prohibits discrimination among employees based on gender.

The plaintiffs alleged that Wal-Mart, the nation's largest employer, discriminated against female employees with respect to pay and promotions. They alleged that local managers exercised their discretion over pay and



promotions disproportionately in favour of men, leading to an unlawful disparate impact on female employees. They claimed that the discrimination they had suffered was common to all female employees of Wal-Mart and sought to litigate the Title VII claims of all female employees at Wal-Mart's stores in a nationwide class action. More specifically, they sought certification of a class consisting of '[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices'.

Rule 23(a)

Rule 23(a) imposes three further requirements for class certification in addition to commonality, namely that the class is so numerous that joinder of all members is impracticable ('numerosity'), the claims or defences of the representative parties are typical of the claims and defences of the class ('typicality') and the representative parties will fairly and adequately protect the interests of the class ('adequacy').

The Supreme Court's decision

Justice Scalia delivered the opinion of the court, in which the chief justice and Justices Kennedy, Thomas and Alito joined, with Justices Ginsburg, Breyer and Sotomayor joining in part. The court reversed the decision of the Court of Appeals for the Ninth Circuit and set aside the orders certifying the class.

Justice Scalia noted the following general principles that govern the determination of commonality:

- class members must have suffered the same injury – it is not enough to allege that they have all suffered a violation of the same provision of law (Slip. Opinion. p.9);

- the 'common contention' which is said to establish commonality must be capable of class-wide resolution, meaning that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke (*Id*);
- Rule 23 is not a mere pleading standard – plaintiffs seeking certification must actually demonstrate compliance with the Rule, i.e., to prove that there are in fact sufficiently common questions of law or fact (*Id* at 10); and
- the 'rigorous analysis' required of the evidence provided in support of certification will involve consideration of factual and legal issues that underlie the plaintiff's claim (*Id* at 10).

Justice Scalia observed that the plaintiffs were seeking to sue 'about literally millions of employment decisions at once' and that there needed to be 'some glue holding the alleged reasons for all those decisions together' (*Id*). The plaintiffs needed to show some 'significant proof' that Wal-Mart operated under a general policy of discrimination.

To demonstrate commonality, the plaintiffs relied on (a) statistical evidence about pay and promotion disparities between men and women at the company, (b) anecdotal reports of discrimination from approximately 120 employees, and (c) the evidence of a sociologist who had concluded that Wal-Mart was 'vulnerable' to gender discrimination. The District Court certified the class and a divided Ninth Circuit Court of Appeals affirmed the certification order.

The Supreme Court majority held that the plaintiffs had failed to provide significant evidence sufficient to demonstrate commonality. The court found that the statistical evidence failed to demonstrate a uniform national pattern of discrimination. The evidence of the plaintiffs' sociologist was unpersuasive because he had conceded at his deposition at the District Court stage of the proceedings that he could not determine whether 0.5 per cent or 95 per cent of the employment decisions at Wal-Mart might have been the product of discriminatory practices. The plaintiffs' anecdotal evidence of discrimination practices (120 affidavits in total, or one affidavit for every 12,500 class members) was likewise insufficient to raise any inference that all the individual, discretionary personnel decisions made

by Wal-Mart were discriminatory.

The court concluded that because the plaintiffs had provided 'no convincing proof' of a company wide discriminatory pay and promotion policy, they had not established the existence of any common question (*Id* at p.19). Adopting the language of Chief Judge Kozinski in his dissenting opinion in the Ninth Circuit, Justice Scalia, for the majority, held that the members of the class had 'little in common but their sex and this lawsuit' (*Id*).

Justice Ginsburg, joined by Justices Breyer, Sotomayor and Kagan, disagreed. Her Honour held that the plaintiffs' evidence adequately demonstrated that resolving the plaintiffs' claims of discrimination would necessitate examination of particular policies and practices alleged to adversely affect women at Wal-Mart's stores nationwide (*Id* Slip. Op. Ginsburg J, p.8).

Analysis

The Supreme Court's decision highlights the significant differences between federal class action proceedings in the United States and representative proceedings in the Federal Court of Australia or the New South Wales Supreme Court. The approach in the United States entails a rigorous analysis of the proof that the plaintiff intends to rely upon to prove a claim on behalf of the class, in order to determine whether the plaintiffs' claims are capable of class-wide resolution. Expert evidence is almost always provided on behalf of the class and is tested through depositions, often followed by a class certification hearing involving a combination of witness testimony and legal argument as to whether or not the requirements of commonality have been met. This invariably entails, as Justice Scalia observed, an analysis of the plaintiffs' underlying claims at a very early stage of the proceedings.

The principal difference between the practice in United States federal courts and here is, of course, that the

existence of common questions of fact or law in a representative proceeding under Part IV of the *Federal Court of Australia Act 1976* (s 33C) or Part 10, Division 2 of the *Civil Procedure Act 2005* (s 157) is assessed by reference to the pleadings, without a substantive analysis of the evidence through which the plaintiff proposes to prove those contentions that are common to the class. There is no procedure to 'certify' a class, although something vaguely resembling the US approach could occur if a respondent to a representative proceeding brought an application pursuant to s 33N of the Federal Court Act or pursuant to s 166 of the Civil Procedure Act for an order that a proceeding no longer continue as a representative proceeding. That could occur, for example, if the evidence filed on behalf of the plaintiffs revealed the absence of questions of fact and law common to the class.

The US system is designed to provide a determination, at the outset of a case as to whether it can proceed as a class action. Where the purported class includes up to 1.5 million people, one could argue it is critical to have that determination made at a very early stage in the proceedings and one can see the justification for requiring the plaintiffs to demonstrate to a court how they propose to prove the common contentions advanced on behalf of the class. However, the determination of commonality in the US federal system can involve a preliminary trial of the merits of the plaintiffs' claims, which can take many months, or (as in the *Wal-Mart* case), years to resolve. That is somewhat at odds with objective of class action proceedings to provide an efficient means to resolve a large number of individual claims through a single proceeding.

By Christopher Withers

Constitutional validity of military justice legislation

Haskins v Commonwealth (2011) 279 ALR 434



SRAR personnel parade for a Beat the Retreat ceremony. Photo: LSIS Helen Frank / Commonwealth of Australia, Department of Defence.

In these proceedings Mr Haskins challenged the constitutional validity of remedial legislation following the decision in *Lane v Morrison* (2009) 239 CLR 230 that the provisions of the *Defence Force Discipline Act 1982* establishing the Australian Military Court (AMC) were invalid. In the aftermath of that decision, the *Military Justice (Interim Measures) Act (No 2) 2009* (IM Act) was passed. Item 5 of Sch 1 of the IM Act applied where the AMC had imposed punishment (other than imprisonment) so as to declare the rights and liabilities of all persons to be the same as if the punishment was properly imposed by general courts-martial, which were subject to review within the chain of command under further provisions of the IM Act. The validity of that statutory fiction was upheld by majority, such that by legislative fiat the invalidly imposed punishments were effectively restored.

Mr Haskins, who was an officer of the army, had been convicted of disciplinary offences by the AMC (under provisions held invalid in *Lane*) and punished by way of severe reprimand and detention for a period of time. He challenged the relevant provisions of the IM Act on two bases: (1) they were a bill of pains and penalties contrary to Ch III of the Constitution; and (2) they acquired his cause of action for false imprisonment against the Commonwealth resulting in an acquisition of property other than on just terms contrary to s 51(xxxi) of the Constitution. By majority, those challenges were dismissed.

French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ

The plurality began by emphasising that the High Court had in numerous previous decisions upheld the validity of legislation providing for the imposition of punishment on a service member for a service offence by service tribunals that are not Ch III courts. This is because the decisions made by such tribunals are amenable to intervention within the chain of command such that the imposition of punishment involves no more than ‘the imposition and maintenance of discipline within the defence force’ rather than any exercise of Commonwealth judicial power. That recognition was critical to the disposition of the first ground of challenge. Their honours reasoned that Mr Haskins’ argument proceeded ‘from an unstated premise of exclusivity’; that is, that only a Ch III court could impose the punishment of detention on him. In rejecting that premise, it was held that the declaration of rights and liabilities by the relevant provisions of the IM Act did not usurp judicial power. For the same reason, the IM Act was not a bill of pains and penalties.

Further reasons were given in support of that conclusion. It was thought inappropriate to describe the impugned provisions as having imposed punishment on those with whom the AMC had dealt. Furthermore, that those provisions made no legislative determination of guilt and did not make crimes of past acts. Significant in this regard was that the declaration of rights and liabilities was ‘subject to the outcome of any review’

(under further provisions of the IM Act) such that the final decision about punishment was made within the chain of command and not by the IM Act. In respect of the IM Act's operation where a punishment had been fully served prior to the introduction of the relevant provisions, it was described as being in the nature of an 'act of indemnity' to 'confirm irregular acts' and precluding liability for them rather than to void and punish 'what had been lawful when done'. Therefore, to describe the provisions as imposing a punishment was thought not to accurately reflect their complete operation.

The contemplated action against the Commonwealth rested upon it being vicariously liable for the acts of an officer wrongfully detaining the plaintiff.

The argument in relation to an acquisition of property was dependent on the plaintiff having an action for false imprisonment. The contemplated action against the Commonwealth rested upon it being vicariously liable for the acts of an officer wrongfully detaining the plaintiff. Thus, it was seen that a necessary step in the plaintiff's case was that the officer in charge of the corrective establishment, acting in obedience to an apparently regular warrant, would be himself liable to the plaintiff for false imprisonment. In this regard, the argument was disposed of on the footing that 'the acts of which the plaintiff complains were acts done by one member of the defence force to another in obedience to what appeared to be a lawful command' which would not be actionable in a civil suit for false imprisonment. Central to this reasoning was that to allow such an action would be destructive of discipline within the defence force as subordinates would be placed in the position of questioning the lawfulness of orders and whether to obey them or risk personal liability in tort. However, their honours declined to state any general rule that no action in tort will lie in respect of any act done for the purposes of military discipline, while offering no clear guidance as to when such an action may lie.

Heydon J

Heydon J delivered a powerful dissent, posing as the question for decision whether retrospective legislation validating the invalid criminal punishment of the plaintiff was valid. His Honour commenced by recognising that there are limits to the ability to enact legislation attaching to invalid Acts consequences which it declares those invalid acts always to have had through the device of 'as if'. In the present context, that depended on whether the impugned provisions offended Ch III. Heydon J considered that they did. They involved legislation directed to a particular group and imposed punishment on them without a judicial trial. The right of review did not alter that conclusion. Such a review, it was thought, would need to assume false hypotheses and work with materials invalidly received as evidence. A right to review a punishment reached on the basis of invalidly received evidence and procedures could not give validity to otherwise invalid provisions of the IM Act. It was not necessary for Heydon J to consider the s 51(xxxi) argument.

By Alan Shearer

... their honours declined to state any general rule that no action in tort will lie in respect of any act done for the purposes of military discipline, while offering no clear guidance as to when such an action may lie.



Duty of care on the battlefield

By Richard Beasley SC



Photo: Australian soldiers patrol a village in Afghanistan. Photo: Able Seaman Jo Dilorenzo /Commonwealth of Australia, Dept of Defence.

Introduction

In May of this year, following an application by defence counsel, manslaughter and other charges were dismissed against two soldiers of the 1 Commando Regiment from Sydney.

It is clear from the judgment¹ of the chief judge advocate, Brigadier I.D. Westwood, why the court martial proceedings could not be sustained in law against the two soldiers, who have been identified by his order only as Sergeant J and Lance Corporal D.

Although the charges fell from an appalling tragedy – the death of five Afghan children – what is arguably less clear is why these men were charged in the first place.

12 February 2009

In early 2009, Sergeant J and Lance Corporal D were serving in the Special Operations Task Group, based in Tarin Kowt in the province of Oruzgan in southern Afghanistan, north of the city of Kandahar.

Following orders, at about 1.00am on the morning of 12 February they approached a residential homestead near the village of Surkh Morghab, about 10km from their base. The homestead was surrounded by mud brick walls, with only a few windows. The soldiers were apparently unaware of the internal layout of the building. As it was night, they were wearing night vision goggles.

Although various press reports stated that the soldiers' mission was to search for an arms cache, this was not entirely correct. The operation – described in some reports as a 'capture or kill mission'² – was, according to the Australian Defence Force, an operation to 'disrupt Taliban activities' and to 'target a significant Taliban leader'.³

When the soldiers approached the mud-walled residential compound, it is unclear who shot first. From the judgment of the chief judge advocate, it appears that the prosecutor in the court martial alleged that an Australian soldier first opened fire upon an adult man, presumably the man thought to be the 'significant Taliban leader'. That soldier was not identified as Sergeant J or Lance Corporal D.⁴

What is clear is that Sergeant J and Lance Corporal D, and other force members, were then fired upon by someone inside a room in the compound. The man said to be a Taliban insurgent may have fired up to three magazines of ammunition at the Australian soldiers – something like 90 rounds of 0.62mm AK47 bullets.⁵

Had the manslaughter and other charges been maintained, it is understood that Sergeant J and Lance Corporal D would have called evidence to suggest that, having been fired upon in this manner, retreat would have been suicidal.⁶ There was little or no cover for the Australian soldiers in and near the compound from

the fire coming from within. Retreat by Sergeant J or Lance Corporal D could also have exposed fellow force members to fire by retreating.

During the course of the gun battle – which may have lasted only 90 seconds – Sergeant J ordered Lance Corporal D to throw a hand grenade through a window into the room from which the shots were coming. He did. After the first grenade exploded, there was a new burst of fire from the room. A second hand grenade was thrown into the room. The shooting from within the compound then stopped.

The person who had been shooting at the Australian soldiers, later identified as a man called Amrullah Khan, was found badly wounded within a room in the compound. He was given aid at the scene by Australian soldiers, but died later at a medical treatment facility at the Tarin Kowt base. Horribly, five children, aged between 2 and 13, were killed by the grenades thrown into the compound to stop the fire. There were other civilian casualties.

Undoubtedly because of the deaths of the children, the incident attracted wide media attention both in Australia and overseas. A report was produced for SBS's *Dateline* programme, which aired in March 2010. This report included footage of distressed family members of the dead men and the children, including some of the family being shown phone-video footage of the dead man's body. The *Dateline* report suggested through witnesses it interviewed that the man Khan who had been killed was not a Taliban insurgent, but a farmer, who shot at the Australian forces in defence of his home. Allegations were made that one or more of the Australian soldiers admitted that the operation was a 'mistake' and that the attack had occurred at the 'wrong place'.⁷ It is unclear whether the man meant to be targeted that night was a Taliban commander called Mullah Noorullah, a Taliban leader involved in numerous attacks on coalition forces and who was killed by SAS and Sydney Commando Regiment forces some two months later, in April 2009. If the dead man Khan was a farmer rather than a Taliban insurgent, he was well armed, given the 90 rounds of AK47 fire. This is not to suggest that it is unusual for many people in Afghanistan to have weapons of this kind.

Inquiries and charges

Understandably, given the deaths of the five children,

inquiries took place into the operation. Immediately following it, the Chief of Joint Operations initiated an internal inquiry. This inquiry was supported by a military police officer and a legal officer, and was carried out in Afghanistan. The matter was then further referred for legal review, and then to the Australian Defence Force Investigation Service for investigation.⁸

On 27 September 2010, the director of military prosecutions charged Sergeant J and Lance Corporal D with the manslaughter of the children killed, a crime punishable by imprisonment of up to 20 years. They were also charged with dangerous conduct causing death, an offence punishable by imprisonment of up to two years. These charges are discussed in more detail later.

A third soldier was charged with not following instructions. Following the dismissal of the court martial against Sergeant J and Lance Corporal D, this soldier's court martial also did not proceed. It is not clear whether the orders said not to have been followed were orders from the then commander of the coalition forces in Afghanistan, US General Stanley McChrystal, which were in relation to how operations should be conducted, with a warning that the war could not be won if high rates of civilian deaths were maintained.⁹

Judgment

Both Sergeant J and Lance Corporal D were originally charged with one count of manslaughter by negligence in relation to the killing of the five children. Later it was proposed by the prosecution to amend those charges to bring five separate counts of manslaughter.

Sergeant J was also charged under s 36(3) of the *Defence Force Discipline Act 1982* (DFDA) with one count of dangerous conduct for 'attacking with weapons an adult male located within a room of a residential compound', and being negligent as to whether this act was likely to cause the death of civilians. The particulars of this charge against Sergeant J were that he directed members of his force to throw two fragmentation grenades into a room, directed them to fire a machine gun into the room, and fired his own M4 assault rifle into the room.

The dangerous conduct by negligence charge against Lance Corporal D was centred on the allegation that he had thrown the two fragmentation grenades into the room.

In order for the manslaughter by negligence charges to be sustained, it was necessary for the prosecution to establish that the accused soldiers owed a duty of care to the children killed during the operation.

Initially it would seem that the particulars provided by the prosecution in relation to the manslaughter by negligence charges were particularised in no more than the following way: 'Each of the accused owed the five dead civilian children a duty of care not to kill or injure them.'

It was alleged, at first, that the duty of care arose under the common law. Reliance was placed on the High Court judgment of *Callaghan v R* (1952) 87 CLR 115 where the court described manslaughter by negligence in this way:

Manslaughter by negligence occurs when a person is doing anything dangerous in itself or has charge of anything dangerous in itself and conducts himself in regard to it in such a careless manner that the jury feel that he is guilty of culpable negligence and ought to be punished.

Reliance was also placed on the judgment of the full court of the Victorian Supreme Court in *Nydam v R*,¹⁰ where the court held:

In order to establish manslaughter by criminal negligence, it is sufficient if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.¹¹

According to the judgment of the chief judge advocate, on the basis of these decisions, 'the prosecution says that the accused men were doing something dangerous in and of itself and that a duty of care therefore arose to those who might be impacted by their conduct'.¹²

The defence counsel for Sergeant J (Major D McLure of 7 Wentworth Chambers) and for Lance Corporal D (Major J Hyde of 9 Wentworth)¹³ brought an application to have the charges dismissed partly on the basis that neither soldier owed 'a legally enforceable duty of care to anyone for their acts in combat'. It was also asserted that the soldiers were immune from prosecution,

although it became unnecessary for the chief judge advocate to decide this point.

It would appear that in oral submissions during the application to have the charges dismissed, the prosecutor advanced 'for the first time the proposition that a duty of care arose as a result of the application of international law'¹⁴ [emphasis added]. It was said that the accused soldiers' orders reflected a duty of care arising under international law. It was also asserted that the 'Rules of Engagement' were relevant as to how this duty of care arose.¹⁵



Australian soldiers patrol Shahidi-E-Hasas, Uruzgan Province. Photo: Petty Officer Pawlenko /Commonwealth of Australia / Dept of Defence.

Perhaps because of this, defence counsel immediately sought clarification as to whether the prosecution contended that the accused soldiers had breached any relevant protocols of the Geneva Convention of 1949, in particular protocols concerning the indiscriminate or deliberate attacks or threats of violence on civilian population. The prosecutor confirmed that no such allegation was made. He also confirmed that it was not alleged that either of the accused soldiers had read the 'Rules of Engagement'. In answering this, he explained how the duty of care arose in the following terms:

To save any ambiguity, as I said, in terms of a deliberate attack, no. ... Remember we're using the *Nydam* test here. We are saying that engaging the fighting aged male such a great situation of danger was occasioned to other occupants of the room that their actions were such a great falling short. Now, I don't think I can put it any more explicitly than that. ... We say that there is evidence that they did know that there were civilians there or that they did appreciate the likelihood. But whatever that may bring in the course of the case, we say the evidence would reveal that a reasonable person would have known of their

likely presence or their actual presence. It's always been our case that in engaging the fighting aged male they created the danger to the civilians and that, as we've said, gave rise to the duty to them at common law. ... We are not suggesting that it is relevant at all to the case whether there was an intentional attack on the civilians. It is simply irrelevant. We are saying that this is a negligent situation. If the question asked is this on the behalf of the accused: are we saying that we breached that specific article of the protocol? No. The articles of the protocol are mentioned as being part of a fabric of duties which we say gives rise to a duty of care, not each and every one of them, but they are, such as the articles that we have pointed out, give rise to proportionality are part of this fabric, and that's how I put it. I want it to be clear they are part of the fabric. As to those particular ones, no, of course not; I think that should be clear.¹⁶

How clear is perhaps debatable.

If an Australian soldier's conduct violates international humanitarian law or the laws of armed conflict, it is clear that such actions are punishable under Australia's domestic laws. Chapter 8 of the Commonwealth *Criminal Code*, for example, contains detailed provisions in relation to crimes against humanity and war crimes. There are, for example, war crimes of murder, and of attacking civilians available in relation to the killing of non-combatants during non-international armed conflict: sections 268.7 and 268.77 of the *Criminal Code*. There was no suggestion that Sergeant J or Lance Corporal D would be subject to such charges, or had engaged in conduct that would warrant contemplation of such charges. Rather, they were charged with manslaughter and other charges which, as mentioned above, all parties agreed depended upon the existence of a duty of care owed to the civilians that were killed.

What is arguably not clear is how it could ever have been suggested that, in the circumstances of the operation that took place on the morning of 12 February 2009, such a duty of care could ever have been said to exist.

The High Court has held, more than once, that Australian soldiers do not owe a legally enforceable duty of care for civil damages in relation to their actions while in the course of armed conflict with enemy combatants: *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344 at 361–362 per Dixon J; *Groze v Commonwealth* (1982) 150 CLR 113 at 117 per Gibbs CJ.

In *Shaw Savill & Albion*, Dixon J (with whom Rich ACJ and McTiernan J agreed) said at 361:

It could hardly be maintained that during an actual engagement with the enemy, or a pursuit of any of his ships, the navigating officer of a King's ship of war was under a common law duty of care to avoid harm to such non-combatant ships as might appear in a theatre of operations.

It cannot be enough to say that the conflict or pursuit is a circumstance affecting the reasonableness of the officer's conduct as a discharge of the duty of care, though the duty itself persists.

To adopt such a view would mean that whether the combat be by sea, land or air, our men going to action would be accompanied by the law of civil negligence warning them to be mindful of the person and property of civilians.

It would mean that the courts could be called upon to say whether the soldier, on the field of battle, or the sailor fighting on his ship, might reasonably have been more careful to avoid causing civil loss, or damage.



Australian soldiers providing security at Malalai Girls School in Tarin Kot. Photo: Able Seaman Jo Dilonzo / Commonwealth of Australia / Department of Defence.

No one can imagine a court undertaking the trial of such an issue either during or after a war. 'To concede that any civil liability can rest upon a member of the armed forces for supposedly negligent acts or omissions in the course of an actual engagement with the enemy, is opposed, alike, to reason and to policy.'

If there is no duty of care for civil damages arising from actual engagement with the enemy, it is difficult to immediately see how there could be said to be a duty of care arising for the purposes of criminal proceedings. It would appear that there is no authority to support such a proposition. Further, there is authority that one soldier does not owe another soldier a duty of care in relation to injury caused in the course of armed conflict.

*Mulcahy v The Ministry of Defence*¹⁷ was a case where the English Court of Appeal deliberated on an action by a soldier who was injured when a gun was discharged after the soldier had been directed by a superior to proceed forward of the gun that had injured him. At page 771 of the judgment Neil LJ said:

I would echo the words of Gibbs CJ, in *Grove's case* ... to hold that there is no civil liability for injury caused by the negligence of persons in the course of an actual engagement with the enemy seems to me to accord with commonsense and sound policy.

At page 772 Sir Iain Glidwell said:

Indeed, it could be highly detrimental to the conduct of military operations if each soldier had to be conscious that even in the heart of battle he owed such a duty to his comrade. My reasons are thus, in essence, those expressed by Dixon J in the passage from his judgment in *Shaw Savill & Albion Co Ltd v The Commonwealth* ... If, during the course of hostilities, no duty of care is owed by a member of the armed forces to civilians or their property, it must be even more apparent that no such duty is to another member of the armed forces.

What is known about the night time operation on 12 February 2009 is that Sergeant J and Lance Corporal D were ordered to target a 'significant Taliban leader'. Presumably, that is someone that they would reasonably view to be a dangerous person. This might have been confirmed to them, regardless of who started shooting, by the fact that the person they were targeting fired upon them, at close range, through the window of a building and through mud brick walls, with up to 90 rounds from an AK47. The action they took – which had awful consequences – was taken while they were fired upon. Clearly they are trained soldiers, but possibly they did not have a great deal of time to weigh, with exquisite balance, or at all, the consequences of the actions they decided to take.

Those actions were taken under pressure of the kind the vast majority of people would never experience. As the chief judge advocate said in his judgment, from the orders given to the soldiers, and through the accepted Laws of Armed Conflict, the men were authorised to use lethal force. They did so in an environment that cannot be described as 'benign', but one where '[t]here will rarely be time for calm reflection and careful weighing of risks and consequences'.¹⁸ Further, the soldiers orders to target the man they were told was a Taliban insurgent

compelled them to conduct the operation they did against him. They could not, in the circumstances 'decide that they will take no further part in hostilities, or that they will refrain from engaging [in] conduct that is inherently dangerous to themselves or others, or that they will refrain from inflicting harm on enemy persons when their duty requires them otherwise.'¹⁹

Accordingly, 'having regard to the restrictions on the soldier, sailor or airman's ability to choose to refrain from inherently dangerous conduct, his or her positive obligation to conduct operations against the enemy and the life and death ramifications of hesitation'²⁰ the chief judge advocate could see no basis for distinguishing *Shaw Savill* and the other authorities he was directed to. He ruled that no duty of care was owed by the two accused soldiers to the civilians that were killed.²¹ The suggestion that the duty of care somehow arose because of obligations under international law was rejected in short terms. Accordingly, none of the manslaughter by negligence charges could be sustained.

That the chief judge advocate found no duty of care was owed by the accused soldiers does not, on the authorities, seem controversial. The fact that the soldiers were charged with manslaughter by negligence for their conduct in a combat operation against an enemy does seem somewhat more controversial. Being shot at in armed combat, by someone you have been told is a Taliban insurgent, who you have been ordered to 'target', and who is firing an AK47 at you from close range, at least arguably seems an odd place, time and circumstance for a duty of care to arise. If such a duty is owed to civilians during a combat mission like this, how does it sit with a duty to follow orders? Or to preserve the lives of your comrades? Or, if it be relevant, to preserve your own life under enemy fire? What is the duty that is paramount, and how much time are you given to weigh up the consequences of both duty and possible breach when .62mm bullets are flying around? What standard of care is involved?

It's possible some obvious point is being missed. Perhaps an experienced soldier would understand how such a duty arises, and perhaps some lawyers would.

But not everyone. As was submitted by Major McClure in argument, 'warfare is intrinsically a reckless activity, not apt to be measured by the legal ruler of negligence'.²² That seems like a reasonable submission, and was not weakened by the fact that it would appear

that no counsel appearing in the case for any party, nor the chief judge advocate, were able to find a single authority from a military tribunal in which a soldier had ever been found guilty of the war crime of negligently causing the death of civilians.²³

The reason why it seems (in the face of, among other things, the High Court's decision in *Shaw Savill*) it was nevertheless contended that a duty of care arose, and

... 'warfare is intrinsically a reckless activity, not apt to be measured by the legal ruler of negligence'.

presumably why the soldiers were charged, was centred on the submission concerning the 'high importance that the law places on human life.'²⁴ How that notion translates into a duty of care arising on the battlefield in a combat operation does not appear to have been expanded on in detail, at least during oral submission.

Because he held that *Shaw Savill* was binding authority that no duty of care arises in connection with actual engagement in the course of armed conflict, the chief judge advocate held (applying conventional principles of statutory construction) that it 'must have been parliament's intention to restrict the operation of s 36(3) to those situations where there is otherwise a duty of care arising in law or, at least, that section 36(3) operates subject to existing law, expressly excluding a duty of care.'²⁵ Accordingly, the dangerous conduct charges under this section were also dismissed.

Conclusion

If Australian soldiers, risking their lives in places like Afghanistan, are charged with criminal offences for their conduct arising out of armed conflict, it is at least arguable that it should be reasonably clear why they have been charged.

Based on the available material from the court martial proceedings against Sergeant J and Lance Corporal D, that matter is at least debatable.

Whether that assessment is correct or ill-informed opinion, those soldiers can nevertheless have the last word here:

Words will never adequately express our regret that women and children were killed and injured during the incident on 12 February 2009. These were people we were risking our lives to protect. However, it should not be forgotten that the casualties were ultimately caused by the callous and reckless act of an insurgent who chose to repeatedly fire upon us at extreme close range from within a room he knew contained women and children. This forced us to make split decisions, under fire, which almost certainly saved the lives of our fellow Australian and Afghan soldiers.²⁶

Endnotes

1. The judgment is available on-line (www.defence.gov.au), as are transcripts of the hearing in relation to the application to have the charges dismissed.
2. *The Australian*, 31 May 2011, Brendan Nicholson.
3. ADF Answers to SBS *Dateline* programme, 12 March 2010.
4. Judgment, page 7, lines 30–35.
5. ABC News, 30 September 2010, Michael Vincent.
6. news.com.au (from AAP) 16 May 2011.
7. *Dateline* transcript, 12 March 2010.
8. ADF Answers to *Dateline* questions, 12 March 2010.
9. *The Australian*, 31 May 2011, Brendan Nicholson.
10. [1977] VR 430.
11. [1977] VR 430 at 445.
12. Judgment p.10 L21–23.
13. Neither defence counsel was asked to assist in writing this article.
14. Judgment p.10 L25–28.
15. The Rules of Engagement is a classified document.
16. Judgment p.11 L33 to p.12 L 35.
17. (1996) EWCA Civ 1323; (1996) 2 All ER 758.
18. Judgment p.20 L17–20.
19. Judgment p.21 L13–17.
20. Judgment p.25 L25–29.
21. Judgment p.28 L4–11.
22. Transcript 16/5/11, p.16 L 35.
23. Transcript 16/5/11 p.21 L40–45.
24. Transcript 16/5/11 p.87.
25. Judgment p.36 L12–16.
26. Statement released on the soldiers' behalf after they were charged, from *The Australian*, 28/9/10, Mark Dodd and Jeremy Kelly.

Filing of submissions without leave

By Catherine Gleeson

It can at times be difficult for counsel to let things lie. In the course of a hearing, matters may arise from the evidence that cannot be dealt with by oral submissions alone. An unanticipated point may be raised by opposing counsel or by the judge that requires a considered response. In these circumstances, leave is often sought and granted to file further supplementary submissions on a limited point. On occasion leave will be granted at the instance of the presiding judge, who requires assistance on a particular matter not covered in the parties' existing submissions.

Reflection being a dangerous thing, there is a temptation to address further matters to the court after the conclusion of a hearing, either unprompted or under cover of a limited grant of leave. The ease with which parties may now access judicial officers, with email details for judges' associates and registrars being readily available, makes it a simple matter to avail oneself of the opportunity to make further submissions.

A review of the authorities discloses that the filing of written submissions after the conclusion of oral argument is not permitted without leave. The courts have repeatedly insisted that the time for argument to be made is at the hearing of the matter: *Carr v Finance Corporation of Australia Ltd [No 1]* (1981) 147 CLR 246 at 258 per Mason J. Parties have no legal right to be heard further after the conclusion of that hearing: *Eastman v Director of Public Prosecutions of the Australian Capital Territory* (2003) 214 CLR 318.

The prohibition on filing further submissions after conclusion of argument and without leave arises even where the other parties consent to the submissions being filed: *Notaras v Waverley Council* (2007) 161 LGERA 230 at 267[147]. The bulk of the authorities on this issue emerge from appellate courts, however the principle is equally applicable in courts of first instance: *Ramesh Gupta v Elizabeth O'Leary (No 2)* [2011] ACTSC 43 at [3].

Leave to file further submissions after conclusion of oral argument will be granted only in exceptional circumstances: *Re Application by the Chief Commissioner of Police (Vic)* [2005] HCA 18; (2005) 79 ALJR 881 at [22]. Those circumstances might include issues arising unexpectedly in the course of a hearing as outlined above, to which may be added matters arising while judgment is reserved, such as further evidence emerging or a relevant, binding or persuasive judgment

being handed down. The discretion to grant leave will be governed by considerations including the reasons for the point not having been dealt with in the course of the hearing and the importance of the matter to the resolution of the real issues in dispute, consistently with s 56 of the *Civil Procedure Act 2005* (NSW) and s 37N of the *Federal Court Act 1970* (Cth).

If leave is granted to make submissions on a limited issue, the submissions must not go beyond the grant of leave: *Notaras v Waverley Council* (2007) 161 LGERA 230 at 267. Similarly, parties are not permitted to file submissions that do not address the matters in respect of which leave has been given: *McCrohon v Harith* [2010] NSWCA 67 at [137].

A review of the authorities discloses that the filing of written submissions after the conclusion of oral argument is not permitted without leave.

A number of reasons have been given for the prohibition. The principal reasons in the appellate context were described by the Court of Appeal in *Bull v Lee (No 2)* [2009] NSWCA 362 at [9] as follows:

For counsel to act in that way seeks to undermine the important principle that, save in the most exceptional circumstances, all arguments relating to an appeal should be put at the one time. It has the capacity to cause waste of the court's time, and both waste of time and expense for counsel's opponent in deciding what to do about the submissions that have been made without leave.

Other reasons for the prohibition have been given. One is that the placing of material before the court in the absence of an order publicly and properly made derogates from the principle of open administration of justice: *Re Application by the Chief Commissioner of Police (Vic)* [2005] HCA 18; (2005) 79 ALJR 881 at [54]. Another is that often draft judgments have been prepared, which have to be restructured after receipt of late submissions, causing a waste of court time. If further submissions are to be made, the presiding judge should be notified of the intention to seek leave to make them at the earliest opportunity: *Kirwan v Cresvale Far East Ltd (in liq)* [2002] NSWCA 395 at [340].

If new matters arise after conclusion of the argument warranting the making of further submissions, the

Verbatim

From *Bale & Anor v Mills* [2011] NSWCA 226

It is useful, however, to remind the parties (and through the publication of these reasons the profession and public generally) of the correct position that has been stated, over and over again, by the courts. The High Court, intermediate courts of appeal and other courts have deprecated in strong terms the filing of material after an appeal without, or outside, any leave given: *Carr v Finance Corporation of Australia Ltd (No 1)* [1981] HCA 20; 147 CLR 246; *In the matter of an application by the Chief Commissioner of Police (Vic)* [2005] HCA 18; 79 ALJR 881 at 884–885 [19]–[23] and 890 [53]–[54]; *Dwyer v Commonwealth of Australia* (1995) 31 ATR 48; *Kirwan v Cresvale Far East Ltd (In liq)* [2002] NSWCA 395; 44 ACSR 21 at [340]; *Chapman v Caska* [2005] NSWCA 113 at [19]; *Willis v Health Communications Network Ltd* [2007] NSWCA 313; 167 IR 425 at [35]; *Singh v Secretary, Department of Employment and Workplace Relations* [2009] FCAFC 59 at [62]–[73]; *Jackson v Conway* [2000] FCA 1530; *R v Theophanous* [2003] VSCA 99; 141 A Crim R 216 at 286 [14]; and *R v Zhan Yu Zhong* [2003] VSCA 56; 139 A Crim R 220 at 221 [2]–[4].

Notwithstanding these clear statements the practice still occurs. That the practice still occurs notwithstanding the regular statements of the courts that it should not is no reason not to continue to state clearly to the profession and the public the correct

position. Not only have the parties and their legal representatives no right (whether they agree among themselves to do it or not) to place before the court without prior leave further material after an appeal has been heard, it is wrong. It undermines and derogates from the principle of the open administration of justice. The practice is not legitimated by sending the material and in that material seeking leave. The proper course (unless prior leave, statute or court rule permits otherwise) is for the proceedings to be relisted so that an application to enlarge the record can be made and determined in open court: see *In the matter of an application by the Chief Commissioner of Police (Vic)* [2005] HCA 18; 79 ALJR 881 at 890 [54] per Kirby J.

The appeal is not an occasion merely for a discussion of the issues so that the parties can go away to marshal and develop their ideas further, bearing in mind the discussion with the court. It is the time and place when and where argument, and sometimes decision, occurs. Once the appeal is reserved, the parties' rights to argument and to be heard have been exhausted.

The consequence of this is not only that sending submissions to the court is wrong, but also the court may (and generally will) ignore what has been sent.

proper course in the absence of any applicable court rules is for the proceeding to be relisted so that the court can consider the application for leave: *Re Application by the Chief Commissioner of Police (Vic)* [2005] HCA 18; (2005) 79 ALJR 881 at [54].

The court may where appropriate review the additional material adduced to determine whether to grant leave. If leave is granted on the basis that the material may assist in the resolution of the issues before the court, the other parties should be given an opportunity to respond: *Dwyer v Commonwealth Bank of Australia* (1995) 31 ATR 48.

The usual rule is that the court will disregard any

submissions filed without leave, and any part of submissions that go beyond a grant of leave: *Notaras v Waverley Council* (2007) 161 LGERA 230 at 267[147]. That said, the court often has regard to submissions filed without leave: *Chapman v Caska* [2005] NSWCA 113 at [20]; *Notaras v Waverley Council* (2007) 161 LGERA 230 at 267[148].

However, the filing of submissions without leave potentially carries more serious consequences for practitioners. In *Bull v Lee (No 2)* [2009] NSWCA 362 at [9] the Court of Appeal observed:

The effect of making submissions after judgment has been either delivered or reserved, that go beyond the scope of

any leave that has been granted is not confined to having those submissions ignored. Counsel should understand that it is a breach of their professional responsibilities to the court to seek to make submissions that go outside the scope of the leave that has been granted.

A further potential consequence could include the making of a costs order (or even a personal costs order against the practitioner concerned) in relation to the costs expended by an opponent in determining what to do in response to the submissions (for example, under ss 56(5) and 99(1)(b) of the *Civil Procedure Act 2005* (NSW)).

Such an order takes account of the dilemma in which an opponent is placed when faced with submissions made without leave: while it may be appropriate merely to submit that the submissions should be

ignored, it might be a brave practitioner who would take the risk, in the absence of an opportunity to appear before the court, that the submissions might be accepted despite the absence of leave. Preparing a response obviously involves further time and cost. In smaller or interlocutory matters unlikely to be reserved for long, there may not be time to approach the court for leave to respond, placing the opponent in a position in which it is forced to communicate with the court on the issue in a manner that sails close to making still further submissions without leave.

The new New South Wales Barristers' Rules

By Carol Webster

New New South Wales Barristers' Rules commenced on 8 August 2011. These are nationally uniform rules, developed with substantial involvement from the NSW Bar Association. The process was initiated by the Australian Bar Association in 2007. At the end of 2008, the then president of the Australian Bar Association, Tom Bathurst QC (at the time the senior vice president of the NSW Bar Association), appointed a working party to review the various bar rules across Australia and propose a draft set of national rules.

The working party comprised Michael Colbran QC of the Victorian Bar, Philip Selth, the executive director of the Bar Association and Jennifer Pearce, now the director professional conduct. Some policy differences between states and territories were resolved at meetings chaired by Bathurst QC and the ABA's proposed national conduct rules were then published for comment in early 2010.

The National Legal Profession Reform Taskforce was provided with the proposed national conduct rules, and included them in the consultation package issued in May 2010, with a draft Legal Profession National Law.

The ABA Council formally agreed to a uniform set of conduct rules on 27 November 2010, having amended the proposed national rules to take account of various submissions that were made.

The Bar Council formally approved the new New South Wales Barristers' Rules on 24 March 2011. The Rules were gazetted on 8 July 2011 with the 8 August 2011 commencement date. As the ABA proposed National Rules drew heavily on the New South Wales Barristers' Rules, re-written in 1999 (substantially by Walker SC), the number of substantive changes for NSW barristers are small. A summary comparison of the old and new rules was distributed at seminars conducted to outline the new rules, and is available on the Bar Association website.

These rules will continue until the proposed National Law comes into force, when state and territory barristers' and solicitors' rules will be superseded by the rules made under the National Law. Any amendments required to deal with issues arising in practice can be proposed at a national level through the Australian Bar Association, with a view to the changes being made in the rules to be made under the National Law.



The life and career of Garfield Barwick

The Sir Garfield Barwick Address was delivered by the Hon RJ Ellicott QC on Wednesday, 17 August 2011.

Sometimes, but rarely, you will meet another human being with an air of authority and purpose about him or her whose sheer enthusiasm for life is so infectious that, while you are with that person, it engulfs you too. They are likely to have a commanding personality. In my experience they are highly intelligent, good communicators and committed compassionate people who see the big picture and are constantly pushing the envelope to achieve some perceived public good. They are not necessarily without fault. In the course of their enthusiasm they can be arrogant, seldom consumed by self doubt, and quick, sometimes too quick, to form views about other people or events.

Nevertheless they are achievers. They usually make a difference and leave great changes in their wake. They are sometimes the pathfinders. Tony O'Reilly and Ted Noffs are two such people I have known. Another is Garfield Barwick.

Barwick is a controversial figure. If you judge his life and contribution by one event, you will surely misjudge him.

Garfield Barwick was born on 22 June 1903 – a federation baby who was to spend much of his long life expounding and interpreting the fledgling Constitution.

His mother, a very intelligent and compassionate woman of commanding presence and his father, small in stature, intelligent and of practical bent, were from backgrounds far removed from the practise of law. She was the third daughter of Australian born parents both from families involved in the wool industry, graziers and operators of wool scours. At the time of federation the family lived in Moree. His father was a printer who met his mother when he was employed by the *Moree Champion*.

For the family it was a battle to maintain a standard of living above the bread line and he was probably only able to be educated at Fort Street and the University of Sydney through winning bursaries. There was no silver spoon around. Their family life was based on a philosophy of hard work, a strong degree of initiative and at times risk taking which led to trouble. For many years the family were committed Wesleyan Methodists who had a strong social conscience. His mother, writing at age 87, describes their early life which revealed an early interest in politics and law which may have

affected him:

After my marriage my husband and I took a great interest in politics, parents and citizens associations – I remember Edmund Barton and George Reid. Before I married I had an interest in debate. My husband was secretary to the local Liberal Society as far back as the time when Holman was seeking a seat in the Commonwealth Government. We were also both interested in the affairs of hospitals.

Barwick says in his autobiography (pages 2–3):

For six years as an only child I had the undivided attention of my parents. I was early admitted to adult conversation and mingled with the many friends and relatives who crowded through our house in Paddington. To these I talked – indeed I think in those days I must have been a vigorous conversationalist for I remember that once I was offered a boy-proof watch (an item any boy would covet) if I would remain silent for an hour while the offeror carried on a conversation with a lady he was courting. I got the watch – seemingly such an interval of silence was unusual.

The couple who were courting were my father and mother. As it happened my father was his mother's brother and my mother, his father's cousin.

Talking was to be the hallmark of his life as some of us found – even on the benches.

Barwick is a controversial figure. If you judge his life and contribution by one event, you will surely misjudge him.

After sharing the University Medal in law Barwick served a period of articles of clerkship and was admitted to the bar in 1927.

This was the year I was born. My family lived in Moree and later near Cobar. Although first cousins, we were greatly removed by both age and distance. Nevertheless by mail and family visits the exploits of Garfield, the barrister, filtered through. As a result by the age of 10 and despite little, if any, personal contact I became a victim and decided to be a barrister.

During the late 30s and early 40s in the course of visits which I made to his parents' home at Strathfield there were occasions when we met. In the early 40s he, I believe, purchased what, in effect, was a very pleasant

weekender or holiday house on the Woronora River and during visits there I joined in the family fun.

It was at a time when he was about to take silk. But he was by no means the recluse who sat in a corner studying a brief. He joined in the activities, not surprisingly tended to dominate the conversation and enjoyed a good game of tennis. To my young mind he was an extrovert. Indeed the enjoyment of conversation, company and social engagement formed a major part of his life.

Barwick, the advocate

Much has been written and said about Barwick's skill as an advocate. I had the opportunity to see him in action in several cases as junior counsel on both the same or the opposite side. He had exceptional skills in simplifying legal principles, explaining them to a court; and an unusual capacity to conjure up attractive examples to make a point. The latter was a skill he often used as chief justice, to destroy, or sometimes enhance the argument that counsel was advancing.

When appearing for a plaintiff or appellant he tended to be short in chief seemingly having won the judge's agreement, leaving it to reply to complete the demolition of his opponent's argument. It was a skill which judges of lesser mind found difficult to combat. As one observed it was not wise to embrace his sometimes irresistible argument while on the bench but to do so later after quiet contemplation. In personal discussion of legal principle he was often so incisive and persistent that it was easier to say 'yes'.

In his autobiography he states that he did not regard himself as a great cross-examiner. There are some cross-examiners who take a particular word or words from the evidence of a witness and cleverly have the witness contradict his or her own evidence. The cross-examiner with this skill usually has an excellent memory or recall on the run of evidence given and can very quickly tie the witness in knots. To the onlooker this is impressive though judges often remain unimpressed. More effective, in my experience, is the cross-examination in which the witness is led to contradict the substance of his evidence and to give answers which build up the cross-examiner's case. My recollection of Barwick is that he had a great recall of evidence but fell more into the latter category. I think he is being modest in downplaying his skill as a cross-examiner.

Opinion work was always a valuable part of a barrister's practice in the period prior to 1970. If not busy in court you could earn considerable fees from opinions given in writing or in conference. Barwick describes writing opinions on the back of briefs. What I saw was very different. I only had one brief for opinion with him. It was for Yates Seeds about seed warranties. I took it to him, he read it and after making a few verbal comments, to my surprise, signed it. No doubt he charged an appropriate fee.

What I observed in his chambers at that time amazed me. He had not one secretary but two working feverishly typing opinions. This was at the height of his practice and one can assume that in this period he was earning many times the salary of a judge.

He had exceptional skills in simplifying legal principles, explaining them to a court; and an unusual capacity to conjure up attractive examples to make a point.

As it happened I appeared with him in what was to be his last case before the Privy Council as a barrister in private practice.

The Estate of Chick, a Moree client, had failed in an appeal on death duty before the NSW Supreme full court. It was decided to appeal to the Privy Council. It was early 1958. Barwick had been elected to the House of Representatives and was about to take his seat in the parliament. I knew he was about to go to London to appear in the well known s 260 case – *Newton's Case*. I rang and told him I had an appeal before the Privy Council and the solicitor had asked me to find out whether he would lead me. He said he would. I said there is only one problem. The client can only afford eight hundred guineas. I said if you would accept three hundred and I took the balance of five hundred, I would be able to take Colleen. He readily agreed.

He had a small flat near St James Palace. There was no time for preparation before the hearing. He had been too busy arguing *Newton's Case* and it had been an uphill battle. I therefore did not see him until the morning of the appeal. He had obviously read and considered the argument. We discussed it and set off across St James Park on foot. There was no mention



Photo:Fairfaxphotos

of the argument. Rather he named in Latin and commented upon almost every species of flower or bush we passed in the park. He had an unusual capacity to acquire a detailed knowledge of a subject matter and appear to become an instant expert. It obviously stood him in good stead in mastering a technical brief. It was so in other aspects of his life, be it sailing, as in the Sydney-Hobart Yacht Race, mastering skiing and the terrain of the Kosciusko National Park or taking on the presidency of the Australian Conservation Foundation.

Chick's Case was heard in May 1958. It followed the hearing of *Newton's Case* in which Douglas Menzies QC appeared for the commissioner of taxation.

At the end of *Chick's Case* Barwick and Menzies who

were very close friends attended a dinner at the Inner Temple to which I, too, was invited. For me it was a unique experience. Obviously they already had a very close relationship with the law lords and other counsel present. At the conclusion of the dinner I walked back with them along The Strand through Trafalgar Square to Piccadilly Circus. There was neither need nor opportunity for me to say anything!

During the journey Barwick recounted a seemingly endless string of stories. When he took breath Menzies filled in with quotations from *Hamlet* and other Shakespearean works. They were in a celebratory mood. Something special was indeed happening in their relationship. Menzies was returning to Australia to take his place on the High Court which he did on 12 June 1958. Barwick, elected in March to the House of Representatives, was returning for his first sitting in the House. In effect it was at the end of their respective practices at the private bar. Public service was about to engulf their lives. As I disappeared down the underground they passed into the evening mist down Piccadilly.

I had another experience of him involving the Privy Council. I was appearing there in 1960 on a petition for special leave. During the hearing of it I received a cable from the then solicitor-general, Sir Kenneth Bailey, who asked me if I would appear for the Commonwealth in relation to an application for special leave about to be heard in a matter of *Dennis Hotels*. He said if I was to accept the brief I was to read a prepared statement and say no more. He also nominated a fee but said that the attorney-general, Sir Garfield Barwick, had asked him to make it clear to me that if I accepted the brief I should not expect that I would be briefed on the hearing. I accepted the brief and did as I was told. On my return the question of who would get the brief on the hearing was a matter of great discussion. It turned out to be Michael Helsham who had chambers on Barwick's floor.

Barwick's contribution to the bar

In his time at the private bar Barwick had not only established himself as the leading counsel in Australia but by 1950 had also established with others a very high reputation for Australian counsel before the Privy Council. Thereafter there was a growing practice for clients to brief Australian and not English counsel in

matters before that body. The journey by Australian barristers to London continued for another 35 years. It was very important in our development as barristers and in expanding our vision of the world. It is fair to say that this was in part a legacy of Barwick's capacity as an advocate.

When president of the New South Wales Bar Council Barwick managed to obtain from the New South Wales Government a 99-year lease of the land on which Wentworth Chambers was subsequently built. Assisted by Ken Manning and others he was the driving force behind the development of both Wentworth and Selborne Chambers. As a result of his drive and their efforts the bar's role as a significant public institution was greatly enhanced and was then almost wholly housed in its own premises.

I have not referred specifically to any of many well known cases in which Barwick appeared as lead counsel. Some were constitutional cases. His practice however stretched across all areas of litigation. Many of his appearances were in difficult cases where, because of his known brilliance, he was briefed because it was thought, as a last resort, he might be able to snatch a rabbit out of the hat.

I will not refer to particular cases. The point I wish to make however is that there have been many counsel with broad practices during my lifetime who, like him, have appeared sometimes successfully sometimes not in many important cases. There has been none however known, respected and accepted so widely for his brilliance as an advocate. To have achieved this accolade might well be his greatest achievement. Indeed throughout his public career his skill as an advocate played a continuing role in court, cabinet, parliament and on the bench.

At the height of his practice he was extremely busy. One day early in my practice, at the suggestion of my father, I reluctantly rang him and he agreed to see me. At the appointed time I exited the lift on the 5th Floor Chalfont Chambers, I looked down the hallway and saw an emerging phalanx of counsel in robes and solicitors and clients advancing towards me. The lead figure was Garfield Barwick. I was quickly despatched and invited to see him some other time; an invitation I cannot remember accepting.

There was a well-known judge in the 1950s who, at

times, even the more talented rising juniors were unable to handle. Barwick is reputed to have met one such counsel on the way back from court who shared his frustration. Barwick offered to go back to the court and lead him in the matter. They went back, Barwick reopened the issue with the judge and it was not long before the judge was saying 'yes Sir Garfield. Of course Sir Garfield' and seemingly making the order.

Barwick was of a different mould to most of his predecessors. He was an activist and warmed to the opportunity to engage in law reform.

I am also reminded of an occasion when I was driving home through Epping. My route took me close to his home in Beecroft. Along Epping Road I was passed by a Jaguar 3.6 travelling at great speed. I recognised the driver. I revved up my Ford Consul and tried to catch up with him. It was in vain. As we drove down Carlingford Road leading to Pennant Hills Road he disappeared into the distance. My mother was always saying to me I was born in a hurry and had been in a hurry ever since. It may have applied to him as well. He travelled in the fast lane.

Barwick as attorney-general

Barwick was of a different mould to most of his predecessors. He was an activist and warmed to the opportunity to engage in law reform.

His preparation of the bill for the first Federal Matrimonial Causes Act and his management of its passage through the parliament was his most successful. When the bill was unveiled and made available for public comment it broke new ground. Divorce was no longer to be dependent on establishing of a matrimonial offence such as adultery or cruelty. The new bill confronted the fact that not all marriages were made in heaven and therefore if one had irretrievably broken down there should be a ground for terminating it. In the bill this was based on separation for a period of five years fault or no fault – a relatively modest reform having regard to the *Family Law Act 1975*. In those days it was controversial, particularly with the churches. His advocacy of the new legislation required substantial tact and effort with select groups and widespread open public meetings.

In the end, it can be said that the measure was widely applauded by most members of parliament and the wider public.

Other reforms related to phone tapping and in amendments to the Crimes Act. These were resisted strongly by the Labor Party and select groups who saw them as an invasion of civil rights.

A major area he examined was restrictive practices and competition. Aided by Professor Jack Richardson, one of his departmental officers, he surveyed relevant legislation and administration in Australia and other countries such as the United States and Canada. However, when well advanced in the preparation of draft legislation Menzies decided to reduce his workload to concentrate on external affairs. Snedden became attorney-general and ultimately introduced the Restrictive Trade Practices Act 1963. It was not as comprehensive as Barwick intended. Nevertheless his work had opened a pathway which led in time to the Trade Practices Act.

His work as chief justice

Barwick resigned from parliament on 24 April 1964 and was sworn in as chief justice of the High Court on 27 April 1964.

Time does not allow any real analysis of his contribution as chief justice. Some aspects are controversial.

There can be no question that for the foreseeable future he established the broad framework within which the High Court would do its work. From the time of federation it was expected that the High Court would ultimately have its seat at the seat of government. Early in his chief justiceship Barwick secured the agreement of the Holt and Gorton governments to construct the High Court in Canberra. It is well known that he was closely involved in the choice of site and architect and in the daily construction of the building. As attorney-general and later minister for the capital territory I had responsibilities in relation to the construction of the court building. His attention to detail is legendary. He insisted on approving the actual appearance of the bush hammering of the outer concrete of the building. Numerous tests were undertaken in his presence to get it right. Inspections of the progress of the work were frequent. On some visits we walked up what seemed endless stairways to examine the progress of the

works. When the finishing touches were undertaken at his insistence he was intent on having every detail checked. Acoustics in the main court and wall hangings were particular examples.

After the dismissal of Whitlam he came under attack from Gareth Evans, shadow attorney-general. It was payback politics and had no real substance to it. For instance, in No. 2 Court the judges could be seen from well outside the building. They were open to being assassinated by a terrorist or a crackpot with a telescopic firearm. The glass to protect them cost in excess of \$1 million. It was clearly needed.

At an administrative level Barwick insisted that the court control its own budget and administration and legislation was passed to achieve this.

He, as attorney-general, had urged the setting up of the Federal Court with wide jurisdiction ...

The opening of the court by Queen Elizabeth II in 1980, coming as it did towards the end of his chief justiceship, fulfilled his strong resolve to establish the court in Canberra as one of the three arms of government.

Other major reforms took place. The governments of the day, at his urging, took steps to lessen the workload of the court. He, as attorney-general, had urged the setting up of the Federal Court with wide jurisdiction for this purpose. This initiative was taken up by Nigel Bowen and a Superior Court Bill was introduced. Nigel was succeeded by Tom Hughes. Tom and I, then solicitor-general, took the view that much of the court's original jurisdiction should be undertaken by the state courts under s 77(iii) of the Constitution. Tom discussed the matter with both Barwick and Sir Kenneth McCraw, the NSW attorney general. In January 1972 he wrote on the matter to Ivor Greenwood, the then attorney general, who shared our view, saying that after a great deal of consideration he had come to think the best solution to be that the Supreme courts should be given jurisdiction in taxation and individual property matters.

The first legislative steps to achieve this (in that case – taxation matters) were implemented by legislation passed early in the term of the Whitlam government.

His work in court

Appearances before him as chief justice could be daunting to counsel. He adopted the view that a justice should use the oral hearing to progress his or her determination of the appeal. Counsel should be questioned, if needed, as part of the process. At times Barwick, the advocate, emerged in probing the argument. Counsel needed to be ready for it.

In a case involving s 92 *Mead v Mowbray* I intervened for the Commonwealth as solicitor-general and presented an argument which favoured the State of Tasmania and was clearly contrary to Barwick's point of view. I was heavily questioned by him. On that day I was still on my feet when the court adjourned. As he led the justices out of the court behind a partition at the rear of the bench I could hear him saying: 'That's a lot of nonsense Bobby is talking isn't it?' As it happened Tasmania won the case 4 to 3.

Later I attended court on another s 92 case with a view to intervening. I did not apply immediately at the start of the case. After lunch on the second day Barwick looked down at me in the well of the court and said: 'What are you doing here Mr Solicitor?' I explained that I might wish to seek leave to intervene. He turned to his fellow justices and said: 'Do we need to hear the Solicitor?' They shook their heads and he said: 'Well leave would be refused Mr Solicitor.' As it turned out this was the *causa causans* of s 78B of the Judiciary Act. I introduced it as attorney-general. It gave Commonwealth and state attorneys-general the right to intervene in constitutional matters.

Judgments

A combination of the position of chief justice, his intellect and personality mandated that he would be the dominant figure in the court. He was not always in the majority but he presided over the court when the foundations for the expansion of Commonwealth power were laid. For instance, the decisions of the Barwick Court in the *Concrete Pipes Case*, the *Payroll Tax Case* and the *Seas and Submerged Lands Case* were instrumental in establishing the taxation, corporation and external affairs powers as a future basis for strong involvement by the Commonwealth in the implementation of national economic and social policy in an economy already dominated by Commonwealth monetary and fiscal policy. At the same time it has to

be said that the justices who sat with him were not themselves shrinking violets but independent of mind and very good lawyers not likely to follow him blindly. He is criticised for the decisions he handed down in taxation matters but it has to be remembered that in doing so he had to be supported by sufficient other justices.

History I believe will assess his contribution as a judge to the development and exposition of legal principle and public and private law in Australia as exceptional. In all he served 16 years and nine months as chief justice.

Barwick and the Whitlam government

During his chief justiceship two matters arose which closely involved the Whitlam Government.

One of the early initiatives of that government was to institute proceedings against France to stop atmospheric nuclear testing at its Pacific test centre near Tahiti. I was solicitor-general at the time and was given the task of preparing and sharing in the presentation of the initial application for interim measures.

Because Australia did not have a member on the court it was entitled to appoint an ad hoc justice and Barwick was chosen for that role. He had of course been a former minister for external affairs. It involved his being absent from the court for lengthy periods running into months.

The hearing of the application for interim measures took place on 21 and 22 May 1973. Both the attorney-general followed by myself as solicitor-general, were to address the court.

En route to the court Lionel Murphy said to me: 'Don't be long.' I replied: 'I'll take as long as my prepared speech requires which will take as long as the court schedule allows.' It was not a good start. When we reached the robing room Murphy said: 'We should all appear without our wigs.' I said: 'Under the court's practice we are all to wear the dress we wear before our highest national court. Murphy, if you want to take off your wig you should do it at home before the High Court not here.' He appeared without his wig, the rest of us did not. The matter was later raised by Lachs, the president, with Barwick who asked him 'Is the attorney-general trying to insult us?' When Barwick tackled Murphy later Murphy asserted he had Lachs's agreement to do it (*Radical Tory* page 256). If he did

have it he would surely have mentioned it to us in the robing room.

It was only the first of the events involving Barwick during the nuclear test case. There were 15 judges and one ad hoc judge. When the hearing concluded in The Hague I discussed with Eli Lauterbach (as he then was) how he thought we had fared. He knew the court well. He went through the various members assessing what he thought were their likely attitudes and said: 'We could win by 9 to 7.' It was not unusual for me and other counsel at the end of a High Court hearing to discuss what we thought our chances were and conclude that we might win say by 6 to 1 or lose by 5 to 2 as the case may be.

When I returned to Australia Whitlam asked me what our prospects were. I told him of my discussion with Lauterbach and said: 'We think we could win by 9 to 7.'

Before the decision of the court was handed down Whitlam addressed, as I recall it, a meeting of the Law Institute in Victoria. It was a private meeting and in the course of it, in answer to a question he said, repeating what I had said, 'We think we could win by 9 to 7.'

News of what Whitlam said leaked out to the Australian and international press.

After a preliminary conference following the hearing, the court took a preliminary vote as was its practice and there was a majority in favour of Australia and arrangements were made for preparation of the judgment. The majority was 9 to 7 or thereabouts. Barwick then left for London for a short period and came back to The Hague for the approval and delivery of the judgment on 22 June 1973. In fact the majority, in the absence of Lachs and another judge was 8 to 6. When Barwick arrived he faced a very unpleasant situation and found he was suspected of having leaked the result of the vote to Whitlam. Barwick of course denied it but Gros, the French judge, was particularly suspicious. My understanding is that this was followed by a more formal enquiry which Gros demanded and which eventually cleared Barwick.

Of course he was innocent and Whitlam too was innocent. The court had not yet delivered its decision when Whitlam spoke. What was not known at the time is that I was the source of Whitlam's statement.

There can be no doubt that Barwick in the semi-political atmosphere of the International Court used his skills as an advocate and he befriended and persuaded a number of judges of the justice of Australia's case. In retrospect this case was one of the few successful initiatives of the Whitlam government. It was based in part on Barwick's success as Australia's ad hoc judge and there was every reason for Whitlam to be pleased with his efforts. But, of course, there was more to come – the dismissal by Sir John Kerr of Whitlam as prime minister.

Because of his giving advice to Kerr on the powers of the Senate in relation to supply and of the existence of a reserve power of dismissal he has been and still is heavily criticised, indeed pilloried, by, among others, Whitlam and the Labor Party. They are great haters and great lovers. They are endeavouring to perpetuate a baseless myth that the Whitlam government was the victim of a massive conspiracy either between individuals or between the forces of conservatism. Had Barwick given the contrary advice he would now be a Labor hero!

In an opinion which I had published on 16 October 1975 I expressed views that the government needed the authority of parliament to spend money and that without supply could not govern. If the prime minister was not prepared to advise him to dissolve parliament to resolve the disagreement between the two houses it was open to the governor-general to dismiss Whitlam and his ministers and seek others who would so advise.

Barwick's advice to the governor-general was that under the Constitution the Senate had equal power with the House of Representatives over money bills except the Senate could not initiate or amend it. A prime minister who could not ensure supply because the Senate failed to pass the appropriate bills must either advise a general election or resign. If being unable to secure supply he refuses to take either course the governor-general had constitutional power to dismiss him and would have the constitutional authority and duty to invite the leader of the opposition to form a caretaker government on certain conditions.

In the broad the two views coincided, though expressed in different language.

For many years it was alleged that I had been a messenger or a co-conspirator. Nothing was further

from the truth. The views I expressed were based on my own research mainly in connection with the 1974 double dissolution and my reading of such works as Evatt's *King and Dominion Governors* and Forsey's on the subject. At no stage during the 1975 events, or for that matter in relation to the 1974 events, did I discuss these matters with Barwick. Further, the views we both expressed were not only well and truly open, based on Evatt and Forsey, but I am bold to say correct, and now seem to be widely accepted.

Barwick was, of course, also heavily criticised for giving advice.

Barwick's view was that it was fundamentally a political matter and that, as in fact happened, it was quite unlikely that it would come before the court. If it had of course he would surely have not sat. This could have been of no disadvantage in the circumstance to any party seeking to put to the court views opposite to Barwick's.

He also relied in giving advice on past instances where a governor-general had sought from, and been given advice by, the chief justice.

Kerr clearly wanted to be as sure as he could that he had the requisite authority. He had sought the advice of the government's law officers. This had not been forthcoming. All he was given was a draft by the Solicitor-General Maurice Byers but with his signature crossed out by the attorney-general.

Barwick was also asked by Kerr to ascertain if Sir Anthony Mason agreed with his (Barwick's) advice. Barwick consulted Mason who said he did.

Practising and academic lawyers may argue and express views on the various issues involved and their views may differ. One thing that seems clear is that Barwick considered it was proper for him to advise the governor-general. This had happened in the past on significant matters and that the advice he gave as to the power of the Senate in relation to supply, the duties of a prime minister faced with a refusal or failure to give supply and the existence of a reserve power are now widely accepted. Further, as Sir David Smith has pointed out, the Labor Party in opposition on over 100 occasions asserted that the Senate had power to refuse supply.

The condemnation of Barwick for advising Sir John Kerr

has been grossly unfair and, I believe, heavily biased. History's judgment will have much greater balance.

Conclusion

This was undoubtedly a remarkable life. He had an amazing mind and an indomitable spirit. His enthusiasm for life and his own involvement in it was immediate and boundless. In many respects he was a pathfinder. He laid foundations and showed the way. If he believed a particular action on his part was proper and public duty required it he took it.

I do not suggest he was beyond criticism or fault or controversy. But his life, as he lived it and as I experienced it was infectious and to share a part of it made you feel you were well and truly alive. You had to be on your guard to keep up. In 1958 he took Colleen and myself on the London tube to Holborn to visit a jewellery shop. Before I knew it he was on the crowded train with Colleen and I was left stranded at the station! That's what it could be like. You sometimes had to play catch up!

The portrait of Sir Kenneth Jacobs

In early 2011 the Bar Association commissioned a portrait of Sir Kenneth Jacobs, a former president of the Court of Appeal and a justice of the High Court of Australia. Members gathered at the unveiling ceremony in the Bar Association Common Room on 10 August. The Hon Sir Anthony Mason AC KBE, the Hon TEF Hughes AO QC and Mr Cal Callaway QC spoke. The portrait is to be donated to the Supreme Court and displayed in the President's Court on Level 12 of the Law Courts Building.

The work is by Ralph Heimans, a well-known Australian portrait artist who painted the portrait of the Hon Justice Michael Kirby AC CMG and a portrait of Crown Princess Mary of Denmark, displayed at the Royal National Portrait Gallery of Denmark in Copenhagen. A number of members of the Bar Association contributed towards the cost of the portrait.

The following speech was delivered by the Hon Sir Anthony Mason AC KBE.

It is an honour to speak at this unveiling of the Bar Association's portrait of Sir Kenneth Jacobs. My brief from the organisers is to speak about what they are pleased to describe as 'Sitting with Sir Kenneth Jacobs'. I shall ignore the limitations implicit in that invitation.

Although Ken Jacobs was some six years my senior, I came to know him at the bar and ultimately we became close friends. We had both read with Ken Asprey before he took silk and we both practised in the equity jurisdiction. He was, of course, an expert in that field of law and was the foundation author of the leading text book on the law of trusts in New South Wales. He was also the Challis Lecturer in Equity 1953–1960, a position to which I succeeded on his retirement from it in 1960. He was appointed a queen's counsel in 1958, eleven years after he was admitted to the bar.

He continued to be a member of the Faculty of Law, while a judge, after his retirement as a lecturer. The history of the Law School *A Century Downtown* records a faculty meeting about 1970 which convened to consider, as it did with monotonous regularity, a motion to rescind a previous decision either to move or not to move to the main university campus. On this occasion Professor W L Morison presented the motion to rescind the decision to move to the main campus. Following his address in support of the motion, Professor Morison records what happened in these words:

At the conclusion of my address the future Sir Kenneth Jacobs summed it up by saying that he had no doubt the same points had been made centuries before in attempts to get the surgeons out of the barbers' shops.

When the rescission motion was carried, the dean said it was probably the most disastrous decision ever taken in the history of the Law School.

Ken Jacobs was certainly not a 'Bleak House' type equity lawyer of the kind that the reader encounters in Charles Dickens' famous novel of that name. He



was a creative lawyer with wide-ranging interests both within and outside the law. He was always interested in constitutional law. In 1958, four years after he was admitted to the bar, he appeared with Bruce Macfarlan (who was also then a junior) for Marcus Clark & Co Ltd, then a well-known retail store, in its challenge to the Defence Preparations (Capital Issues) Regulations which were based on an exercise of the defence power in peacetime. The Commonwealth's demurrer to the plaintiff's statement of claim was overruled, so the two juniors had a win. But as the case was left to be tried on the facts, it was not a comprehensive victory. Even so it was a considerable achievement for two junior counsel to win a major constitutional case.

In 1960 he was appointed a judge of the Supreme Court in Equity. His appointment was enthusiastically received. It was a pleasure to appear before him. He was invariably courteous and gave close attention to the evidence and the arguments. He was noted for his excellent judgments which not infrequently turned on the reason for the rule rather than the rule itself. So it was no surprise when he was appointed to the newly-established NSW Court of Appeal.

One of his achievements after he was appointed a judge was that he was nominated as the judge of a Constitutional Court established for the island of Cyprus.





The old antagonism between the Greek and the Turkish communities in Cyprus had once again welled up – if, indeed, it had ever abated – and the establishment of the new court was thought to be a means of resolving or alleviating the tension. Unfortunately – or perhaps fortunately – before Ken could take up the position, Turkey invaded Cyprus and took over the government of the northern part of the island. So a martial solution avoided the need for a judicial solution. I looked in *Who's Who* for a reference to his Cyprus appointment but there was none. His entry in that volume is sparse and typical of his modesty.

He achieved fame by his celebrated comment on the proposed *Supreme Court Act 1970* prepared by the Law Reform Commission. The Act was designed to give NSW a judicature system to replace this state's old common law/equity jurisdictional divide which had provoked lawyers in other jurisdictions to regard NSW as a legal museum. His deflating comment was that the Supreme Court Act was 'a great leap forward to 1870'.

My first experience as a judge was sitting with him on the NSW Court of Appeal and my friendship with him gave me a confidence I would not otherwise have had for he was most generous in making available his experience in working with the other members of the court. He took me to a dinner the first day I sat in the Court of Appeal and I well remember the evening as I am sure he does. In the well-known case of *Barton v Armstrong* his dissenting judgment¹ in the Court



of Appeal was upheld by the Privy Council majority decision.² In his judgment there is a reference to a passage in *Bracton* which, it is believed, had never been judicially cited before. It is understood that the English translation in the judgment was made by the judge himself.

He was in the Court of Appeal, as he was later in the High Court, always prepared to discuss his views on the arguments presented so long as there was a prospect of an instructive exchange of views. That is not always an ever-present prospect in courts of appeal of which



I have been a member. My recollection is that both in the Court of Appeal and in the High Court he did not intervene excessively in the argument and confined himself to asking questions to assist his thinking about the issues, the particular difficulties that were troubling him.

When president of the Court of Appeal he was appointed to the High Court in 1974. Due to severe ill-health he retired from the High Court in 1979, long before the statutory retirement age. In the five years he was on the court he made a distinctive contribution to the work of the court, as he had earlier done in the Court of Appeal. Had he been able to serve his full term on the court, he would have achieved a reputation as one of the outstanding justices of that court.

I would not presume to evaluate his qualities as a judge, except to say that he had a strong sense of the continuity of the law. To the extent that there was movement in judge-made law, it moved along the line of a continuum. That meant that binding precedent must be respected. He was certainly not, however, a lawyer of whom it could be said that precedent was an attitude of mind. While he appreciated the great value of certainty in matters of property and commerce, he had a close eye for justice in the shaping and re-shaping of the law on doubtful points, particularly on questions outside those areas of the law.

His concern was with the justice of the applicable rule, not with unruly or instant justice. The outcome in the

particular case must be consistent with the justice of the rule so that the outcome in the particular case fitted the general framework of the law and did not damage it. In all his work, his extensive knowledge and interests played an imperceptible part. He was an avid reader, keenly interested in history and the classics, as his MA degree in ancient history, for which he studied after he retired from the High Court, attests.

When he left the court, I greatly missed the interesting conversations I had with him, not only on matters of law, but about public affairs, literature, history and personalities. They were conversations made all the more illuminating by his distinctive learning, humanity and understanding.

And, last but not least, of course, he was a keen gardener, though he left no trace of it in his judgments. But his garden at Crook's Lane Corner near Marlborough in Wiltshire was a tribute to his artistry and vision as a gardener. There, apart from gardening, he enjoyed book binding. It is a pity he is not with us this evening; he would have enjoyed the occasion and all the more so as so many of his relatives and friends are here this evening.

Endnotes

1. [1973] 2 NSWLR 598.
2. [1976] AC 104.

Tutors' and Readers' Dinner

The annual Tutors' and Readers' Dinner was held at Bel Mondo on 22 July 2011.



Below: Hilbert Chiu and Claire Latham



Louise Jardim and Sarah Talbert



L to R: Priscilla Blackadder, Samantha King, Jacqueline Sandfords and Christian Dimitriades



Mathew Sealey and Peter Bruckner



Above: Kate Williams and Martin Smith



Left, L to R: Jeanette Richards, Rashelle Seiden, Hagen Sewell, Rachel Francois, Sanjay Warde

Clerks' Annual Conference Dinner

The inaugural Barristers' Clerks Association Conference was held on 7 October. The conference dinner was held in the Establishment Ballroom.



L to R: Steven Ipp, Margaret Ashford, Patrick Larkin and Karena Viglianti



L to R: Paul Daley, Chief Justice French and Nick Tiffen



L to R: Priscilla Blackadder, Susan Worth and Andrew Laughlin



L to R: Paul Daley, Bob Rymer, Chris Hoy SC and Billy Telfer



L to R: Tova Gordon, Michael Bennett, Simon Fitzpatrick, Joshua Knackstredt



L to R: Casey Shether, Daniel Moujalli, Angela Noakes, Sharon Newton and Richard Magney



Bellanto QC and Trish Bellanto

Launch of oral history projects

The Bar Association's Oral History Project and 'Women Practising at the NSW Bar: the years to 1975' were launched at a function in the Common Room on 1 September 2011.



Left: Cecily Backhouse (second from left) and her friends

Below, L to R: Julia Baird, the Hon John Slattery AO QC, Derek Cassidy QC, Chester Porter QC, Elizabeth Evatt AC, Janet Coombs AM, Geoff Lindsay SC and Justice Beazley



Right photo, R to L: Gabrielle O'Connor, Carmel Marlow and her daughter



Chester Porter QC and Derek Cassidy QC



Above: Elizabeth Evatt AC and Janet Coombs AM

Left: Chief Justice Tom Bathurst and the Hon Justice Margaret Beazley



Juliette Brodsky, researcher and producer of the oral history multimedia presentations



Left: the Hon Justice Michael Slattery and his father, the Hon John Slattery AO QC

Charity Dinner for the Martin Place homeless

On 12 October 2011 a fundraising dinner for the Martin Place homeless was held at The Pavillion Restaurant in Sydney's Domain. A total of \$24,000 was raised for the Matthew Talbot Homeless Service, a special project of the Saint Vincent de Paul Society.



Left: Jane Needham SC, Julie McDonald (St Vincent de Paul Society), Bernie Coles QC, Attorney General Greg Smith SC

Below: The AG with the band Blue Groove



L to R: Geoffrey Denman and Rhonda Newman



Left: David Ash in fine form



L to R: Caroline Hickey, Ruth Heazelwood, Chrissa Loukas (standing) and Helen Cox



L to R: Maria Cinque Attorney General Greg Smith SC, Mark Ierace SC, Stephen Hanley SC and Peter Hastings QC



Robin McGrath and Jane Needham SC



Melanie Williams, Rod Mater, Elizabeth Picker, Virginia Lydiard

Doing their bit: barristers in the Second World War

This is the first of a two-part series by Tony Cuneen. The whole work is an ongoing project by the author for the Francis Forbes Society for Australian Legal History. A symposium, sponsored by this society, the Bar Association and the University of Technology and Science on Historical Connections between Lawyers and Australian Defence Forces is planned for 24 March 2012. The symposium will to be opened by Chief Justice Bathurst, and will include speakers from the Australian legal community, academia and the military. Comments and further material are welcome. Please contact the author at acunneen@bigpond.net.au

Introduction¹

Over three hundred New South Wales barristers saw service in the Second World War.² A few have had their memoirs published or had their experiences mentioned in biographical articles.³ Often the reference to their military service occurs as an isolated statement in an obituary or similar account, presented as a footnote to their professional lives. Judge and war veteran John (Gaffer) Flood Nagle⁴ believed that lawyers' experiences in the war were worthy of a book and collected a file of letters from other veterans, but the project was never completed.⁵ Most participants are now dead. This series is a consolidation and memorialisation.

The New South Wales Bar contributed men to the war effort in excess of the normal percentage of volunteers from across the country. Of the 148 people (the vast majority men) admitted to the bar after 1930, 92 enlisted in the armed services. Some years were particularly strongly represented. Seventeen out of the 20 men admitted to the bar in 1938 enlisted, as did six out of seven barristers admitted in 1937. In 1943 at least a third of all barristers were on war related service. By war's end, 18 barristers were dead: killed in action, died of illness, or victim of accident.

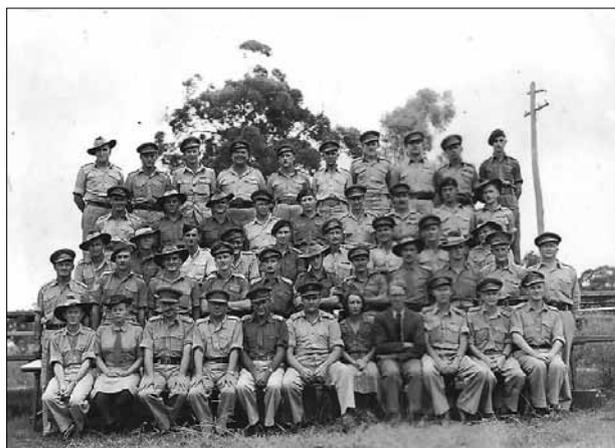
Two hundred ex-servicemen were admitted to the bar after the war. Of the 300 barristers who had war service, at least 117 became judges. Others went into politics, the most prominent being Prime Minister Gough Whitlam QC. Sir John Kerr AK, GCMG, GCVO, QC was a chief justice of New South Wales and a governor-general.

Barristers enlisted in the army, navy or Air force and served in a variety of places and capacities during the war. They saw action in the close jungle combat of New Guinea, they experienced the privations of the Burma Railway and Changi Prisoner of War Camp, they took part in the bombing raids over Germany, and they sailed on the North Atlantic convoys.

At one point it was the proud claim of Sydney University's Law School that its graduates and students

were represented in virtually every unit of the Australian Armed Forces. At the height of the conflict the members of the bar were part of a legal diaspora scattered across every theatre and aspect of the war.

Others maintained the tradition of supporting the conflict through their work in war related industries and charities. There was real sense of pride in the bar that its members were, in the words of the time, 'doing their bit'. Moreover, the war would prove a watershed for the law itself: war related issues shaped both the nature of much litigation and the people who lived through the conflict.



Lt Col John Kerr, later CJ and governor-general, front row, centre, 1945. Photo: courtesy Des Ward

Enlistment

Whatever glamour war service may have had in the early years of the Federation it had well and truly evaporated in the trenches of the Western Front and on the slopes of Gallipoli. In the 1930s, Great War veterans were dying in their thousands at an average age of 45 years, when the average for non-veterans was 60. The author's grandmother kept a diary of her life covering both conflicts, and when the Second World War broke out in 1939 she scrawled in large letters across a whole page: 'Dear God – Not Again!'

It took a committed person to forgo a prosperous professional life and enlist for frontline service. However, the generation of barristers who did so would eschew any overly idealistic articulation of heroic motives. Their usual responses, when asked to articulate their motives, were simply to say that 'everyone was doing it' or 'it was the thing to do'. Whatever their true reasons, the Sydney Bar supplied a substantial proportion of recruits in relation to their number, just as they had done for the last Great War, when at least 39 barristers enlisted and ten were killed in action.

The patriotic urge to enlist by existing members of the bar affected some men who could have justifiably kept out of the services. Henry T E (Bernie) Holt⁶ had served in the First World War and was appointed a judge of the District Court in August 1939. When war broke out a month after his appointment he answered a call for ex-gunner officers to attend a refresher course. Holt promptly attended the course, held at the racetrack at Warwick Farm. The experience of a trainee soldier was a much different world from that of a judge. Accommodation was in the horse stalls, which he no doubt accepted as part of the deal. He was appointed a captain in the Citizen Military Forces (CMF) but resumed his judicial duties and assisted in what was euphemistically termed 'certain intelligence work'.⁷ Like so many lawyers the combination of his military and legal skills led him into some of the more obscure but significant aspects of the war effort.

Another District Court judge to offer himself for service was First World War veteran Bertie Vandeleur (Baron) Stacy. He was too old for active service and was appointed the Commanding Officer of the Sydney University Regiment during the war. Other barristers who were rejoining or continuing reserve service after the First World War included Angus Leslie, Merlin Loxton MC,⁸ Cyril Bartholomew Lynch and William Ballantyne (Rocket) Simpson.⁹

Cyril Bartholomew Lynch had been admitted to the bar in 1938 after working as a teacher. He had been seriously wounded twice in the First World War. He put his age down from the correct 45 years to 38 and enlisted in July 1940. He would have a hard time of it.

Some barristers insisted on enlisting despite physical disability. Frank Carter Stephen¹⁰ had just been admitted in 1938. He had a congenital deformity of one foot which severely restricted his movement



Barrister James (Ted) O'Toole. Photo: courtesy of Her Honour Judge Margaret O'Toole.

such that he had to employ a runner when playing cricket. Although there could not have possibly been any obligation on him to enlist he nevertheless joined the Australian Army Legal Department, and rose with that Department until he became assistant to the judge advocate general from 1942 to 1944 with the rank of major. He later joined the AIF. H J H Henchman commented that 'If ever there was a man on whom there was no obligation to go to fight it was this man and if ever there was a man who realised it was his duty to his country it was Frank Carter Stephen.'¹¹

Another who overcame a physical limitation was Frederick George (Funnel Web) Myers.¹² 'One of his notable characteristics was the possession of physical courage and powers of endurance. He had a disability which required him to wear a cumbersome surgical boot. This did not prevent him from engaging in military service in World War II.' Myers was well known for having gone over the Kokoda Track despite his disability.¹³

Other barristers to enlist were keeping up family

traditions. Michael Helsham,¹⁴ Adrian Curlewis,¹⁵ John Bruxner,¹⁶ Laurence Street¹⁷ and Tom Hughes¹⁸ came from families with extensive military and legal connections. Some had relatives who had been lost in the First World War. Laurence Street was named after his uncle who fell in action during the early days at Gallipoli. John Bruxner's father had been awarded the DSO in the First World War.

Tom Hughes's father, Geoffrey Hughes MC AFC had served in the First World War and would serve again in the Second World War. Tom's uncle Roger died as a result of wounds suffered while tending a patient in the First World War.¹⁹

A number of barristers had military reserve experience, with the Sydney University Regiment a particularly strong source of full time recruits. William John Victor Windeyer (always Victor)²⁰ and David Selby²¹ had their initial experience of the military in this unit. Others such as Alan Victor Maxwell²² had commenced their military training in school – in his case he had been a cadet lieutenant at Shore, a school with a strong tradition of military service among its ex-students.

Of those who were not at the bar when war broke out 17-year-old George Buckworth was a great example of just how keen some young men were to enlist. He was a good four years underage when he enlisted.

Sydney University Law School Comforts Fund

The Sydney legal community gave its support to the war and to its members who enlisted through a variety of schemes and projects. The emerging Sydney University Law School had displayed great enthusiasm for the First World War and there was little change in the second. Again the Law School was a central clearing house of support for the lawyers who were away on active service. The Sydney University Law School Comforts Fund was directly concerned for any Law School students and graduates who were in the services. The fund was founded at a meeting at the Law School in Phillip Street on 10 July 1940.

The first patrons of the Law School Comforts Fund were Sir John Peden and the chief justice, Sir Frederick Jordan. Sir Frederick was also lieutenant governor during the war. His associate John Slattery²³ has recalled a time of rationing and administrative simplicity far different from today.²⁴ Jordan travelled to and from work by

tram and put in long hard hours. He was very keen to ensure that people knew 'what they were meant to do' under the intrusive war regulations. There was a great expansion of litigation during the war, much of it related to these regulations.²⁵

The first president of the Law School Comforts Fund was Sybil Greenwell (nee Morrison), one of the earliest woman barristers in New South Wales. An influential group of silks were vice-presidents. One of the stalwart operatives was the talented Jean Mullin (nee Malor), who had graduated with first class honours in law but never practised, instead devoting herself to a long and successful career as an editor. Another key supporter was Margaret Dalrymple-Hay, the clerk to the Faculty of Law and the Law School Librarian during the war. She took a direct interest in the careers of the Law School students and graduates. The Fund was supported by virtually the entire legal profession.

The aim of the Comforts Fund was to 'keep legal men and students in the services in touch with the Law School and the profession, and with each other; and to send them benefits not obtained through other sources.' Any legal people were to be included in the list of the fund's beneficiaries. While there were occasional parcels of delicacies the 'main object of the fund was to keep men on the roll regularly supplied with reading matter.' Books and other reading material were in short supply at the time, especially on active service, and they were invaluable to relieve the tedium of long periods away from home and out of the normal flow of life.

Lawyers kept in touch with professional and social news via a quarterly magazine called *The Legal Digest*. This typed script of around 25 pages was a gossipy compilation of news of lawyers on active service, significant court cases, appointments, the latest decisions and family details concerning the profession. It was compiled under the guidance of Margaret Dalrymple-Hay and contained a mixture of general, and sometimes cheeky, references to the social and professional lives of lawyers. There were plenty of references to mess parties, jokes and gentle mockery of those in the uniform and in practice at home.

John Bruxner said that the *Digest* was particularly appealing to 'anyone wanting to wallow in sex, crime, scandal, gross breaches of censorship and security regulations, defamation and all the more typical

outpourings of yellow journalism.²⁶ His lighthearted hyperbole captures the tone exactly, although there were sombre references to those who had fallen in action. Practising barristers offered summaries of significant legislation and court life for *The Legal Digest* while others entertained visiting service personnel.

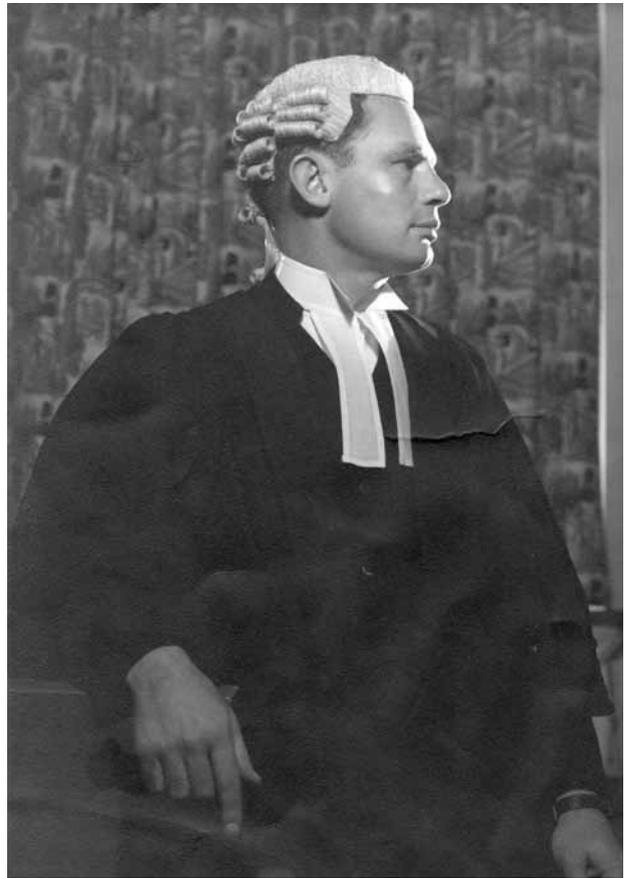
Sydney University Law School went to great lengths to assist their students during the war. Staff took a great personal interest in students and graduates. Students who wished to continue their studies while on active service were sent lecture notes and digests of cases and were to be able to sit examinations under appropriate supervision in camp. The extra effort was perhaps made easier by the decreasing number of students in the Law School during the war.

Unfortunately the goodwill generated by support for the Fund did not prevent an ugly dispute developing over the appointment of two professors to the Law School: the new Dean Professor James Williams and Professor Julius Stone were subject to some criticism as it was thought in some quarters that their appointment should have been delayed until after the war to give any servicemen who wanted to apply the chance to do so. The dispute involved a number of unfortunate confrontations between the university senate, the students and the faculty, and was never satisfactorily resolved.

There were various attempts by members of the bar to minimise the damage to the professional lives of barristers who were enlisted. Some of the schemes were more practical than others. One idea proposed by Richard Windeyer KC in February 1942 was a scheme where every barrister would donate sixpence in every guinea earned to a fund to maintain the income of barristers on active service. In addition there was a scheme where barristers would work for half fees, sharing with those on active service. These schemes were well meaning but did not receive the required support to become accepted practice.²⁷

Barristers in the Middle East theatre

The first major operational theatre was in the Middle East. A well-known barrister in the service was Lieutenant Colonel (later Brigadier) Victor Windeyer. At one stage Windeyer was commanding the 2/48 Battalion at Tobruk. He was an energetic and brave



Des Merkel, by Max Dupain, courtesy Merkel family

leader who often went forward into the front line positions. His courage and skill were recognised by the awarding of the Distinguished Service Order (DSO).

One of Windeyer's officers during the siege was Lieutenant David W Barton Maughan,²⁸ another Sydney barrister. Maughan was lucky to survive the battles including one shell burst on his battalion headquarters which killed a number of other officers. Barrister Robert (Rex) Green²⁹ was not so lucky. He was killed in action at Tobruk on 27 October 1942 serving with the 2/17 Battalion. At the time the 2/17 Battalion was commanded by Lieutenant Colonel John Wilson Crawford of the firm Ellison, Rich and Crawford. Crawford had commanded the Sydney University Regiment immediately prior to Windeyer. Other men later admitted to the bar who served at Tobruk included Philip Woodhill,³⁰ Ernest Byron³¹ and Desmond Merkel who was there with the 2/13 Battalion, the same unit as Barton Maughan.

Merkel wrote of his experiences there:³²

The dust-choked sangars, the heat, flies and dysentery, weevil-studded bread and salt-fouled water, oily bully-beef and greasy margarine. The acrid smell of exploding shells and their horrifying scream; the murderous rattle of strafing aircraft, the whispering menace of mortars. The long cold nights on patrol, the savage attacks beaten back. The deadly hiss of splinters and the calls for stretcher bearers in the dark. The longing for cool fresh water as the burning months dragged on. All these faced and endured till the siege was lifted . . .

Greece was another area of operation in the Mediterranean. The ill-fated Greek campaign found a number of barristers struggling to escape with their lives. One, Charles Walker, aged 39, was killed in action on 12 April 1941 while serving with 1 Anti Tank Regiment. When Greece fell to the German advance in April 1941 a number of Australian units were cut off and had close escapes. Major Philip James Woodhill had survived Libya but was one of the thousands of Australians trapped on the mainland. He was a close associate of Victor Windeyer; they had been in the Sydney University Regiment together as well as the same chambers in 184 Phillip Street. Greece was a desperate time and Woodhill combined with another officer, Captain Vail, to lead hundreds of men to safety on the coast. It was an arduous experience. Food shortages, long forced marches and constant attack from enemy planes and troops had a harsh effect on Woodhill's health. The normally ebullient good natured man was reported to be 'a shell of his former self' after the experience.³³ He had a brief recuperation in Egypt before rejoining his unit in the Lebanon and Syria. He was withdrawn from front line duty and made the Legal Staff Officer (LSO).

Also serving in Greece was Woodhill's close friend and fellow barrister, Alexander (Alec) Sheppard.³⁴ Sheppard too was active in trying to hold together the fragmented Australian troops. He worked hard to maintain a supply line using donkeys to cover the rough tracks through the mountains, always at risk of ambush from the enemy patrols. He later supervised the embarkation of troops from the beach near Marathon. Sheppard was awarded the Military Cross for his work in both these areas.

The position of LSO which Philip Woodhill filled was established in the Headquarters in Palestine in March

1941. The appointment of a professional lawyer to the role had a 'healthy effect' on the legal aspect of running an army. 'Court martial applications [were] better prepared, summaries contain[ed] less inadmissible evidence and courts of inquiry [were] better conducted.'³⁵ In addition the LSO dealt with the increasing number of compensation claims made by the local population for traffic accidents, assaults, and malicious damage.

The lack of clear guidelines did not help the LSO who had to balance unsupported claims with the need to keep the local population politically aligned with the Allied forces. David Benjamin advised that it was generally considered wise to uphold a claim rather than having it thrown out of court on a 'legal technicality'. To help in their quest for 'Justice', they imported two books, *Cockle on Evidence* and *Roscoe on Criminal Evidence*. The major cases they tried included the usual Absent Without Leave, Robbery with Violence and False Representation.³⁶

Captain T A M (Mick) Boulter³⁷ was another Sydney barrister caught in Greece. He was born in Adelaide and had been a solicitor in Melbourne but was admitted to the Sydney Bar in 1939. He was captured as a corporal at Kalamata on 29 April 1942 and taken to a disease ridden prisoner of war camp at Corinth where he was put with around 10,000 British prisoners. On 5 June the prisoners were marched out for the first stage of their transfer to camps in Germany. His experiences were recorded in the Official History of the campaign:³⁸

Boulter escaped on 7th June by jumping into some low scrub beside the road and lying there until dark. That evening he obtained clothing from a Greek and for some days worked in the fields in return for food and shelter. Thence he was sent to a remote and self-contained mountain village on Mount Oiti near Lamia where he was joined by two other Australians, a British pilot, and a Pole. They decided to make their way to Euboea and thence from island to island to Turkey. They left the friendly villagers, crossed the railway and main road, climbed the Kallidromon mountains and reached the coast where, on 22nd June, a fisherman ferried them to Euboea. Here, among Greeks they listened to the BBC broadcasting the news that Germany had invaded Russia. The Greeks made the fugitives so comfortable that all but Boulter decided to remain where they were. He walked through the hills to the east coast of Euboea and then along it seeking in vain for a passage out. He could now speak 'quite a little Greek', and he eventually reached a monastery, where (as always

at the monasteries) the priests treated the fugitive with great sympathy, and the bishop arranged with a fisherman to take him to Skyros, first stage in the escape of many Allied soldiers. He walked across the island to Skyros town, and there met a Greek who had already been paid by the Consul at Smyrna for ferrying escapers thither. They reached Smyrna on 25th July after three days at sea, and sailed to Haifa on a Greek tramp about ten days later.

Boulter was something of a celebrity after his return to the Allied forces and his daring story was written up in the press.

Not all the barristers who served in the Mediterranean were in the army. William Gordon Kloster, was a pilot with No 3 Squadron flying Tomahawks against the Luftwaffe. On 22/11/41 at 1540 a total of 23 Tomahawks took off to sweep over the Tobruk-El Adem area and met over twenty Messerschmitt 109s southeast of El Adem. During an hour long dogfight, the Germans lost six 109s. Six Curtiss Tomahawk IIBs of 3 Squadron were lost. William Kloster was one of two men taken prisoner. Kloster had previously flown out of Palestine and in the Syrian Campaign. He survived the war as a prisoner in Germany.

Other barristers to serve in the Middle East including Peter Leslie,³⁹ who learnt sufficient Arabic to translate conversations later in court,⁴⁰ William (Bill) Ash,⁴¹ Bertram (Bertie) Wright, William Prentice⁴² and John Flood Nagle. John Nagle saw action as a gunner with 2/5 Field Regiment then later as a paratrooper in the South West Pacific. His younger brother, Val, a solicitor, was killed in action in New Guinea. Nagle was pleased to serve with his good friend Leycester (Shagger) Meares⁴³ in the Middle East as well as New Guinea.

Chance meetings between lawyers in foreign parts were always welcome and often mentioned in letters to family or to *The Legal Digest*. These enthusiastic reports suggest that the bar community was close knit and supportive of its members, despite the sometimes combative nature of the professional side of their lives. In 1941 Edward St John⁴⁴ was on his way to a court martial in the Middle East when he was hailed by Bill Ash, who was on his way to join the 2/13 Battalion. That unit was

commanded at the time by Sydney barrister Lieutenant Colonel Turner. Ash served with the unit throughout the Middle East and New Guinea campaigns.

A number of barristers served in the legal section of the army in the Middle East. At one point the Sydney barristers who were working together in Tel Aviv included Brigadier William Simpson, Rex Chambers,⁴⁵ Allen Eastman, Edward St John, David Benjamin and John M Hammond. Russell (Dooley) Le Gay Brereton⁴⁶ was also working with Brigadier Simpson. Brereton wrote that he endured sandstorms so fierce that he had to take a shovel to bed to dig himself out in the morning. He also playfully speculated on his power as aide de camp to General Morshead. Brereton essayed lightheartedly about approaching Lieutenant Colonel Rex Chambers and asking if it was possible to go absent without leave, sit on his own court martial, find himself guilty then send himself home.⁴⁷

Stories of windstorms and other natural hazards, boozy encounters with members of the English Bar and other gossip were duly reported in the pages of the *Legal Digest*. Other barristers were on active service in more remote areas. William Perrignon⁴⁸ who was serving with the Australian Survey Regiment, wrote to the *Digest* of having to endure 'a howling gale and rain pouring all over the floor'⁴⁹ in the Lebanese mountains.



Captain Russell Brereton, 9th Division Legal Branch (middle of the picture), seen here later in the war during an adjournment of a war crimes military court on Labuan Island, North Borneo in December 1945. Photo: Australian War Memorial, Ref: 122773.

These men, who had been at the bar before the war broke out, were part of what Sheppard called 'the legal circle in the AIF'.⁵⁰ The network extended across all theatres of war. It went into operation when on 26 November 1941 in Beirut, Philip Woodhill died tragically from food poisoning. He had only a few hours earlier seen his friend Sheppard on the road to Baalbek. The legal community in the Middle East came together for the funeral in Beirut and included the Melbourne king's counsel Brigadier Herring, as well as Lieutenant Colonel Victor Windeyer and the Sydney solicitor Captain Fred Chilton. News of Woodhill's death travelled to New Guinea where his friend and fellow barrister David Selby was serving. Selby had been best man at Woodhill's wedding and was distraught over the death of his friend. They had enjoyed many good times together. The legal community across the country mourned Woodhill's death as indicated by the many letters to his wife, Joan. Letters of sympathy came from Sir John Peden of the Sydney University Law School, Brigadier William Ballantyne Simpson, Percy Spender KC MP, Lieutenant Colonel JP Fry of the Queensland Bar and assistant judge advocate general at the time, David Selby and Major General Herring KC. The bar was conscious of its own and the death of any member was keenly felt by the others. He was known as being very good company, who enjoyed calling out loudly 'Round me men, they're picking off the officers' when in his cups.

The battle at El Alamein late in 1942 marked one of the turning points of the war. [Now] Brigadier Victor Windeyer again displayed his great skill and aggressive spirit in action, for which he was awarded a bar to his DSO. Barton Maughan was awarded the Military Cross for his 'enterprise, courage and coolness' during the battle. Russell Le Gay Brereton viewed the battle from the high position of aide de camp to General Morshead and recalled the spectacle of the armies moving about the plains and the grandeur of the flares, tracers and the 'unearthly peace' after 'twelve days of bedlam'.⁵¹ When Lieutenant Colonel Turner was killed at El Alamein, he was 33.

Singapore and Malaya 1942

The next theatre to absorb the best of the legal profession was in the Far East fighting the Japanese. The Australian defence plan centred on the 'Singapore Strategy' and the mystique of the British Empire and

the English Navy. The idea of Singapore as some kind of impregnable bulwark against any threat had mesmerised Australia against the looming threat of the Japanese expansion. It was not supported by military reality. The first blow fell on Australian troops in the Malay Peninsula, a military posting which had not been popular as it was considered too far away from any real action. Everyone involved in defending the Malay Peninsula was shocked by the speed of the Japanese advance in early 1942.

After a series of defeats on the mainland the Allied forces withdrew to Singapore Island. Two barristers lost their lives in its defence, Major Richard Keegan⁵² on 11 February and Thomas Vincent MC on 9 February 1942. Keegan was severely wounded and had to be left behind when his unit was overwhelmed by a Japanese attack near Bukit Timah area on the southern half of the island. He had been involved in virtually non-stop fighting for weeks. Also with him in the 2/19 Battalion was Major Thomas Vincent. He had been admitted to the bar on the same day as Keegan, 15 February 1934. They had commanded adjacent companies in the battalion throughout the campaign. Vincent was missing, presumed killed 9 February in the Tengah area. He had been involved in an extraordinary series of action including travelling through enemy lines to round up stragglers and bring them over 30 miles back through the jungles and the Japanese to their own lines. His company held the last rearguard action over the Johore Causeway before its destruction.⁵³ As a result of his actions he was awarded the Military Cross after the fall of Singapore, but details of his death were not established until much later. The medal was presented to his 11 year old son, Anthony, at Government House in 1946.

After the collapse of resistance on the Malay Peninsula troops were penned into Singapore and on 11 February 1942 the Japanese flew over and dropped small boxes carrying the terms of surrender.⁵⁴ One of these boxes was taken to the commander by a young and grimy Captain Adrian Curlewis⁵⁵ of Mosman, a barrister in a previous life. The surrender would take him into three years of harsh captivity in which he would prove himself to be a genuine leader many times over.⁵⁶ Curlewis' harbourside home at Mosman, Avenel, was evacuated at the same time as he went into captivity. In addition, Phillip Woodhill's traumatised family moved to Bowral,

partly for safety and partly to deal with the grief. Enlistments in the armed forces increased across the community in response to the ever increasing threat.

Thousands of Australians were captured in Singapore and passed into Changi prison. Adrian Curlewis had the opportunity to accompany General Bennett in his controversial escape to Australia. Curlewis said of that time:⁵⁷

I didn't quite know if was an order or a request that I should join (Bennett's) party to do some swimming through mangroves to get a boat. Then when I went away from the original invitation I started to think it over: would the men feel that they had been let down by the officers? I made up my mind then that I wouldn't go.

A number of other barristers endured the privations of being prisoners of the Japanese including Captain Phillip Head,⁵⁸ Richard WL Austin, First World War veteran Cyril B Lynch and James P Lynch (no relation to Cyril). Another prisoner was a young articled clerk, later Sir David Griffin, barrister and Lord Mayor of Sydney.⁵⁹

Curlewis was one of the leaders in Changi POW camp. Command became problematic after the surrender of so many troops as the usual structures and supports for the military hierarchy fell away. Only naturally capable leaders were able to earn the respect of the troops in the new situation. Apart from the brutal conditions one of the worst enemies of the prisoners was boredom and the overwhelming sense of the lack of purpose in their lives. One way to combat these debilitating mental handicaps was for there to be a course conducted in which the men could learn some sort of skill. Adrian Curlewis was one of the founders of 'Changi University', set up just four days after the capitulation. He was nominated as Dean of the Faculty of Law and taught subjects in that field as well as Malay languages and motor mechanics. The courses had to be kept secret from the Japanese and where possible the instructors used smuggled text books.⁶⁰ His most popular lecture was entitled the 'ABC of Crime' in which he took a letter of the alphabet and 'explained in it legal terms and related an interesting or amusing incident that he recalled. A was for arson, B was for bribery . . .' and so on.⁶¹ He also conducted a course in surf lifesaving.⁶²

Curlewis also worked on the Division War Diary for the Malayan Campaign. He interviewed many officers to compile an account of the disastrous defeat. The task

was most onerous and not without controversy in the claustrophobic atmosphere of a POW camp. The traumatised prisoners were struggling to understand the reasons for their predicament and Curlewis was in a difficult position. He was right when he said that 'some hard words will appear when the whole story (of the campaign) is written.'⁶³ The activity went some way towards giving purpose to their incarceration. In May 1942 he wrote in his diary: 'God, what a waste of life this is.'⁶⁴

Adrian Curlewis's diaries indicate that he took some comfort that he shared this time as a POW with his close friend from the bar, Phillip Head. They were under the command of Lieutenant Colonel (Sir) Frederick 'Black Jack' Galleghan in Changi. In a discussion with Galleghan one evening Phillip Head pointed out that when they were back in Sydney they would have to raise their hats to judges in the street. Galleghan thought this was 'bloody nonsense'. Head insisted it was the proper etiquette and when he was back in Sydney Galleghan checked and discovered that Head was right. So after Adrian Curlewis was appointed to the bench in 1948 he happened to meet his old commanding officer, Galleghan, on the Mosman ferry wharf one evening. Galleghan immediately raised his hat in deference to Curlewis' superior status and said, 'Good evening, sir.'⁶⁵

Phillip Head was another barrister who was a very significant figure in the POW camp. He was created an MBE (Military Division) for his 'exemplary performance of his duties. His citation reads:⁶⁶

The Duties called for tact, efficiency and courage, particularly when dealing with Japanese and Major Head exhibited those qualities in a marked degree. He always endeavoured to assist his fellow prisoners of war and his continued unselfish efforts helped to ameliorate their conditions. His continuous and outstanding devotion to duty and loyalty under very difficult circumstances and the impartial manner in which he performed those duties earned him the respect of prisoners of war of all nationalities in Singapore.

The other barristers who were prisoners had their own adventures. David Griffin noticed that there were some young European children in the camp and he wrote a book for them, *The Happiness Box*, which was illustrated by his commanding officer. The Japanese commander suspected it was a really a secret code and it was

saved from destruction by being buried. It was later recovered and published in Australia. Cyril Lynch had a son who joined the RAAF while his father was a prisoner in Changi. The son was shot down over Germany. He became a prisoner of the Germans. This is believed to be the only father and son POW combination from Australia.

Conditions in Changi were bad enough but for those men selected to go to the Burma Railway or other destinations life became hell on earth. Ironically many of the prisoners chosen to leave Changi were the healthy ones and the opportunity to leave the crowded gaol was often greeted with some relief at the time. After all, it was believed that nothing could be worse than Changi.⁶⁷ The men were told they would be moved to new and pleasant surroundings and that gramophones would be issued on their arrival at the Burma–Thailand Railway. The reality was far different.

Adrian Curlewis was transferred by train to the Burma–Thailand Railway as part of F Force in April 1943. His report on this experience, written in collaboration with another officer, Lieutenant Colonel Charles Kappe, was one of the sources for the *Official History* of that dark time in Australian history. It is impossible to do justice to the horrific conditions in which Curlewis survived and proved himself. As an officer he made representations to the Japanese regarding the well-being and safety of the POWs. This was a most dangerous business as the Japanese and Korean guards considered any hesitation in an explanation as an indication of deception and the Australian involved could be punished regardless of rank.⁶⁸ In addition Curlewis suffered from the usual tropical illnesses of malaria, beri-beri, ulcers and the like. One brief entry in his diary on 18 October 1943 read ‘Stone-breaking and starving’.⁶⁹ It is a good summary of what he endured.

The Sydney barrister James P Lynch was also transferred to the Burma–Thailand Railway. He kept a graphic diary of his time in captivity.⁷⁰ His account included descriptions of the regular beatings and general privations suffered by the prisoners. He endured long forced marches to the railway, and wrote that he had ‘a dazed recollection of trudging along with red hot irons in the muscles of ... calves and thighs and the packs feeling ten times their real weight’. On occasion he was asked to apply his legal training to the harsh



The Commonwealth War Graves Commission Cemetery at Thanbyuzayat, Myanmar (Burma). Photo: Courtesy of Chris Winslow.

conditions in captivity. Eight men were to be executed after an unsuccessful escape from the railway. Lynch was called upon to frame ‘a letter of protest based on international law and humanity’. It did not change the situation and they were all shot.

Conditions were generally appalling. He wrote of the ‘blotting, blinding rain that soaks through in a few seconds – rain that stings and despite the 15 degrees north latitude, freezes’. The men’s health deteriorated and there were outbreaks of malaria, smallpox and all the related tropical diseases. Lynch eventually succumbed to harsh conditions and died of cerebral malaria on 26 November 1943. He is now buried at Thanbyuzayat War Cemetery, Myanmar (Burma).⁷¹

Barristers in the navy

Barristers who served with the Australian Navy included Laurence Street; Harold Glass;⁷² George Amsberg;⁷³ Howard Beale;⁷⁴ Robert St John;⁷⁵ Harold Farncomb;⁷⁶ David Moore; Gordon Johnson; John Sinclair;⁷⁷ Clive Barker; Clive (Dickie) Dillon; and William Kenneth (Bill) Fisher.⁷⁸ Harold Glass enlisted in the navy in June 1942 after two years in the Sydney University Regiment. He was the communications officer on board *HMAS Shropshire* and *HMAS Australia* in 1943 and 1944. In early 1945, he was transferred to the Special Branch of the RANVR. He was then sent to serve on board the American ship, *USS Wasatch*, which was involved in the invasion of the Philippines. On board that ship he was

subjected to the terrors of Japanese kamikaze attacks.⁷⁹ Like many, he afterwards did not wish to talk greatly about his war experiences.

George Amsberg was luckier than many. He survived the war. At one time he was the ranking naval officer in Port Moresby and was well remembered by a family friend, Harold Herman, who was badly injured in the fighting in 1943 and had his leg amputated. Amsberg made a point of helping out Herman and visited him often while he was recuperating.⁸⁰

One young man to enlist in the RAN as a 'Hostilities Only' Volunteer Reserve was Phillip Evatt.⁸¹ He signed on in November 1940. He trained initially at the Anti Submarine School at Rushcutters Bay in Sydney then sailed to England and volunteered for the Royal Navy for submarines. He served on board *HMS Unbroken* and *HMS United* in the Mediterranean Sea throughout 1943. In October 1944, Evatt was appointed the commissioning First Lieutenant in *HMS Tapir* when it left for its first war patrol off the west coast of Norway near Bergen. On 12 April the crew were warned by sonar of the presence of a U-boat, which they engaged. Evatt was awarded the Distinguish Service Cross as a result of the action. The *London Gazette* 19 June 1945 stated the award was for 'exceptional skill, audacity and judgment while service in *HM Submarine Tapir*. He trimmed the submarine during successful attack on a German U-boat in rough and difficult weather in which the U-486 was destroyed by a salvo of torpedoes off Ferjesen Fjord . . . and for efficiency of a very high order of training the crew and for generally high standard as an officer during thirteen war patrols'.

Ivan Black⁸² was another barrister in the navy, serving in the English Channel area when he was captured, and spent three years in a German POW camp. After his release he described his capture as occurring on 15 February 1942 when he 'stepped ashore, or rather was tipped out of [his] dinghy on the inhospitable shores of Brittany' virtually into the arms of the Germans, who took him first to gaol where he 'languished in squalor for some 37 days before going into prison camp'.⁸³ His incarceration was not as brutal as that suffered by his colleagues under the control of the Japanese, but it was still a grinding experience which he alleviated by the usual round of lectures and educational activities. He was also greatly comforted to receive parcels from the

Law School Comforts Fund to ease his sense of isolation and to provide some items of practical use.

On 19 November 1941 barrister Richard Sievey was serving on board *HMAS Sydney* when it engaged the German raider *Kormoran*. In one of the great mysteries of the war the well-armed *Sydney* was sunk by the comparatively weaker German ship. Sievey was lost along with all his shipmates. He had only been admitted to the bar in March of the same year in which he died. His brother, John, died when *Perth* was sunk in March 1942.

Barrister Lieutenant Lytton Wright was on board *Yarra* when it took part in an operation involving the seizure of an oil refinery and the occupation of the associated oil fields. *Yarra* later went down in an heroic engagement in which it engaged three Japanese cruisers. Lytton Wright was killed in the action. He was described as 'lecturer in admiralty, brilliant graduate, yachtsman, sportsman and friend of all the world'.⁸⁴

The year 1942 was a worrying time for any people associated with the legal profession, as it was for the entire country. A number of lawyers were missing in action. Alan Bridge⁸⁵ had been in Java as Naval liaison officer and had failed to make the rendezvous with a ship to be evacuated. He had written lightheartedly to the Law School only a few weeks before, mentioning that he 'had become quite an expert in diving into appropriate cover from the bombs that were dropped in regular visits from the Japanese. These parts are magnificently picturesque. Hosts of native servants would spoil us utterly if Japs, mosquitoes, scorpions and other over attentive friends did not detract from the charm of life.'⁸⁶

Bridge's lighthearted tone would have changed dramatically when he was caught on Timor with a mixed group of around 40 disappointed men from the navy, RAAF and army. They evaded capture for 58 days while the Japanese searched for them using ground and air units. It was the most harrowing of escapes and took place in extremely rugged and dangerous country. There were crocodiles threatening every river crossing. Men in the group died steadily from all manner of hazards, including snakebite. Most suffered multiple illnesses.⁸⁷ They were eventually rescued by the American submarine *USS Searaven* which transported the men back to Fremantle despite



Four officers from Lark Force of the Rabaul Garrison. Front row, left, Lieutenant David Selby, commanding officer of Anti Aircraft Battery Rabaul. Photo: Australian War Memorial. Ref: P05404.001.

the boat being loaded with ammunition and catching fire on the way. The men were an unforgettable sight on arrival; emaciated, unable to stand and barely alive. At the time of his being reported missing he had a wife and young daughter.⁸⁸ The experience on Timor left Alan Bridge thoroughly debilitated.⁸⁹ He was able to return to practice in 1943 and for a time held briefs at half fees for SM Falstein in view of the latter's air force service.⁹⁰

Clive (Dickie) Dillon was one of those barristers whose service in the navy took him to the four corners of the globe. At different times he was reported to be on a converted trawler in the North Sea, transiting through New York and based in London. He saw action against the battleship *Tirpitz* in the freezing reaches of the North Atlantic then was on escort duty in the Russian convoys. He moved to warmer locations in the Mediterranean and saw action against German landing craft in the Aegean. He wrote to *The Legal Digest* describing how bombarding Rhodes was a 'tame affair' which at least 'broke the monotony' of his service. On another occasion he captured a number of Germans in a landing craft and an armed caique. He described the experience in the kind of understated, breezy style common at the time; they 'put a few shots near the landing craft and most of the Huns got an idea that there was a better 'ole somewhere else, and dived overboard where they made themselves very annoying by wanting to be Kameraded [surrender]. A number of prisoners were picked up and our doctor had a long felt

ambition satisfied – he had always wanted the lavatories cleaned out by the *Herrenvolk*.⁹¹ Dillon survived the war and continued his service in the Naval Reserve.

Rabaul

A major area of operations for Australian soldiers was the Gothic violence of the New Guinea campaigns. As the Japanese thrust down the Indonesian archipelago and into the north of New Guinea a number of barristers were caught up in futile actions. One of the most famous was at Rabaul. David Selby had a gallant and hazardous military campaign when the Japanese invaded the island in February 1942. He had been an officer in the Sydney University Regiment before the war and through that unit he was connected with many local lawyers.⁹² He was part of a small anti-aircraft unit located on Frisbee Ridge on Rabaul, which, in the naively quixotic strategies of the time, was meant to stop a force many times its size. His unit was able to fire at a number of Japanese planes but eventually he recalled being seized with a 'peculiar numbness' as he looked down on a Japanese invasion force in the bay many times larger than the Australian defenders.⁹³

When the Japanese overwhelmed Selby's position he took to the jungle with a large group of stragglers for a long trek south, evading death many times. At one stage Selby's group was under great threat from natives who were stirred to action by what they thought was the demise of law and order. Selby's band was saved by the kind hospitality of an impressive Irish-Australian priest, Father Ted Harris. In the narrow coincidence of such things, Harris was himself a graduate of Sydney University Law School and a friend and contemporary of another fellow graduate Frank Hidden.⁹⁴ Harris was from Balmain and had graduated in 1932 but had immediately gone on to study to be a priest. He ran the Catholic mission on Rabaul. After leaving Harris, Selby continued on his way, tormented by hunger and always fearful of ambush from either the Japanese or the natives. He wrote of creeping along with his revolver loose in its holster, listening for suspicious sounds and 'half expecting, at any time, to hear the whistle of a spear through the leaves.'⁹⁵ They were only very lightly armed and virtually starving by the time they reached safety. Selby did an heroic job leading the men out of danger.

As promised, a boat (*HMAS Laurabada*) went back to rescue people from the mission in which Selby had taken refuge. Father Harris refused to leave his flock. The last photo is of him standing in his short sleeves on the wharf, smiling as he waved farewell to the last ship which could have taken him to safety. He chose to stay with his native parishioners. He was a fine member of the Sydney legal community although his path had taken him away from the bar. The Japanese inevitably captured him. There are a number of different accounts as to how Father Harris met his death. All of them report a cruel end to a brave life. David Selby remained a lifelong admirer of the priest and spoke often of him.

The end of the beginning

While these tense actions were taking place, young New South Wales barristers joined up in increasing numbers. Virtually all the young men admitted to the bar after 1940 enlisted soon after their admission. In addition young law students were very keen to interrupt their studies and enlist, especially in 1942, one of the worst times of the war for Australia. The Japanese attack on Pearl Harbor meant that in this year mainland Australia would be directly attacked. Early in the year, pioneering woman barrister Sybil Greenwell resigned her presidency of the Law School Comforts Fund to give her services as a camp cook for the duration of the war. Her position was taken by Mrs Colin Davidson, the wife of Mr Justice Davidson.⁹⁶

By April 1942 there was scaffolding around the Martin Place GPO, blast barriers around some city firms, and calls for an extensive system of air raid shelters around the city. Windows were shatter proofed and blacked out. In May those measures became more pressing as Sydney Harbour was subject to direct attack by Japanese midget submarines, while cargo ships could be sunk not long after they left the Heads. There was rationing of tea and beer, shortages of everything from sugar and rice to toothbrushes and raincoats. The arrival of American troops left wigged and gowned barristers in Phillip Street liable to be asked to pose for

photographs by the allied visitors who were heard to exclaim loudly that they 'had never seen anything like it' in their lives. Counsel occasionally appeared in court in military uniform, although it was disapproved of by the Bar Council. (Side arms and head dress were not to be worn.)



Des Ward (right) on Bougainville.
Photo: courtesy of Des Ward.

One son of a veteran who enlisted around that time was William Desmond Thomas (Des) Ward.⁹⁷ His father, Jonah (Harry) Ward, had died in 1922 of gas related injuries sustained in battles including the Somme in the First World War. Despite the loss Des was keen to enlist but his mother insisted he finish his law degree first. In September 1942, he enlisted in the AIF, two days after his final law exams in the Law School in Phillip Street.

Ward first trained in what was known as the Forward Defence Lines (FDLs) in the Kembla Grange area south of Sydney. Late 1942 was still a very dark time in the war and there were Japanese submarines active off the coasts. Sydney itself had been attacked only six months earlier. Des was soon sent to gunnery school at Warwick Farm, and was fortunate to be selected for officer training. His university background probably helped him gain selection to be trained on the new 25 pounder artillery pieces then being introduced into the military. This background later also assisted him with selection for officer training. He recalls the interview. It was a formal military situation and the first question to Des was: 'What is your attitude to discipline?' As the interview progressed Des relaxed as the questions moved more onto the topic of law. 'I relaxed from the formal, pencil-like poses of an officer at attention and put my hand on his desk – later on I was ticked off by the adjutant for relaxing so much in the presence of a superior officer, but he had been talking about the law, not military things and I thought it was ok. No one seemed to mind really except the adjutant.'⁹⁸ His war, like so many others, had only just begun.

Endnotes

1. It has been a challenge tracking down details of people some 65 years after the end of the war. The first stage was to generate an Honour Roll. Initially I used lists in the *Law Almanac* from 1943/1944 which published basic details of those barristers and solicitors who had served in the armed forces. Many men who were subsequently admitted to the bar also served and I have included them as well. Their names were initially located by matching lists from the post war Law Almanacs with databases of service personnel. Searching through the database of the State Archives and then the Law Almanac gave many names and details of men who went on to become queen's counsel or served on the bench. Many generous members of the bar and the judiciary as well as the general public supplied further details in response to public requests for information through *In Brief* and the RSVP section of the *Sydney Morning Herald*. Eventually information came from around Australia and overseas, including places as far afield as Hawaii and Istanbul in Turkey. Regrettably the process of research was not started until just a few years before the demise of many men who could have easily listed those who had served and of course given accounts of their own experiences. As usual any such enquiries have to balance the desire for information with the natural modesty of so many Australians who will underplay their own actions rather than risk being considered self aggrandising. Luckily their families were able to overcome any such reticence although many recall that their fathers did not talk of their experiences a great deal, preferring to move on from something they found to be generally frightening and tedious. I am particularly indebted to His Honour Harry Bell who read a number of drafts and went out of his way to make detailed written and verbal commentaries on them. In addition His Honour Des Ward, despite illness, spent some hours being interviewed at length about his experiences and supplied a number of photographs, helpfully scanned by his wife Carolyn. Justice John Slattery also spent considerable time with the author going over the draft article and Honour Roll and made valuable suggestions. Other interviews of varying length were conducted with Sir Laurence Street, Judge Margaret O'Toole, Justice Michael Slattery, Justice Bill Windeyer, Tom Hughes QC and Ross Pearson. In addition valuable encouragement, advice and information was generously provided by many members of the legal profession and their families. I am especially grateful to the members of the Francis Forbes Society for Australian Legal History, particularly the Secretary Geoff Lindsay, SC, as well as the NSW Bar Association, especially Chris Winslow and Philip Selth, for their great support for the project.
2. At this stage no women have been found to have served although one female barrister, Sybil Greenwell was reported in the *Sydney Morning Herald* as having offered her services as a cook. Many other female barristers were engaged in war related charitable activities during the conflict.
3. Some notable exceptions have been David Selby's *Hell and High Fever*, Harry Bell's *Wee Waa to Wewak*, or the fictionalised account of John Williams in the film *Blood Oath*. There was a fine biographical account of Tom Hughes AO QC in the *Bar News* of Winter 2005, and it is used in this article with permission from the author.
4. Later chief judge at common law, additional judge of appeal, royal commissioner into NSW Prisons.
5. I am indebted to Judge Nagle's daughter Winsome Duffy who reported seeing the file of collected letters from war veteran lawyers as a teenager. Telephone interview, 15 February 2011.
6. Later a judge of the District Court, chairman of all Quarter Sessions and acting judge of the Supreme Court, QC.
7. H J H Henchman, *A Court Rises: Supplement No.1 1959-1982* The Law Foundation of New South Wales, Sydney, 1982, 5-8.
8. Later judge of the Supreme Court of the ACT and also of Norfolk Island.
9. Later judge of the Supreme Court of the Australian Capital Territory and judge of the Supreme Court of Norfolk Island.
10. Later His Honour Judge Stephen QC.
11. Henchman, 21.
12. QC, later judge, Supreme Court, Equity Division.
13. TEF Hughes AO QC Address Supreme Court Judges Dinner 2 February 2006. Available on http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_tefhughes020206 Hughes also mentions that Myers was known unaffectionately as 'funnel web'.
14. Later chief judge in equity, additional judge of appeal, QC.
15. Later a judge of the District Court.
16. Later a judge of the District Court.
17. Later Sir Laurence Street, chief justice, QC and a leading member of the NSW legal community.
18. Tom Hughes has had a long and distinguished career at the NSW Bar and in politics. He was Commonwealth attorney-general, president of the Bar Association and QC. He was awarded the Legion d'honneur in 2005.
19. Peter Hughes, Roger's son, was killed in a flying accident in the Second World War.
20. William (Victor) Windeyer was later awarded CBE, DSO & Bar and on three occasions MID. He was subsequently knighted and served as a judge of the High Court of Australia and a privy councillor. He was christened William but was known as Victor.
21. Later QC, acting judge (Supreme Court of Papua New Guinea), judge in divorce (Supreme Court), additional judge of appeal, lecturer and deputy chancellor Sydney University.
22. Later a judge of the Supreme Court, QC.
23. Later judge of the Supreme Court, AO, QC. Details from Justice Michael Slattery, interview 18 April 2011.
24. The Honourable J P Slattery AO QC Address Supreme Court Judges' Dinner 1 February 2007. <http://www.forbessociety.org.au/documents/slattery.pdf>.
25. I am indebted to comments on this topic made by his Honour Justice John Slattery in interview at Chatswood, 23 May 2011.
26. 'Tropical Titbits' *Legal Digest No. 12*. 31 December 1943, 7.
27. JR Kerr, CLD Meares, BJF Wright, RTH Barbour & PR Capelin 'The New South Wales Bar Association' in JM Bennett (ed), *A History of the New South Wales Bar the New South Wales Bar Association 1969*, 162-163.
28. Maughan was the son of David Maughan DSO KC. He wrote a volume of *The Official History of Australia in the War of 1939-1945, Series I, Army, Vol.III, Tobruk and El Alamein*. He became a solicitor after the war.
29. Prior to enlisting was a prosecutor with the NSW police.
30. Admitted to the bar 1931, subsequently became the legal assistant, Crown Law Office, New Guinea. I am greatly indebted to Judge Chris McKenzie, a judge of the of the Hawaiian District Court who generously copied and sent over 150 pages of letters and documents pertaining to his father who died on active service when Chris was an infant.
31. Vale Ernest Byron QC in *Stop Press: Newsletter of the NSW Bar Association*, No 61 May 1999, p.11. Byron was admitted to the bar and was later deputy senior public defender.
32. Sgt D Merkel 'Parade at Gaza Airport' in *Bayonets Abroad: Benghazi to Borneo with the 2/13 Battalion AIF*, pp.299-300.
33. Letter, Alexander Sheppard to Mrs Woodhill, McKenzie Papers.
34. Listed as a barrister on enlistment papers but not listed in the New

South Wales Almanac for the time.

35. David Benjamin War Diary of Legal Staff Office. Middle East, April 1941. Available online at Australian War Memorial.
36. Benjamin 1941. pp.2–8.
37. Later a judge of the District Court, chairman of all Quarter Sessions, QC.
38. G Long, *Greece, Crete and Syria Official History of Australia in the War*, Australian War Memorial, Canberra, p.189.
39. Later judge (District Court) chairman of Quarter Sessions. Also served in New Guinea and Australia.
40. Email from Peter McEwan SC, 26 August 2010.
41. Later judge of the Supreme Court, QC.
42. Later chief justice Supreme Court of Papua New Guinea, judge in Australian Federal Court, QC.
43. Later judge (Supreme Court), president NSW Bar Association president Australian Bar Association, QC. Further information supplied by his friend Harry Bell, among others. Meares was known as a great character, much given to ascribing nicknames to barristers and judges, some of which are mentioned here. He was well known by the nickname, 'Shagger', because of his wide use of the term.
44. Later Member House of Representatives, QC.
45. Later a judge of the Supreme Court.
46. Later judge (Supreme Court).
47. *Legal Digest* No 8, 31 December 1942, p.7.
48. Later judge (District Court) chairman of Quarter Sessions, senior member NSW Industrial Commission, chairman-judge Crown Employees Appeal Board, QC.
49. William B Perrignon, letter to Sydney University Law School, *Legal Digest*, No 4. 30 September 1941, p.7. Later a District Court judge, chairman of Quarter Sessions.
50. Alexander Sheppard, letter to Margaret Dalrymple-Hay, 4 December 1941. Mckenzie Papers.
51. 'Echoes from El Alamein' in *Legal Digest* No. 9, 31 March 1943, p.2.
52. Admitted to the bar 1934. Chambers at 132 Phillip Street.
53. 'Near North' *Legal Digest* No. 5 31 March 1942, p.9.
54. L Wigmore, *The Japanese Thrust*, Vol IV of *The Official History of Australia in the War of 1939–1945*, Australian War Memorial. Canberra pp.354–355.
55. Later His Honour Sir Adrian Curlewis, a judge of the District Court.
56. One Victorian silk who had been a member of the legal department on Singapore, Major Maurice Ashkanasy KC, managed a daring escape by boat in February 1942.
57. Sir Adrian Curlewis, quoted in Hank Nelson, *POW: Prisoner of War - Australians Under Nippon* ABC Books 1985, Sydney, p.20.
58. Later a judge (District Court), chairman of Quarter Sessions, QC.
59. Admitted to the bar 1946. Later a partner in Dudley Westgarth and Co. Knighted in 1976. Had a long career, including being lord mayor of Sydney. Details from Meredith Hinchcliffe 'Sir David Griffin Renaissance Man', *National Library of Australia News*, Vol XIII, No.8, May 2003, pp.11–13.
60. Kuching POW camp had a similar course, conducted by the Brisbane barrister, Len Draney. Sydney solicitor and POW, Allan Loxton, was one of his students.
61. Philippa Poole (ed) *Of Love and War: The Letters and Diaries of Captain Adrian Curlewis and his Family 1939 – 1945*, Lansdowne Press, Sydney, p.178.
62. 'Life-Saving in POW Camp', *Sydney Morning Herald*, 17 October 1945, p.8.
63. Adrian Curlewis quoted in Peter Stanley 'The men who did the fighting are now all busy writing': Australia Post-Mortems on Defeat in Malaya and Singapore, 1942–45. In Farrell & Huston, *A Great Betrayal? The Fall of Singapore*, p.256.
64. Adrian Curlewis in P Poole (ed), *Of Love and War: The Letters and Diaries of Captain Adrian Curlewis and his Family 1939–1945*, Lansdowne Press, Sydney, p.132.
65. Stan Arneil, *Black Jack*, Macmillan, Melbourne, 1983, p.75.
66. 'Obituary Judge Phillip Head' QC MBE *The Australian Law Journal*, 63, p.578.
67. Arthur (Speed) Hollingsworth POW in Changi and Japan. Personal Interview with the author, Manly, June 2002.
68. John Allen, POW on Burma–Thailand Railway. Interview with the author, Dural, 12 January 2011.
69. Adrian Curlewis in Poole P, p.216.
70. James Lynch. 'The Diary of Sergeant James Lynch' in The Wave Rolls On Waverley College Old Boys' Association. I am indebted to Justice John Slattery who alerted me to this document.
71. Details come from Lynch Diary.
72. Later judge (Supreme Court) judge of appeal, president of the NSW Bar Association, QC.
73. Later judge (District Court) chairman of Quarter Sessions QC ED had two trips to Vietnam as judge advocate.
74. Later KBE, QC, MP, federal parliament, minister for transport and minister for supply, ambassador to the United States.
75. Later judge (Federal Court) chief justice of Western Samoa.
76. Admitted to the bar, 6 June 1958 then joined firm of solicitors Alfred Rofe & Sons. Served in First World War. Commanded HMAS *Canberra* and HMAS *Australia*. Later became a rear admiral CB DSO MVO. His wide ranging career is well documented in other naval circles.
77. Later judge (District Court), QC, leader of Sydney Naval Reserve Legal Panel.
78. Later judge (Supreme Court, president Industrial Relations Court) QC.
79. Sources include the war record of Harold H Glass at National Archives as well as private communication with Dr Arthur Glass in July 2011.
80. Harold Herman, interview with the author, Sydney, May 2011.
81. Later a judge (Federal Court, Australian Industrial Court, ACT Supreme Court), acting judge Supreme Court of Northern Territory, judge of the Supreme Court of Norfolk island, head of royal commission into use of chemical agents in Vietnam.
82. Later member for Neutral Bay in the NSW Legislative Assembly.
83. I Black in *Legal Digest* 18, 30 June 1945, p.11.
84. *Legal Digest* 5 March 1942, p.9.
85. Later judge (Supreme Court of Northern Territory), QC.
86. *Legal Digest* 5 March 1942, p.7.
87. Colin Humphries, *Trapped on Timor*, 1991, pp.30–71.
88. *Legal Digest* 5 March 1942, p.9.
89. I am indebted to Campbell Bridge SC for his assistance in this account of his father's experience.
90. *Legal Digest* No 10 31 June 1943, p.2.
91. CB Dillon *Legal Digest* 17 31 March 1945,
92. Jen Rosenberger 'A judge You'd Follow into the Jungle' *Sydney Morning Herald* 3 October 2002.
93. David Selby, *Hell and High Fever*, Currawong Publishing Co, Sydney 1956, p.34.
94. Later a judge of the District Court.
95. David Selby 1956, p.119.
96. *Legal Digest* No5. March 1942, p.10.
97. Later a judge of the District Court, QC. ED and had two trips to Vietnam as judge advocate.
98. Information comes from a series of personal and telephone interviews with the his Honour Des Ward with the assistance of Carolyn Ward conducted by the author over the period of November–December 2010, with the final draft approved by email.

APPOINTMENTS

The Hon Justice Anthony Meagher

Anthony John (Tony) Meagher SC was sworn in as a judge of the Supreme Court of New South Wales and a judge of Appeal on 10 August 2011.

His Honour attended St Ignatius College and then the University of New South Wales, commencing his commerce / law degree in 1972, the second intake year of undergraduate students. After graduating in 1976 Meagher JA joined Minter Simpson, before studying law at the London School of Economics where his Honour worked for the specialist air law firm, Beaumont and Sons.

Meagher JA was called to the bar in 1982, and read on the eleventh floor with Roger Giles, as his Honour then was, then occupying a room on the sixth floor before returning to the eleventh floor in late 1986. In 1992 his Honour was one of the original members of Level 5 St James Hall. Meagher JA's practice included trade practices, media law, mergers and acquisitions, shipping, professional negligence and banking.

The attorney general spoke on behalf of the NSW Bar, Mr Joseph Catanzariti spoke on behalf of the solicitors of NSW and Meagher JA responded to the speeches.

The attorney general said that his Honour has:

long been recognised as one of Australia's leading practitioners with a commercial practice that has attracted everyone from disgruntled footballers to captains of industry. You have also frustrated your fellow barristers on a consistent basis with the obvious respect you have earned from the Bench. 'It is very annoying' said one, 'they take far more notice of what he says, he's regarded as very reliable'. Whether those who accompany you on skiing trips or on your weekly twenty kilometre run would agree is a matter of exploration.

...

One suspects some things will not change such as your panache for jumping out of helicopters on skiing trips with a number of fellow barristers. You only took up the sport relatively late in life but the juices soon began to flow. 'He was determined to be very good', offered another of your new colleagues, 'because Tony would compete with a lamppost'.

The attorney general suggested that occasionally his Honour's work had been:

a labour of love. I speak in particular of your role in the Super League litigation involving News Limited and South Sydney and briefed to represent the NRL in their salary cap proceedings against the Melbourne Storm Rugby League Club, and Wallaby, Lote Tuqiri. Some may have reminded the winger that he was getting exemplary service from a former outside centre of some note. Indeed your Honour



Photo: Courtesy of the Supreme Court of New South Wales.

played ninety nine first grade games for Eastwood Rugby Union Club in the Sydney grade competition.

Mr Tuqiri's claim against the Australian Rugby Union for wrongful dismissal involved a frank exchange with Justice Einstein, another of your new colleagues. You were less than impressed when he asked you what your reaction would be to 'reading out aloud the contents of the pleadings'. You replied 'Your Honour is joking'. The good news for you and your opponent on that day, another new colleague in Justice Sackar, is that you now get to decide what is funny or not in Court.

The attorney general had referred to his Honour having acted for PBL in the C7 litigation, and for the Seven Network as they attempted to prevent an employee joining the Ten Network as chief executive. Mr Catanzariti said of this:

Kerry Packer considered your Honour his counsel of choice in many high profile media cases, including recovering the Logies for *TV Week* from Channel Seven

but, ever objective in your dealings, your Honour also acted for Channel Seven in restraining one of their executives from joining Channel Ten.

The attorney general also referred to one of his Honour's law lecturers at the University of New South Wales:

It was there that you first encountered the unforgiving regime of John Basten, now a Judge of Appeal on this Court. You managed to finish near the top of his exam for law lawyers and society but then the then Mr Basten took a dim view of your poor, some say it was zero, attendance at his lectures. He decided you should do some supplementary work before you passed which your Honour considered was a great injustice, on the basis that you probably contributed as much as those who actually attended lectures.

Meagher JA corrected that story:

Fortunately, having given me nought out of fifty for class performance in the subject Law, Lawyers and Society, for the questionable reason that I had not attended any classes after the first, Justice Basten remained open to persuasion and allowed me to do a supplementary written assignment to earn the marks necessary for a pass.

His Honour noted in this regard that he joined four other graduates of the University of New South Wales on the court: Fullerton, Latham, McCallum and Rothman JJ.

Mr Catanzariti referred to the art work seen as you step out of the lifts on the fifth floor of St James Hall, one of Mike Parr's self-portrait etchings:

It is indeed thought provoking or in the words of Kath and Kim 'nice, different, unusual'. Perhaps these qualities are also reflective of those who reside on the fifth floor although as of today, only one of the three Silks involved in the acquisition of this artwork now remains on site. Moving from the lift towards the various chambers, further insights about the residents are revealed from observing their rooms and furnishings. In your Honour's case the photograph of your great grandfather, the late Andrew Watts KC, proved significant. A very able counsel and first class cross-examiner, Andrew Watts's smooth and courteous manner was known to succeed where others failed. It was also Andrew Watts who gained approval from the then Chief Justice, Sir Phillip Street, to hold the first Red Mass on 29 February 1931 at St Mary's Cathedral, to mark the opening of Law Term.

Mr Catanzariti also said that his Honour exhibited a calm demeanour, and had:

suggested to some that you are more akin to the proverbial

duck-calm on the outside, but paddling madly beneath the surface. Meticulous in your preparation and research, rigorous in your thinking and extremely hard working, you are one of the first to arrive at work and often the last to leave.

Meagher JA said:

Over the years I have become more conscious of the responsibility that goes with the role of running trials. Michael McHugh recently drew my attention, in a different context, to a poem by the bull fighter Domino Ortega which was translated by Robert Graves. It conveys a sense of the position of the barrister in the trial:

Bull fight critics ranked in rows
Crowd the enormous Plaza full
But only one is there who knows
And he's the one who fights the bull.

I do not want to take this analogy too far. I am conscious of where I sit today and of the usual fate of the bull.

However, I believe that it is critical for the efficient, yet fair conduct of cases that barristers strive, consistent with their obligations to their client, to see that only the real issues are litigated and need to be resolved.

It goes without saying that I have been supported by many good instructing solicitors from a range of firms, large and small. I have sought to encourage, and benefited most from, instructors who are prepared to question my judgment and views in the process of resolving a particular client's problem or advancing its cause. I have also expected much of my instructors and only on a few occasions have my expectations not been realised.

Meagher JA noted that for most of his 20 years at the bar his clerk had been Paul Daley, who continued to clerk even when they moved to Level 5 St James:

He is a friend and confidante. This year we celebrated fifty years of his service and friendship to the members of the eleventh floor. With one exception, his clerking has been exemplary. Unfortunately, I feel I must mention that one occasion. Paul asked me whether I would accept a brief which he described as 'involving questions of construction'. I was free and accepted the brief without further thought. When the twelve lever arch folders arrived accompanied by a Scott Schedule, I understood for the first time what Paul meant by 'construction'.

APPOINTMENTS

The Hon Justice Christine Adamson

Christine Adamson SC was sworn in as a judge of the Supreme Court of New South Wales on 17 October 2011.



Photo: Courtesy of the Supreme Court of New South Wales.

Her Honour graduated from the University of Adelaide in 1986 with honours in law, and then joined the Commonwealth Attorney-General's Department as a legal officer. In 1988 Adamson J came to work in Sydney at the Australian Government Solicitor's Office.

Adamson J was called to the Bar in 1989, and read with Stephen Robb and Michael Rudge. Her Honour took a room in Blackstone Chambers and built up a successful practice encompassing trade practices, administrative law, constitutional law, professional negligence, personal injury and disciplinary matters. Her Honour took silk in 2003 and in 2004 became a founding member of Banco Chambers. In August 2006 her Honour was appointed chair of the NSW Council of Law Reporting.

The president of the Bar Association, Bernie Coles QC spoke on behalf of the NSW Bar, The president of the Law Society, Stuart Westgarth spoke on behalf of the solicitors of NSW and Adamson J responded to the speeches.

The president described her Honour as

a thoroughly courteous, patient and articulate advocate with broad experience acting for both plaintiffs and defendants and an innately judicial temperament. In the eyes of many, a briefing solicitor and industrious junior, your Honour has been the epitome of a senior counsel, learned in the law, meticulous, diligent and quick to seize upon the essence of a case.

The president had commenced by referring to an article in the *Sydney Morning Herald* on 27 May 2004 he had seen, which he described as a little surprising because of her Honour's 'well-deserved reputation for being thoroughly undemonstrative':

Your Honour featured front and centre in a quarter page photograph, flanked by three of the women barristers whom you had mentored, and not to mention inspired, during your time, up to that time at the Bar. The article dealt on the particular difficulties that women need to overcome in order to establish a successful practice at the Bar, but ended on a characteristically enthusiastic note.

Your Honour likened yourself to a born again Christian when talking up the Bar as a place to practice law and in relation to the prospects which it offered to the women who might follow your Honour's fine example and join it.

The president said that the article:

encapsulated your generosity towards junior women barristers and indeed, barristers generally. The vital encouragement you have given to so many is a theme that recurs throughout your Honour's own highly successful career.

The president referred as well to her Honour's speech as Ms Senior at the 2004 Bench and Bar Dinner:

...the first occasion of that kind your Honour had ever attended. During your Honour's speech ..., your Honour provided an interesting vignette recording that, following your Honour's appearance in younger days at a Jessup Moot, a member of the Melbourne Bar had taken your Honour aside and urged you to come to the Bar. As your Honour on that occasion so succinctly observed, a chance remark like that can change someone's life. There is, as I have said, some surprise that your Honour is leaving the Bar, given that for so long your Honour has been such a forceful and eloquent proponent of the Independent Bar, its norms and institutions.

Your Honour once described the Bar as a good place to practice law, if one has a certain temperament of intellect, doesn't mind anxiety attacks, insomnia, working on Sundays and irregular cash flow.

The president said that he:

dare not speculate on how ... the Chief Justice was able to persuade your Honour to join the bench of this honourable Court, save to say that his Honour would have no doubt have been required to muster all those very considerable powers of persuasion for which he was so universally renowned in his own career amongst us.

The president also referred to her Honour's appellate practice:

Although your Honour was understandably much in demand as junior counsel, your Honour embraced readily the pleasures and challenges of appearing unled in a very large number of cases of real significance. By the early 2000s, your Honour had begun to develop what became a very considerable practice in this court, and your Honour's eventual considerable appellate practice, appears to have commenced at least while your Honour was still in your Honour's 20s. A case reported in Volume 28 of the *New South Wales Law Reports* in 1992, records the Honourable R.P. Meagher giving the leading judgment with the words:

As a result of Ms Adamson's persuasion, the appeal must be allowed.

That case was doubtless noticed by many. It may fairly be said that, at least from the perspective of those contemplating what became briefed to your Honour in subsequent appellate practice, a star was indeed born.

The president concluded with a further reference to the professional conduct matters in which her Honour represented the bar:

Again, the citation of those matters would be lengthy, but your Honour invariably in those, and in every other case, conducted your Honour's cases with a deep sense of public duty and commitment to the protection of the public interest where that was at issue in the proceedings. As with your Honour's other cases, your Honour did so dispassionately and with an impeccable sense of fairness.

Mr Westgarth said that in her Honour's:

... first year at Lyndon Infants School at the tender age of four years, all the children were given 'flash cards' on which they could print the first word they wanted to learn and then practise. The Adelaide Festival of Arts program was being promoted at the time.

While other children were selecting words like 'ladder' and 'house' your Honour chose 'Saltzburg Marionettes' and, of course, had to be issued with a flash card about a metre long.

He had said that her Honour's voracious appetite for the written word was reflected in her Honour's

...room full of books – not a legal tome to be found among them ...

Favourite works are read and re-read – Samuel Beckett, Oscar Wilde, Simone de Beauvoir, Kazuo Ishiguro and Virginia Woolf. It is indeed 'A Room of One's Own'.

Your Honour's love of language and the cadence and beauty of words inspires you to put pen to paper, writing short stories and other works of fiction. Writing judgments should be a breeze.

Mr Westgarth referred as well to the many areas in which her Honour had made an outstanding contribution:

... – the Council of Law Reporting, acting on behalf of the Bar Association and the Health Care Complaints Commission with regard to professional misconduct cases, the Australian Competition and Consumer Commission and the Independent Commission against Corruption.

In addition your Honour has taken up many cases for the public interest and has frequently appeared in the NSW Court of Appeal.

Whether it is acting for the Environmental Defender's Office of NSW in the Administrative Appeals Tribunal with the aim of protecting endangered grey nurse sharks or encouraging more women to join the Bar, a unifying aspect is your Honour's commitment to social justice and the greater community good.

Your Honour has always been very supportive of women and the function they play in terms of presenting a different viewpoint; of being persuasive advocates without being excessively strident. Your Honour has taken a strong mentoring role in encouraging junior barristers to be the best that they can be.

Perhaps this harks back to your youth when you and your sister attended the 'Women in Politics' conference in Canberra in 1975. As your mother stated in the book *Women's Electoral Lobby: 21 years in South Australia 1972-1993*: We marvelled at the intellectual stimulation, and the feeling of common purpose that was generated there.

Mr Westgarth concluded:

It seems fitting to remind your Honour of the poem you contributed to the Walford Anglican School Year Book of 1979 entitled *Metamorphosis*: Once again: 'You stand with your foot in the door of the world knowing that behind you...is the impetus which will enable you to pass through'.

Alexander Shand QC (1929–2011)

The following eulogy was delivered by the Hon R V Gyles AO QC at a memorial service for Alec Shand QC in St James Anglican Church on Thursday, 21 July 2011.

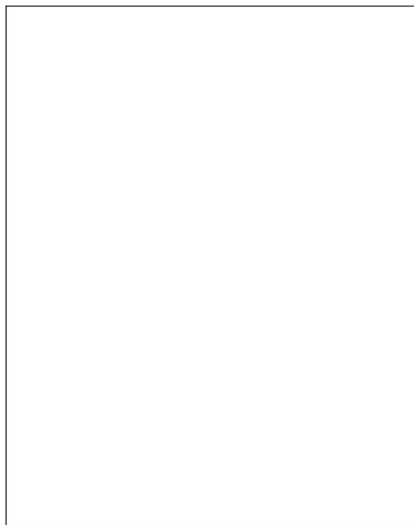


Photo: Palani Mohan / Fairfax Syndication

I first met Alec when, after leaving school in the middle 1950s, I started playing cricket for Lindfield District Cricket Club. Alec and his brother John were regular players. Alec was a left-hand fast medium bowler and a punishing middle order batsman. Any fieldsman who dropped a catch or let a ball through his hands from Alec's bowling experienced the Shand stare and voice that later broke hundreds of witnesses. He was an impressive figure to a young university student.

Alec had recently commenced practise at the bar and when, in due course, I was admitted as a solicitor, I briefed him in a number of matters, including two long-running matrimonial causes. Apart from his effective manner of presentation, his preparation was always thorough. That may have been assisted by the matrimonial clients both being attractive women whose evidence required close proofing in conference.

I fast forward to the middle 1970s. The Moffitt Royal

Commission was underway and I was Dennis Needham's junior assisting the Commissioner Justice Moffitt. Alec had recently taken silk and received the brief to represent the poker machine company, Bally Incorporated, and its principal in Australia, Jack Rooklyn. The Commissioner formed an unfavourable view of Bally's activities very early in the proceedings, and did not hide it. Dennis and I had a ringside seat for many months as Alec set his jaw and traded blow for blow with the Commissioner. Although he did not convert Justice Moffitt to the Bally cause – I doubt that Sir Garfield Barwick at his best could have done that – Alec earned the Commissioner's respect for the steadfast and resourceful defence of his clients.

So began a stellar career as leading counsel. His appearance before the Moffitt Royal Commission was the first of many appearances before commissions and inquiries of all kinds.

Amongst many others, he represented the interests of or associated with prominent individuals as diverse as Neville Wran, Lionel Murphy, Rex Jackson, Brian Burke, Angelo Vasta, George Freeman, Laurie Connell, Boris Ganke, Kerry Packer and Rupert Murdoch – the good, the bad and the ugly.

His legal roots were in the common law jury trial – civil and criminal. He carried his experience in personal injuries, defamation and the criminal law with him as a silk. The leading practice that he developed in defamation led to other fields of law involving the media, including television licensing and

regulation and the arcane area of administrative law.

His growing reputation as an advocate led to his being offered work in commercial causes and equity suits. That reputation travelled, and he appeared in substantial cases in most, if not all, of the Australian jurisdictions and in Fiji. I am not sure how his loyal clerk, Brian Bannon, kept track of him.

Alec appeared in appeals in the Privy Council, the High Court, the Federal Court and the courts of appeal or full courts of the states and territories but, above all, he will be remembered as a first instance advocate of choice for those with their backs to the wall in a difficult case or cause, no matter what or where the court or tribunal.

Amongst many others, he represented the interests of or associated with prominent individuals as diverse as Neville Wran, Lionel Murphy, Rex Jackson, Brian Burke, Angelo Vasta, George

Freeman, Laurie Connell, Boris Ganke, Kerry Packer and Rupert Murdoch – the good, the bad and the ugly. I'll warrant Rupert Murdoch would like to have Alex Shand by his side right now. Alec was a celebrity counsel in the best sense of the word.

Why such success? He had a good court presence – he was good

looking, upstanding with a clear and well modulated voice. He was never accused of being an equity whisperer. He had a colourful turn of phrase. One adjective would rarely be enough. He prepared well and mastered the facts. He was courageous, tenacious and determined. He had a good instinct for the strengths and weaknesses of witnesses and cases. Most importantly, his message was always direct, clear and unequivocal. You knew which side Alec was on. That gave his clients and their solicitors great comfort.

I should add that, although Alec was a tough opponent, he was fair and honourable.

Alec was by no means one dimensional. He maintained a lively interest in sport, particularly tennis. He dabbled in business ventures – not always successfully. He was a director of East West Airlines for a number of years, and was chairman until it was swallowed up. He was a director and then chairman of Counsels Chambers Limited. He was the doyen of 7th Floor Selborne Chambers for many years. He put together a macadamia empire near Lismore which led ultimately to his move with Lorraine to that area and to the local chambers. He celebrated 50 continuous years' practise at the bar while at Lismore.

In the 1990s he developed an interest in Aboriginal land rights, particularly in the Kimberley, and became an advocate for that cause from then on.

Some years ago I was in a group, including Alec, having a chat after court. One of those present asked him whether he was interested in judicial appointment. Alec stopped, looked at the enquirer with something approaching disdain, and said 'The Shands are barristers'. A fitting epitaph.

The following eulogy was delivered by the Hon TEF Hughes AO QC at a memorial service for Alec Shand QC in St James Anglican Church on Thursday, 21 July 2011

The paths of Alec Shand and myself first crossed in 1954 when he was admitted to the bar. His redoubtable father asked me to have Alec as a pupil for the compulsory 12 months of reading required of newly admitted barristers. We became members of the first floor of the old Selborne Chambers in Phillip Street. This was a cavernous old building, erected in the second half of the 19th century. The occupants of that floor had included practitioners such as Sir George Rich, Sir Frederick Jordan, Sir Dudley Williams and AB Shand KC, Alec's grandfather. Their ghosts seemed to hover over us.

Alec was an apt pupil. I was in no position, and lacked the ability, to teach him as much as his father could and did. My seniority at the

time of Alec's admission was only five years.

As Alec's practice developed, it became apparent that the forensic characteristics of father and son were in some ways dissimilar. As a cross-examiner JW Shand was venomous; a prominent weapon in his armoury was the technique of getting the cross-examinee to agree with the abstract proposition that

... the main difference between father and son in forensic technique lay in the contrast between parental dagger and filial broadsword.

engagement in a particular species of conduct would be reprehensible and destructive of credibility. From there he would move to extracting

an admission that the witness had in fact engaged in that conduct.

While Alec did not renounce this particular mode of cross-examination, the main difference between father and son in forensic technique lay in the contrast between parental dagger and filial broadsword. I was far too young ever to have seen Alec's grandfather in action, but I suspect that Alec

inherited more grand-parental than parental forensic genes. Whatever the genealogical source or sources, the inheritance was rich.

One of Alec's principal attributes as counsel was his doggedly determined persistence in the pursuit of his client's cause. Witness his role as senior counsel for my friend Neville Wran in the Humphreys Royal Commission conducted by Sir Laurence Street in 1983. Sometimes it was said that at times he was too dogged.

We spent short vacations at Thredbo where we skied together under the tutelage of Austrian instructors, one of whom had been a Luftwaffe pilot.

Criticism of the forensic performance of others is common at the bar. No senior counsel with a busy practice is exempt from it. But Neville Wran voiced no misgivings (if he had any) about Alec's conduct of the case. The client let counsel run it his own way. The outcome was not only an acquittal of the client of any imputation of wrongdoing but an emphatic positive finding that the allegations against Neville Wran had no substance. This was a great triumph for a Premier wrongfully traduced

and for his leading counsel.

The friendship between Alec and myself was cemented by a shared interest in skiing. We spent short vacations at Thredbo where we skied together under the tutelage of Austrian instructors, one of whom had been a Luftwaffe pilot. Alec and I, together with Ian Curlewis, John Holt, John Minter and my brother

Geoffrey were founding members of Crackenback Ski Club, the first club in the Thredbo Valley. We sat on its executive committee together. We built the Club for £5,000. It opened on the August Bank Holiday weekend 1957 in heavy snow. We helped to build the first uphill transportation at Thredbo, the Crackenback Rope Tow, under the leadership of my brother Geoffrey. I recall an occasion when a heavy load of building materials dropped from the tow within inches of where Alec was standing below,

nearly cutting off what became a stellar career at the bar.

Joanna, who is here today, and I had the pleasure of making our rather subterranean apartment at 'Manar', 42 Macleay Street, Potts Point, available for Alec's and Lorraine's wedding reception on 21 March 1959. On that occasion, our daughter Lucy, then less than a year old, made her presence felt by breaking a beautiful vase given to us by Alec as a thank you present.

I remember Alec as a colleague who for many years was in great demand as a formidable leading advocate in important cases. I remember him with affection for our friendship in earlier years.

Simon Kerr SC (1972–2011)

On the afternoon of 14 October the bells of St James pealed resoundingly. The queue of mourners, come to farewell Simon Andrew Kerr SC, extended up Phillip Street past the law courts. This eulogy was given by Justin Gleeson SC.



The Bench, Bar and the broader legal community gathered in this church almost 18 years ago, on 16 December 1993, to mourn the passing of Paul Dixon Kerr at the cruel age of 49. Murray Tobias QC, as president of the bar, spoke on that day. Paul's wife Carol, and his son and daughter, Simon and Belinda, were present.

We gather again today, in equal or greater numbers, and with great sadness, to join Carol, Belinda and now young James Dixon Kerr, in saying our farewell to Simon.

My name is Justin Gleeson. I am head of Banco Chambers which was Simon's professional home and family for the last 7 years.

Simon's father Paul had come to the law late, with an engineering and architectural background. He had read with Tobias and established himself as a leading junior in fields of building and engineering and in local government. Paul spent most of his 40s fighting a skin cancer that attacked his face. Over time, his face became increasingly disfigured and he had to undergo numerous operations. He carried

on working till near the end without ever making a complaint or seeking any quarter from his opponents, and with a generosity of spirit, always helping out, and giving advice to, others. Paul displayed great courage and dignity in facing this terrible disease and his ultimate death. Tragically, his son has also had to face the ravages of cancer and an untimely death. Like his father, Simon displayed immense courage and dignity over the past four months.

About a year before his death, Paul came to Bret Walker, then shortly to take silk, and asked him to look after his boy Simon who was coming to the bar. Bret did so without hesitation. Bret and Murray proposed Simon for membership of the Association. Simon was admitted to the bar in September 1993 at the exuberant age of 21 years 8 months and 6 days. The records of the Association stretch back 97 years. Simon is the 6th youngest person to have ever joined the bar. One has to think back to the likes of Chester Porter in 1948 or Elizabeth Evatt in 1955 to find those who came so young.

Simon had been schooled at Sydney Grammar. There he chose to reveal only some of his talents. Most of us don't think of him as a sportsman, but the school records show he was the captain of the school's 2nd VIII rifles team, whatever that activity involves. Also it's not generally known that Simon had a brief flirtation with dangerous left wing ideas: the records show that from 1988-89 he had a stint in Amnesty International.

In 1992, he was one of the early

graduates of Bond University. The law was growing on him, but never in a narrow or merely bookish sense. He reported proudly to the Association, in support of his application in 1993, that at Bond he was manager of the Bond University NSW State of Origin Rugby Team, with his duties involving selecting the team and getting sponsors so the team could wear the best jerseys, and that he was chairman of the Student Residence Catering Committee. A dislike for wasting valuable time on poor dining was there from the start. His great friend Jason describes him from Bond days as old before his time. He wore tweed suits.

From the outset at the bar, Simon was a young man keen to work hard to make a success of his career, without any arrogant assumption that he would necessarily make it, particularly so young, but with an overwhelming desire to make his father proud of his efforts. Walker describes him as perhaps his most effective pupil in making Walker perform his duties as tutor: Simon was always there in Walker's chambers, with his work done well, and done on time, and with questions for how he could improve.

Simon worked not only hard, but also thoughtfully. He was there at a crucial time in the expansion of building and construction work. He rapidly grew into a role where he understood and enjoyed the challenges of working with senior executives and consultants, bringing together the lawyer's jargon and concepts with the real world activities in hand. His tastes continued to improve. Walker says

he introduced Simon to Meursault and Sassicaia at a time when fine French and Italian wines were expensive yet affordable; Simon continued to drink them when they had become simply expensive!

Simon's other official tutor was Guy Reynolds, later SC. His unofficial tutor was Bob Greenhill also later SC. Greenhill became a close friend and surrogate father. Bob should be speaking here today but I suspect Simon feared Bob would cry, swear or tell scandalous stories about the criminal cases in which Bob led Simon in the early days, or all of the above. Bob describes Simon from early on as a brash, bright, clever bugger, and that's the bit I can repeat.

Simon quickly moved into his father's large old room on Ground Floor Wentworth Chambers where his practice prospered and he enjoyed happy days until 2005. He was known there as the floor's resident real estate agent, always urging colleagues much his senior with perfectly nice rooms that they should back themselves to purchase larger rooms on the floor. He ensured the floor would enter the annual Bench and Bar boat race, with the day to start early with a lavish display of lobster and champagne and an equally good lunch after the race. His sense of humour was readily on display. He had no difficulty running around chambers wearing reindeer ears just because he had been asked to by the 6-year-old daughter of head of chambers.

Simon loved variously but always passionately. He loved the bar, fast cars, dining and women. It's difficult to know in which order.

Any reason to drive a fast, stylish car any distance was taken. Some reasons were undeniable. Simon would drive from Bond University to Sydney to see his father before he died. In the early years at the bar, Simon would get up at 3 am on the weekend to collect and drive Frank Corsaro later SC and Greenhill to be ready to tee off in golf at Stanwell Park at sunrise. At his height, Simon simultaneously owned the black Tom Magnum Ferrari 308 for weekend use, a BMW for daily use and a Bentley for occasional use. Simon also briefly owned the Beast, a limited production, imported Mercedes Benz AMG, which he collected in characteristically understated fashion. He opened a major case in Sydney, called the plaintiff, and at the end of the day flew to Canberra to collect the Beast. He then drove back to Sydney and resumed his case with the plaintiff in the box the next day. The Beast was stolen from Simon's private, alarmed garage in an elaborate, traceless theft which remains unexplained. This suggests that not only Simon considered the Beast special. Simon consoled himself with the purchase of his Bentley.

Kerr was the king of fine dining, particularly at lunch after a full day case had been efficiently disposed of in the morning. Otto, Manta, Rockpool, Beppi's, Glass. The list goes on. His colleagues learnt that the only way to get a last minute booking in Sydney was to do it in Simon's name and to endure the disappointment on the face of the restaurateur who, hoping to see Simon, was confronted with a lesser customer. Dining for Simon was in the original tradition of the bar.

It involved company, friendship, generosity beyond bounds or reason, the sharing of stories, and the passing on of advice about law, life and politics – of which he had a subtle understanding and always a profound interest.

A junior member of our floor recalls an early meeting with Simon when both were working late in chambers. Simon took him to his then favourite haunt, the Golden Palace. Mr Ho greeted Simon and took him straight past a long queue to Simon's favourite table. There Mr Ho summarily ejected the four Chinese gentlemen who were still eating, seated Simon and his colleague at the table and the champagne arrived immediately. Simon asked for his 'usual'. A waiter came up staggering under a large, writhing crayfish. Simon pronounced it unsatisfactory and demanded something bigger. Four waiters then arrived struggling to contain an even larger crayfish. 'Cut it up', said Kerr.

Simon's generosity to junior members of the bar was not, however, merely social. It was vocational and personal. He introduced solicitors to new readers and juniors, and then actively fostered those relationships. He was the first to sweep around Banco to gather up the readers to go to 15 bobbars, swearing in ceremonies and other bar events. Simon was proud that, as a junior, he had appeared in almost every court in country NSW. He helped junior members with practical advice on how to run cases in every jurisdiction; instructing them on how to (politely) stand up to judges, how to make objections,



Simon Kerr with his much-loved son James.

what submissions were necessary to secure potential appeal points and other invaluable practical tips. Perhaps most closely to his heart, he taught junior members to leave witty sledging to the silks.

Simon loved the bar in all its facets, more than anyone I have known. He loved dealing with clients and working up cases with his leaders and later his juniors. He loved working with or against the finest talents at the bar, and appearing before all manner of judges. No judge was left uncertain of the approach Simon was taking, and no client left in doubt as to whether

the case had been put as forcefully as possible. He could be abrasive, but never nasty. He loved jousting with opponents, the more senior the better. He earned their respect. He never missed a chance to show his wicked side. Once in the tussle between the Sultan of Brunei and the late Michael McGurk, Bergin J sent Simon, then a junior, and Noel Hutley SC out of court to agree a timetable point. Simon, acting for the Sultan, took the chance to remind Noel that the next time he flew to Europe it might not be ideal for him if his plane suffered engine trouble and had to land in Brunei;

Noel's name may have found its way to the watch list held by the Sultan's Secret Police! Noel tried to muster outrage, but couldn't help admire the cheek of the man. What Simon didn't let Noel know was that his real aim from the case was to be awarded a Pehin or Bruneian knighthood by the good Sultan!

Simon ran a most difficult action against the Commonwealth of Australia to great success. His loyal solicitor Andrew Thorpe said if courage and determination were a cure for cancer, Simon would still be alive. From the same case, his opponent, John Sackar then QC, described Simon as one who, while not silk for long, displayed a level of maturity, a complete mastery of the facts and an ability to use humour to overcome forensic difficulties in a manner those much older seldom display. In Sackar's words, if the Kerr family has a tragic gene for cancer, they equally have one for dignity and courage in facing adversity.

Simon was duly rewarded with silk in 2009. No barrister could have taken more seriously that honour or loved wearing the silk gown more. He was rapidly becoming one of the leaders of the bar. He had his hands over virtually every failed dam, road, building, tunnel and power station in the country. I personally have the treasured memory of presenting Simon with a red bag.

Simon was the glue that built and bound Banco chambers. He was instrumental in its founding, in its expansion, and in every stage of its life. Equally he never missed the chance to update his knowledge with Newlinds SC on the latest version of *Who's Who*, or on the

means to earn Imperial honours, Australian honours or indeed any medals or honours at all. He even contemplated turning Catholic if he could get one of those Knights of Malta Crosses. He had a talent for giving McHugh SC a gentle ribbing for any reason, or none at all. He regarded the advice of the Floor Leader as infallible, although he was selective in seeking it. His passing leaves a great hole in the heart of Banco, and a larger hole in the heart of Phillip Street itself.

Of all Simon's loves, his family came first. After his father's death, Simon was the 'go to' man of the family. His proudest moment was the birth of James with Lucy. The loss now suffered by his mother Carol, and his sister Belinda, is unimaginable. Carol and Belinda you have our support today. In recent times, Simon had found love with Jane. All of Simon's family are in our thoughts at this time.

Simon was diagnosed with stage IV melanoma some four months ago. He responded with great courage and bravery. He was a proud man, and did not want to tell too many people, even close friends and colleagues, how ill he really was. He forthrightly told his loyal solicitors in the largest of cases of his true condition. They begged him to continue in their cases as long as he could. And he did. He was still appearing before a senior arbitral panel and in the Supreme Court, until a few weeks ago. As

his father had done, he sought no indulgence and made no excuse. While gravely ill, he attended the 15 Bobber for Tom Bathurst as the new chief justice of NSW. He wanted to do the right thing and be there.

Throughout this period, as over the previous 9 years, his ever-loyal personal assistant Tanya Nakhl has been there. Tanya, the Banco community thanks you. We hope you know how important a part of Banco you continue to be.

Simon was interested in the affairs and cases of others until the end. He was more upset that he had to give others the bad news than for himself. In his last week, he still wanted minute by minute descriptions of the progress of Smallbone's case against the Bar Association. His humour never left him. He said at his final floor dinner that the upside of his condition was that so many barristers were now going to a particular Macquarie Street dermatologist but that, unlike Craig Thompson, he was still waiting to receive a credit card on the dermatologist's account. A couple of days before he died, he was all praise and good will towards two floor colleagues who had been made a silk and a judge. At the same time he roused himself to text his loyal instructor and friend David Cowling at 4am to advise that Cowling should be increasing his on-line bids for the green beret worn by John Wayne in the film of the same name.

In recent months Simon underwent treatment that increased his suffering in the hope of extending his life with James. From the age of 13, Simon had attended his father's chambers whenever he could to help out. In all, he spent 26 of his all too short 39 years in and around the two sets of barristers' chambers that he loved so much. In time, his son James, who was the absolute love and dedication of his life, became a regular feature running around Banco chambers, whether in his Grammar uniform or his karate outfit. Simon would always say to James: 'say hello properly to... Mr Gleeson, or Mr Newlinds, or Mr Dick or Mr McHugh'. Simon wanted things done properly and he wanted his son to have the full life with his father that Simon was denied. We cannot restore to him the latter, although James you will always be welcome to run around Banco, at any age.

Farewell Simon, you were a courageous, debonair, sometimes wicked, always funny, man; a superb colleague and a true and loyal friend.

You will be missed by all.

Bullfry at the end of the dinner

By Lee Aitken (illustrated by Poulos QC)



Another large Scotch, ‘chasing’ a bottle and a half of red, suffused him – the first Mrs Bullfry used to complain that he was ‘all mania’ and ‘no depression’ – he could feel the mania slowly gaining a foothold now – how would this evening end? As it usually did? What did the Bard say?

A man may drink, and not be drunk,
a man may fight and not be slain,
a man may kiss a bonnie lass,
and still be welcome home again!

He looked around circumspectly – his cummerbund was beginning to give way, revealing the bottom of a torso which demanded a full figure ‘rashie’ before he could decently venture into the ocean. The eminent federal jurists had long since fled in their Commonwealth cars to the safety of domesticity; only one was left heavily in his cups – an occupant of the bench of a lesser territory who was now entirely legless – Bullfry had known him for over 30 years, in court and out – he would need to get him safely to rest at his hotel to avoid a report in some scandal sheet. The bevy of young barristerettes who had been present only a moment before had disappeared in the company of more callow and attractive admirers – his perception of

time was becoming ‘existential’ which meant that four hours might pass in the blink of an eye. He counselled himself to avoid the dive off Macleay Street where he had ended up a year ago on stage with the girl, and the snake, after the festivities – he needed a companion – and who better?

‘How are you fearless leader? Where are we headed?’

‘My boy – uptown, I think. – Baron’s has closed for a refit, but I know a small shebeen where we would be most welcome. I managed to reverse the forfeiture of its lease only recently – the usual ridiculous allegations involving non-payment of rent, fire orders, and the ‘use’ clause – some complaint concerning a ‘common bawdy house’ about which, as I told the duty judge, there is a large amount of old, and important, learning’.

‘That sounds just the ticket – who is else is in?’

‘Fatty’ has had to retire early because of cricket tomorrow; ‘Puddles’ is already flat – it may just be you and me to start with but no doubt the ‘team’ will grow as the troops reassemble – give me a hand here with ‘the chief’.

Together, they struggled with their unsteady companion down to a nearby rank, and fought their way aboard

a cab. After dropping their passenger at the Marriott, they alighted exuberantly amidst a thronging crowd, no-one of whom, unsurprisingly, was wearing a dinner jacket.

'Turn it on for later on! Turn it on for later on!' – Bullfry could well imagine the result if he returned at cockcrow and endeavoured to follow that advice – he avoided the tattooed Islander, and followed his boon companion down the steps. Was this a wise idea? After a dinner past, the Floor had foregathered and drunk on into the dawn – this had not found favour with his companion's better half. On that memorable occasion, with colleagues severally holding his companion's arms and legs, they had knocked timorously at the matrimonial door to be greeted by his benighted, and 'benightied', spouse who had said simply: 'Leave him on the porch!'

And what of his own wake-in-fright moment, after the '03 dinner? He had fallen into bad company, lost track of time and place, and awoke agog and befuddled in a matinal crepuscular gloom. He had rolled over in a bed, checked his watch with horror, and said to his companion, 'Ye Gods! Is that the time? – I had better be getting home', to be greeted with: 'You are home!'

Blinking against the strobe lighting, the two wayfarers went down the mirrored staircase – a smiling 'waitress' thrust a bin of VB into Bullfry's trembling hand. The patron of the establishment, newly relieved against its forfeiture, approached and indicated with an expansive gesture where they could sit in comfort, while enjoying the privileges of the house.

'What did you think of the dinner?'

'Right up there with some of the great ones. The guest of honour spoke brilliantly despite the accent – I had never realised before tonight how little I knew, or cared, about the common law of New Zealand'.

'Yes, but I thought their chief justice performing the haka in traditional dress, before the start of his speech, was a little over the top – I'm all for local customs, but what does that nose-rubbing, and the greeting with the tongue, really mean? Miss Junior didn't quite know how to respond. And mentioning the Bledisloe early on – always a mistake at what is, after all, a Waratah's venue. Thank goodness security stopped that common law bloke from reaching the stage – anything might have happened.'



'You're right – and it wasn't a good look when Freddy, at the end of his speech, misjudged the distance and nearly fell off the podium. Still, these things happen and it is always nice to get out for the evening – as well, attendance helps one to confirm who is still alive, and who is not'.

It was another night to forget – hours passed. The boon companions drank on steadily as sunrise approached, and at the usual time Bullfry provided funds for the traditional hamburger and chips. Slowly, slowly the sun rose – it rose on no happier sight than men of good abilities, and emotions, conscious of the blight which was upon them, and relieved that, for one evening at least, it could be allowed to eat them away.

They staggered out to greet the dawn from the Stygian depths – somewhat dishevelled, and merry.

Bullfry began with his favourite refrain in such a situation:

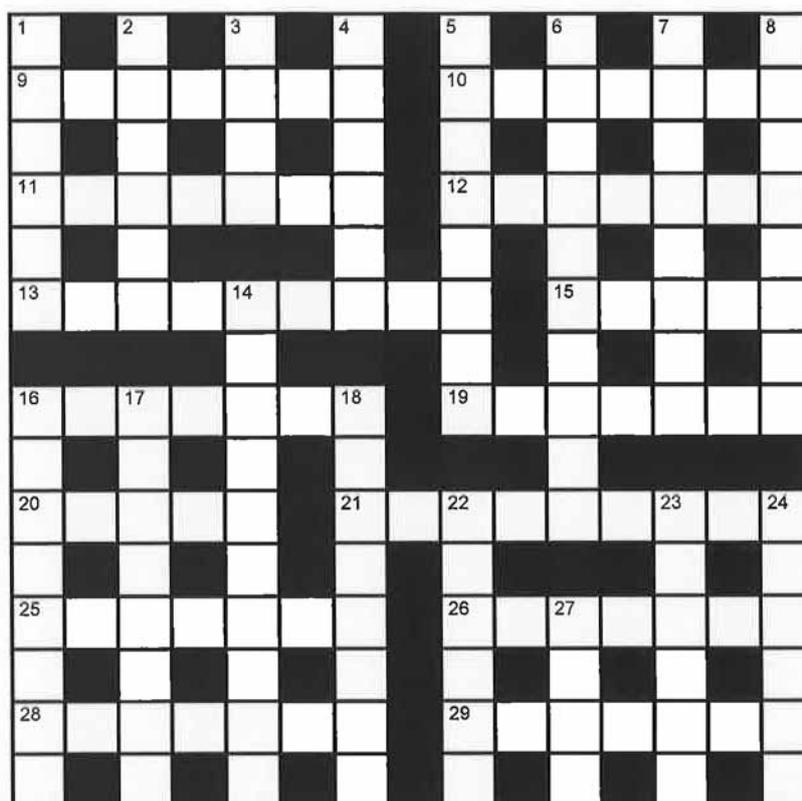
'And not by eastern windows only,
When daylight comes, comes in the light,
In front the sun climbs slow, how slowly,
But westward - look! – the land is bright'.

But it was to the East that they turned as they began the long and sobering march up Oxford Street.

'Bondi at nine for a quick dip, I think – and then some chambers work to blow away the cobwebs!' said Bullfry, straightening his bowtie and cummerbund which had been displaced during a restless interlude.

Crossword

By Rapunzel



Across

- 9 Doubtless and dimensionless quarter, the fourth degree. (7)
 10 A revolutionary leader's 'rival approach'. (7)
 11 Live in nun's dress. (7)
 12 To fix on 'half measure' -type corruption. (7)
 13 Poky Purim yields to the Day of Atonement. (3,6)
 15 Sounds offal rubbish? (5)
 16 Labor stall (Or Lalor lost reformatory?) (7)
 19 Right of possession in the late Nancy Reagan. (7)
 20 'This shall never meet!' cried Mr Clemens. (5)
 21 Try oomph? Instead, vets tried. (4,5)
 25 Improved trading lifts victory force. (7)
 26 A very loud can (friendly?) (7)
 28 Engorged...sell now? Error! (7)
 29 Follows wallets around upstart. (7)

Down

- 1 A roguish thing we call a foot (Selden). (6)
 2 The pleasure of pain around pain for this poohbah. (6)
 3 What's left when a cheque's ripped off. (4)
 4 Arch in time (mil). (6)
 5 Mole's mate, drunk, treads water, but Latin out. (5,3)
 6 Fearful fringed the frenzied. (10)
 7 A Roman road into broken up for high flying science. (8)
 8 (Lawless) 'Let's try a judge!' (8)
 14 Enabling it, afresh, incorporeal. (10)
 16 Chifley's home transformed thrust by a liberal degree for new CJ. (8)
 17 Street spectacle on tour? (4,4)
 18 Messy litigation minus ten leaves a party. (8)
 22 Trick irrational langoustine? (6)
 23 To dye with blood, battered I rub me. (6)
 24 Plea from evensong, however. (4,2)
 27 Lex left the law of the forum (Lat). (4)

Solution on p113

Big Fella All Same Judge: A History of the Supreme Court of the Northern Territory

Dean Mildren | The Federation Press | 2011



The title of this engaging book comes from an affirmation which Aboriginal witnesses were asked to make by a special magistrate in the Northern Territory, Joseph Nichols. Nichols affirmed witnesses in Pidgin English, along the following lines:

Jacky, you bin see that big boss fella, all same judge, bin sit longa there? – pointing to the judge.

Jacky replied. 'You-eye'.

Now you bin tellum all same judge fella all about that trouble bin come up longa Yuendumu. You bin tellum all same true fella what you bin see longa your own eye, not what some bugger bin tellum longa your ear. No more gam, no more humbug.

Mr Nichols was himself a colourful character. He was described by a local legal practitioner (later to become a Supreme Court judge in the territory) as:

... the fattest man I have ever seen. He made Sidney Greenstreet of *Casablanca* fame look like the Thin Man. His sparkling dentures made with the precision of a fitter and turner unfortunately lacked the vulcanising effect of his gums, the result being a perpetual beatific

smile. He wore the fashionable Darwin Rig of the day which made him look like a plantation owner. He was habitually attired in long white trousers, shirt with long sleeves and black tie. His girth was enormous and to prevent his midriff from becoming blackened by the Bakelite-type steering wheel of his car which dug into his paunch, he donned a little white apron at all times before getting into his car.

As might be gathered from these extracts, this is an entertaining book. It not only provides a fascinating account of the history of the Supreme Court and justice more generally in the Northern Territory, it does so in a very readable way.

... this is an entertaining book. It not only provides a fascinating account of the history of the Supreme Court and justice more generally in the Northern Territory, it does so in a very readable way.

The author is well qualified to give this fascinating historical account of the territory's legal and judicial systems. Dean Mildren has been a justice of the Northern Territory Supreme Court since 1991 and, prior to his appointment, he practised in the Northern Territory for many years. Justice Mildren also displays the welcome trait of any good judge: the ability to laugh at himself. He recounts a case in 2004 when a young serial thief whom he had previously released on a suspended sentence came up before him again for breaching the terms of his release order. Upon hearing that the accused had committed numerous stealing and burglary offences while on suspension, the judge asked: 'Who was the bloody idiot who granted him bail?'

The book traces the history of the judicial system in the Northern Territory from 1863, when the Northern Territory ceased to be part of New South Wales and became part of South Australia. The author has carefully researched the background and contributions of all the judges who have served in the Northern Territory. They include Justice Samuel James Mitchell, who was appointed a resident judge on 1 April 1910 and resigned in April 1912 when the Commonwealth (which in 1911 had taken over administration of the territory) refused to offer him a commission for more than five years. Justice Mitchell is also remembered as the

grandfather of Dame Roma Mitchell, Australia's first woman to be appointed as a senior counsel, then as a superior court judge and later as governor of South Australia.

We are also treated to some fascinating insights into the things which particularly motivate Northern Territorians. In December 1918 there was a serious public uprising in Darwin provoked in part by the administrator's decision to increase the price of beer by 31 per cent. There was considerable public disquiet about this, together with other actions taken by the administrator and his perceived ally, Justice Bevan (who was then the territory's sole Supreme Court justice). A public rebellion was avoided when, on 18 October 1919, the administrator, Justice Bevan and

the government secretary were all run out of town by the Darwin mob, leaving their wives behind.

No one should be surprised that Justice Bevan was both controversial and unpopular, particularly in the eyes of Darwin's beer-drinking trade unionists. In 1915, in the midst of a waterside workers strike (which meant that a Dutch vessel was unable to unload its cargo), Justice Bevan went down to the wharf and personally assisted in its unloading!

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This well researched book deals extensively with the interaction between the territory's justice system and Indigenous Australians. We learn that it was the practice to imprison Aboriginal witnesses (potentially for months) prior to them giving evidence in criminal trials. The conditions at Fanny Bay Gaol at the time are described as 'barbaric'. We are also given a timely reminder of the draconian nature of the territory's Welfare Ordinance 1953–1957, under which the administrator declared all

but six Aboriginals in the territory (including Albert Namatjira) to be wards. This meant that all such persons could be taken into custody (for their own 'care and assistance'), were restricted in their freedom of movement without written authorisation and even had to get permission to co-habit or marry. This part of the book takes on a particular poignancy in view of the recent debate and controversy concerning Commonwealth intervention, a modern reality

which possibly also attracts the author's description of the Welfare Ordinance as 'an appalling piece of legislation of the most patronising kind imaginable'.

We are treated to absorbing accounts of many Territory cases which have contributed to Australia's legal history. Cases such as the trial of Bradley Murdoch for the murder of Peter Falconio, the significant litigation in *Mengel v Northern Territory* (which has proven to be a landmark decision

in torts and administrative law) and, perhaps most fascinating of all, a refreshingly objective analysis and description of the various proceedings surrounding the death of Azaria Chamberlain. Justice Mildren also discusses numerous cases dealing with the relevance of customary law and sentencing of Aboriginals and how Territory courts have dealt with 'payback punishment'.

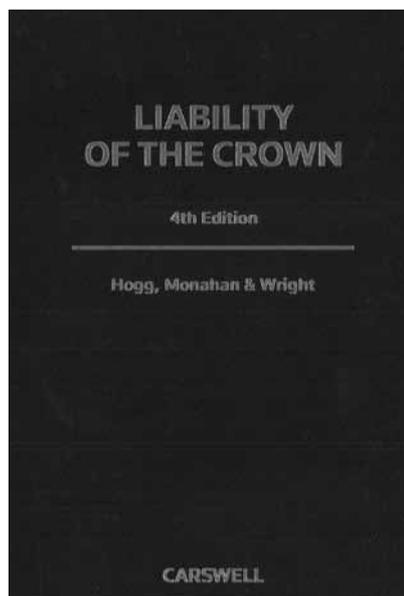
I hope that the author will forgive me if I mention the only malapropism I spotted in the entire book. In detailing the extra security installed for the Falconio trial, the author describes on page 331 how the dock 'was provided with a perspicacious screen'!

The publication of this book deserves two bouquets. The first must go to The Federation Press for having the courage and imagination to undertake its publication, helping to secure its reputation as Australia's leading legal publisher. The second goes to the author for having produced such an interesting and informative work.

Review by John Griffiths SC

Liability of the Crown (4th ed)

Peter W Hogg, Patrick J Monahan and Wade K Wright | Carswell | 2011



It is 40 years since the first edition of *Liability of the Crown*. It covered Australia, New Zealand and the United Kingdom. Earlier editions were, I think, influential in the move from *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd* (1979) 145 CLR 107 to *Bropho v Western Australia* (1990) 171 CLR 1 and *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90. Earlier editions were often cited in Australian courts, with greater approval as time went on.

The fourth edition is restricted to Canada, although the authors make reference to the law of Australia, New Zealand and the United Kingdom. The focus of the book, say the authors, is the extent to which the Crown, in the sense of the executive branch of government, is liable to pay damages or give other redress to persons injured by the exercise of government power. But that description does not adequately describe the depth of principle from which that issue is addressed nor the width of the subject matters that are considered.

A list of just the new or rewritten chapters – tort, contract, restitution, trust, estoppel, procedure, evidence, expropriation and the Crown as creditor – indicates the scope of the book and how it has expanded since earlier editions.

The authors' view is that the executive branch of government (the Crown) ought to be governed 'as far as possible' by the same rules of legal liability for harm caused to private persons as is a private person. The similarity of this language to the terms of section 64 of the *Judiciary Act 1903* and equivalent provisions in the Crown proceedings legislation of some of the states will not escape the attentive.

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The early chapters of the book, dealing with remedies against the Crown, relate (with approval) the gradual assimilation of the Crown to private defendants and criticise the few immunities (used in a very general sense) of the Crown that persist.

Of interest to Australian public lawyers is the discussion of the recent decision of the Supreme Court, *Canada (Attorney General) v TeleZone Inc* [2010] 3 SCR 585 rejecting any prohibition on 'collateral attack' and holding that the plaintiff suing the Crown for damages in tort was entitled to have the claim disposed of in a single proceeding, as would be the case if the defendant were a private person.

Also of interest is the decision in

Kingstreet Investments Ltd v New Brunswick (Finance) [2007] 1 SCR 3 dealing with the entitlement of the taxpayer to a remedy in restitution to recover money paid as tax where the tax is subsequently found to be unconstitutional.

The authors note the 'melancholy history' of the special rule that the Crown is not bound by a statute except by express words or necessary implication and with sadness note that it continues to be the law of Canada, except in two provinces, British Columbia and Prince Edward Island. *Bropho* is noted as 'a modest and incremental judicial reform'.

It is a pity that the incisive thinking which informs this book is no longer

directly concerned with Australia. I echo Professor Harry Whitmore's review of the first edition when he wrote in the *Federal Law Review* in 1972:

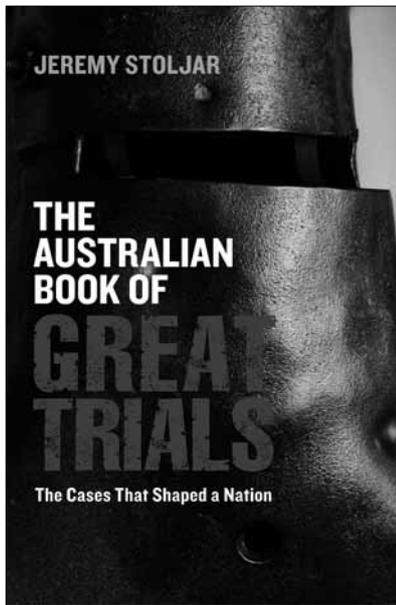
On reading this book I am filled with regret that one of our leading public lawyers, Peter Hogg, has left Monash University to take up a chair in Canada.

Nevertheless it is of great interest to see what development has been made in Canada in demythologising the Crown and to note what, in the authors' view, remains to be done.

Reviewed by Justice Alan Robertson

The Australian Book of Great Trials: The Cases That Shaped a Nation

Jeremy Stoljar SC | Pier 9 | 2011



The following speech was delivered by the Hon Justice Heydon AC at The Mint, 20 September 2011.

Jeremy Stoljar is a senior counsel. But times are hard at the bar even for senior counsel. Alternative sources of income must be found. He has decided to earn money by his pen. As Dr Johnson said: 'No-one but a blockhead wrote, except for money.' Authors, unfortunately, like barristers, are members of an impoverished class. To authors the level of royalties is the subject of eternal interest. They share the world-view of Field Marshal Slim, who, after his term as Governor-General of Australia ended, returned to England to promote his autobiography, *Defeat Into Victory*, with the words: 'We field-marshals have learned, in peace as in war, to sell our lives dearly'.

Now Pier 9, which has published this book, deserves much credit for it. Like other publishers, it runs many risks. No doubt the contract it has made with Jeremy will

include clauses about defamation, manuscript preparation, obscene material, breach of contract and plagiarism.

Why defamation? Because many authors whom publishers of books about law have to deal with are academic lawyers, and their profession almost exclusively consists of defaming judges.

Why manuscript preparation? Because publishers know that although authors supply manuscripts which have a beginning, a middle and an end, they do not necessarily appear in that order.

Why breach of contract? Publishers know that some authors are more famous for the books they are going to write than those which they have actually written. They remind one of Hugh Trevor-Roper's conversation with the Prime Minister, Margaret Thatcher, in which he said he had a book on the stocks, to which she retorted: 'On the stocks? *On the stocks?* A fat lot of good that is. In the shops, that is where we need it.'

If there are clauses giving Pier 9 control over obscene material, I think that Pier 9 will have overlooked commercial realities as they are in the age of Dominique Strauss-Kahn. Pier 9 should have remembered that Rousseau's *Confessions* has been described as 'a lucid journal of a life so utterly degraded that it has been a bestseller in France ever since.'

Why do publishers worry about plagiarism? Publishers take care not to be rude about the books they publish, because you never know who wrote them. But they should remember Sir Owen Dixon's

aphorism: to copy out one book is plagiarism; to copy out two is diligent scholarship; to copy out three is original research.

In some ways this book reminds us of how the law in practice has changed. The early trials described were very short affairs – they were prepared quickly, they did not last long, their consequences ensued almost at once. They say that in Russia everything is true, eventually. But in modern litigation some things are true all the time. One of these modern truths is that any given event takes much longer than people expect. Justice Jacobson has a female court officer who comes from Spain, the land of the siesta. He occasionally takes a five minute adjournment in the middle of the morning or the afternoon. The other day he said: 'Adjourn the court for five minutes.' The court officer then realistically called out: 'All rise! The court will adjourn for seven minutes.'

One reason why litigation in practice has changed is the increased complexity of evidence, particularly expert evidence. This book shows that it played a small role in the case of Dean in 1895, but an enormous role in the Chamberlain case in 1982, where, in Mr Justice Morling's opinion, it caused a miscarriage of justice. And as scientific expertise increases in complexity and ambition, it will become a growing problem in the decades to come.

But the law has become more complex and unpredictable in other ways as well. Ian Callinan QC was once cross-examining in a commercial cause before Mr Justice Rogers. At one point his junior

passed him a note: 'Ask him about Fay Richwhite.' So he asked in his quiet but determined style: 'Do you know a Miss Fay Richwhite?' The somewhat startled witness said: 'No', before being rescued by Mr Justice Rogers: 'Mr Callinan, she is not a lady; it is a merchant bank!'

Then there are the increased difficulties of criminal procedure, with its multitude of jury warnings, some necessary, some discretionary. Only Judge Gibson of the District Court rebelled against this when he said: 'The prosecution must prove its case beyond reasonable doubt; but it does not have to go beyond that.'

There are examples in the book of the eternal continuities of Australian life. We experience great heat and bushfires, as the northwest wind blows across the fierce and terrible purity of the desert, and we call this 'climate change': yet the book records that there were great temperatures and bushfires in 1851, just before the gold was found which led to the Eureka Stockade trials. We intensely debate flood taxes and carbon taxes and mining taxes: the book analyses how those Eureka Stockade trials arose out of mining taxes. We worry about the impact of the law of restitution on older doctrines. Earlier this year, Mr Bret Walker was asked in the High Court if a claim in restitution had been pleaded in the statement of claim. With the disapproving glare of Justice Gummow burning down on him, to my recollection Mr Walker replied – and if he did not say this he ought to have – 'Of course not! It would be plain professional negligence to do a silly thing like that.' Yet the book



reveals that in the first civil trial in Australia, described in this book, the *Cable Case* in 1788, a bailment case about the loss of a parcel on the First Fleet, the case of the plaintiff convicts was put in restitution.

The book will remind readers of many things. In analysing the case of Ronald Ryan, the last person on whom a death sentence was carried out in Australia, the book describes the trial and other hearings before Mr Justice Starke. Sir John Starke, at the end of his much-admired career at the bar and before he had become a judge, had managed to prevent Robert Tait from being hanged – culminating in the scene when Chief Justice Dixon, speaking for the court, not only made an urgent order staying Tait's execution, but also added an order directed to the Deputy Premier and Chief Secretary, and later arranged for that order to be served on him personally in order, as he said, to prevent that statesman from inadvertently committing murder. Sir John Starke was the son of the great Sir Hayden Starke, the man of whom Sir Owen Dixon after his death said that he had 'a forensic power as formidable as I have

seen.' He was once on a Victorian country circuit in which the case before his was a murder trial. The jury returned at a late stage of the evening and convicted the accused. The trial judge placed the black cap on his head and pronounced the mandatory death sentence. He then said: 'Call the next matter!' Hayden Starke objected because of the late hour. The judge said: 'What has that got to do with it?' Starke said: 'My client's case is important. It is about pounds, shillings and pence. It's not a mere hanging matter.'

One theme of the book is the role of the law in protecting the weak – the plaintiff convicts in the *Cable Case*, the Aboriginal victims of the Myall Creek murderers, the miners in their struggle against the government in the Eureka Stockade Trials. Those three pieces of litigation took place before the arrival of democracy. But the book also tends to vindicate the qualms of those nineteenth century thinkers, like Alexis de Tocqueville, Robert Lowe and Lord Salisbury, who opposed or feared democracy because of the impact which the tyranny of the majority would have on the liberties of minorities. The twentieth century taught us that the wars of the peoples are more terrible than the wars of kings. So is the wrath of the peoples against marginalised and powerless minorities. That is particularly so if a minority is thought to carry a risk of causing physical danger, like the Australian Communist Party in the 1950s or Muslims this century. The author describes how the High Court struck down legislation banning the Communist Party. He also describes the various

pieces of litigation concerning Joseph Thomas. Some think the legislative system of control orders which affected Thomas to be too oppressive; although the High Court did not strike it down, the *Communist Party Case* may have influenced some softening of it. In general Australia is an exception to the rule that there is no advertisement for colonial government like post-colonial government. But the protection of minorities remains an ever-present need.

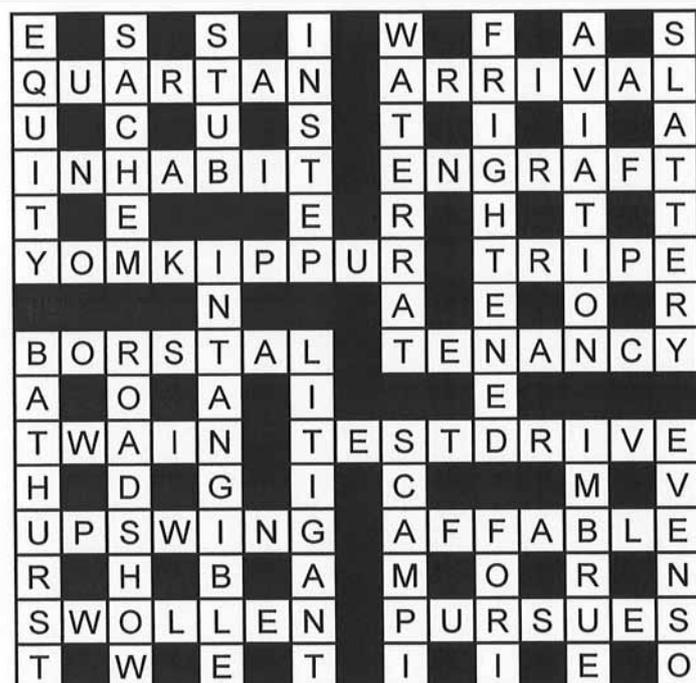


Let me conclude by saying in the presence of his son Sam that Jeremy Stoljar is the son of one of the greatest academic lawyers who ever worked in Australia – another Sam Stoljar. As one would expect, his very interesting book is written with great clarity and liveliness.

I have only one complaint. The author's portrait makes him look like a cross between a member of the Italian Red Brigades and an East German film director of the 1970s. These representations are not accurate guides to his character. With only that small demur, I have great pleasure in launching this book and wishing it every success. Go out and buy! There are only three shopping months to Christmas.

On the whole the book is kind to both judges and legal practitioners. Indeed it is sympathetic to most of the protagonists in the dramas it discusses, including guilty criminals. Jeremy Stoljar is not like President Theodore Roosevelt's daughter, Alice Roosevelt Longworth, who would say: 'If you don't have anything nice to say, come sit here by me.' The book reveals many unusual and little-known things about Australian life over the last 22 decades. Further, it reminds us of the great ability of Mr Justice Hunt: I refer not so much to his role as a defamation lawyer, or as an appellate judge, but to his capacity to preside faultlessly over extremely complex and stressful criminal trials. The book reminds us, too, of the strange posthumous career of Justice Murphy. In *Miller v TCN Channel Nine Pty Ltd*, delivered one hour before his death, all the other six judges opposed his contention in that case that there was an implied guarantee of free speech in the Constitution. Yet less than six years later, three of those six judges, together with three new judges, said in the *Australian Capital Television Case* that there

was; and numerous other ideas of Justice Murphy propounded on the court and emphatically rejected in his lifetime were taken up after his death. It would be good to have a detailed study of Justice Murphy, neither hagiographical nor abusive, but penetrating.



Law & Peace

Tim Kevan | Bloomsbury | 2011

You've already set your trajectory. You just don't realise it yet. You won't until it's far too late. It's like when they used to warn you about the wind changing when you were a child. Whatever might be in those oh so earnest little hearts of yours, you're never going to be a UN Goodwill Ambassador or win a Nobel Prize. You're never going to climb Mount Everest, or even simply live by the sea and write a novel. Instead, cash will be king, your clerks will have more say over your lives than your family and you'll all have glorious careers at the great English Bar. So wake up kids and smell the stink of your lost dreams.

This gold standard cynicism belongs to OldSmoothie QC, one of the big cast of legal characters in Tim Kevan's second novel, *Law & Peace*.

Developed from a blog now appearing in *The Guardian* newspaper (www.guardian.co.uk/law/baby-barista-blog), Tim Kevan's first novel *Law and Disorder* chronicled the highs and lows of BabyBarista, a fictional pupil at the English Bar.

Having won a spot for a room, in Kevan's sequel we find out how BabyBarista fares in his first year as a fully fledged tenant in Chambers. *Law & Peace* (written again in the style of a diary) contains the same cast of eccentric members of Chambers. There is the barrister who claims a tax deduction for his cocaine habit in his tax return as 'motor fuel'. OldRuin now laments the 'weight of time' and 'the paths he never trod'. OldFilth, appointed to the Bench, now somewhat recklessly sends out messages to

followers on Twitter while hearing cases:

Very attractive counsel appearing before me at the moment.

Ha! They really think they can pull the wool over my eyes that easily?

Hmm. Must be almost lunchtime.

Whose side shall I pick? Attractive counsel or another bore? Difficult one.

UpTights is still having herself plied with Botox, and dreaming of younger barristers. She has also recently applied for silk. Upon being passed over, this sympathetic letter from OldSmoothie is an example of the regard that the barristers in BabyB's Chambers all have for each other:

Dear Uptights,

May I be the first to offer you my sincere condolences on your being rejected as a QC for the second time running. Whilst I'm sure that at your age rejection is something you have learned to manage, I realise it must still come as somewhat of a blow to have it confirmed at such a high level. I hope very much that you will at least take comfort in the words of the official press release which says: 'If you have not been appointed that does not mean you are not a valued and perfectly competent advocate'. Yours affectionately, OldSmoothie.

As for BabyB, once again his life and career are in turmoil. Having paid for his Oxford degree, his mother is facing financial ruin. So BabyB is engaging in insider trading and breaking all kinds of ethical rules to save her from the loan sharks. His love life is in crisis, and he has developed an arguably unhealthy desire for older women, given that the older woman in question is the former Alaskan governor, Sarah

Palin. Yikes. He is also deeply depressed about being stuck in a profession populated almost entirely by people who specialise in 'twisting the truth and taking technical points' and, even worse, by solicitors.

Law & Peace, however, is ultimately a story of salvation. For BabyB, the road to redemption comes from the lessons he learns from the wise group of senior citizens he is representing in a David and Goliath battle against a giant telecommunications company whose mobile phone masts seem to be neurologically harming, or at least neurologically altering (sometimes in good ways) the group of plaintiffs he represents. The catastrophic risks to human life that these mobile phone towers pose in this novel have not yet been accepted in Australian jurisprudence.¹

The travails of the bar are sometimes too much for BabyB, but in the end he gets his soul and his mojo back, and comes to realise the universal truth about all legal and life dilemmas: '*There's nothing a good surf can't sort out*'.

Law & Peace is a faster-paced and equally funny match for its hugely enjoyable predecessor.

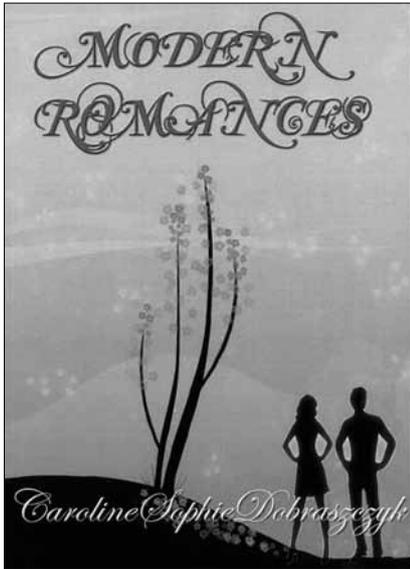
Review by Richard Beasley SC

Endnotes

1. *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256 at [184].

Modern Romances

Caroline Dobraszcyk | Poseidon Books | 2011



The word 'romance' in its bathetic sense is found in a Restoration play by Margaret Cavendish, *The Wits Cabal*. In Act 1, the wits have the following exchange:

Faction: I think good Husbands may be in our thoughts, but not actually in the World.

Ambition: I am of your opinion, they may be mention'd in our words, but not found in our lives.

Pleasure: Faith we may hear of good husbands, and read of good wives, but they are but Romances.

Portrait: You say right; for we may as soon finde an Heroick Lover, and see all his impossible Actions out of a Romance Book, as a good Husbands; but as for Wives, I will not declare my Opinion.

Six years later, Cavendish herself wrote a romance novel (also, by the bye, probably the first

science fiction from a female). *The Description of a New World, Called the Blazing-World* opens with a prolix version of the formula we have come to love: 'A Merchant travelling into a foreign Country, fell extreemly in Love with a young Lady; but being a stranger in that Nation, and beneath her, both in Birth and Wealth, he could have but little hopes of obtaining his desire...'

The genre is criticised by an illiberal type, the person who not only thinks that they have readers' interests at heart, but feels entitled to tell them so. Hmm. The writing is, of course, formulaic, but so is getting out of bed. And what barrister doesn't respond well to formula?

Besides, and in the bar's tradition of biting the hand that feeds, Dobraszcyk avoids the one great expectation of the formula, the certainty that the two protagonists will end happily entwined.

In fact, all of Dobraszcyk's three heroines and one hero end up alone. The opening story is the lengthiest, a lamentation on the paralysis of unrequited love. She then shifts to three crisp vignettes: a visit by the ghost of love gone; the holiday tryst; and a rape.

Only the first heroine ends up with her aloneness as a continuation of an atomised life. The others return to their lives cathartised. Indeed, the last and tightest of the four stories finishes with the heroine

experiencing upon her assault a rather chilling apotheosis.

Halfway down the second page of Dobraszcyk's work, between the ISBN number and the Dewey number, is written 'Subjects: Man-woman relationships—Fiction'. Indeed.

Frigyes Karinthy was an Hungarian writer of the early twentieth century who wrote about Gulliver in the manner of Swift (and thus, unsurprisingly, in a style not wholly distinguishable from Cavendish). In *Voyage to Faramido and Capillaria*, Gulliver finds himself in Capillaria, a land beneath the sea where men – or 'bullpops' – are for fine dining and women rule as gods. Dobraszcyk's heroines might have agreed with Karinthy's introductory remark:

Men and women – how can they ever understand each other? Both want something so utterly different – the men: women; and the women: men.

Those who need their prose to be objectivised before it can be digested as Truth should avoid this book. Those who are willing to be diverted by an enjoyable perspective on the irreconcilability of idealised love and the mess which is woman + man, will enjoy it.

Review by David Ash

Bar football 2011

By John Harris, Simon Philips, Anthony Lo Surdo



The NSW Bar Football Club (NSW Bar FC) has grown in strength, popularity and skill since its inception in 2008. 2011 was no exception with the NSW Bar FC ranks swelling to well in excess of 60 members.

Domain Lunchtime Competition

NSW Bar FC competed for the third successive year in the Domain Soccer League (DSL) Competition. If success is measured by fun, fitness and collegiality then NSW Bar FC enjoyed yet another enormously successful and productive year in the DSL even if that success may not have been reflected in the competition table.

Sports Law Conference and Bar Football 'State of Origin'

On 10 September 2011, under sunny skies but unseasonably cool temperatures, the Queensland Bar Association hosted the Suncorp NSW Bar v Victoria Bar Annual Challenge Cup and the Suncorp NSW Bar v Victoria Bar v Queensland Bar Annual Football Challenge Cup

at the Robina City Football Club on the Gold Coast. Over 60 barristers and 3 members of the judiciary from the 3 States participated in the day.

The NSW Bar FC touring party consisted of Stephen Free, Michael Fordham, Vahan Bedrossian, Colin Magee, John Harris(C), Greg Watkins, Simon Philips(C), Nick Tiffen, John Marshall SC, Gillian Mahony, Houda Younan, David Stanton, Geoff Lindsay SC, Adrian Canceri, Graham Turnbull SC, Simon Burchett, Lachlan Gyles SC, Matthew Graham, Elisabeth Peden, Daniel Tynan, Jonathan Clark, Rohan de Meyrick, Cameron Jackson and Anthony Lo Surdo.

The games were preceded by a Sports Law Conference at the Vibe Hotel, Surfers Paradise led by the intellectual powerhouse of the NSW Bar and chaired by his Honour Wayne Cochrane of the Land Court of Queensland. Turnbull SC spoke on 'When physical contact on the field becomes a crime', (John) Marshall SC presented a paper on 'Anti-Doping in Sport', Elisabeth Peden/Daniel Tynan

explored 'Construction issues in sports contracts' and Peter Steele addressed 'Personal Risk Products'. The papers were followed by a lively discussion on 'Appearing before Sports Tribunals' led by Maconachie QC and a panel consisting of Marshall SC, Gyles SC, Harris and Burchett.

The Sports Law Conference raised \$1,125 which was donated to Camp Quality and will assist in sending children living with cancer on sports and recreation camps.

Game 1 – NSW v Qld

This was the second time that these States had met in fierce combat. Last year we reported 'Early fears that Queensland looked and appeared significantly younger and fitter were quickly alleviated by a game dominated by New South Wales.'

Qld again looked younger and fitter but they also showed greater speed, ball skills and dominance in the early part of the game and went into a deserved lead with a goal after 15 minutes. The score could have been



2 or 3 nil had Qld captain Selfridge converted a penalty kick and Harris for NSW not stopped another close range shot. Possibly the penalty miss was British justice as Referee Tiffen awarded what the critics have unanimously agreed was a soft penalty.

The early Qld onslaught lagged after it replaced more impressive players while NSW substituted Marshall SC and brought on Tynan and Philips. Philips and Magee then controlled the back line and the ball made its first incursion into the Qld half.

NSW made a series of attacks leading to what Tynan described as a shot which 'bamboozled' the Qld keeper. More conservative commentators described the goal euphemistically as the keeper being in the wrong spot at the wrong time. However the goal is described the game was then equal at 1-1.

NSW went into the lead when the impressive Free scored just before half time after good lead up passing through Watkins and Bedrossian. The score at half-time was 2-1.

At half time Harris implored his

players to forget Turnbull SC's comments on 'When physical contact on the field becomes a crime' with comments directed particularly at Mahony who is never shy in defending her patch. Maonachie QC, ever a lover of the World Game, looked on in wonder.

NSW continued its late first half dominance aided by new reserves Clarke and Younan. Bedrossian then scored what looked to be the winning goal to take the score to 3-1 with five minutes left in the game. Farr for Qld scored a late goal to close the proceedings at NSW 3 Qld 2. Best and Fairest honours for Qld went to Lee Clark and for NSW to Daniel Tynan.

Game 2 – NSW v Victoria

Having narrowly accounted for our youthful Qld hosts, the NSW team was reasonably confident that it could continue its unbeaten run against an understrength Victorian side. This confidence was well placed with NSW eventually achieving a dominant victory after meeting some strong early resistance.

The Victorians, led by their captain Mike Kats and the evergreen Peter Agardy and ably assisted by some temporary Southerners (Stanton, Mahony, Marshall SC, Harris and others from NSW who switched allegiances to balance numbers), had the benefit of a strong breeze in the first half and used it to good effect. While NSW keeper Burchett was not called upon to exert himself overly, his teammates found it difficult to penetrate the Victorian defences and, despite having a good share of possession, goal scoring chances were few for NSW. The match was scoreless at half time.

The second half was a different story. With the wind at their backs, the NSW midfield of Canceri, Free, Magee, and Gyles SC dominated and created regular scoring chances which were clinically taken. First Bedrossian scored the opener after some great lead up work. Then Magee poked home a second from close range. Philips converted a perfectly delivered corner from Gyles SC and Bedrossian sealed the result with a fourth.

Such was NSW's dominance that defenders De Meyrick, Fordham, Younan, Peden and Lindsay SC were able to begin planning the evening festivities without being distracted by their Victorian opponents.

The final score was 4–0 to NSW, which comfortably retained both the Suncorp NSW Bar v Victoria Bar Annual Challenge Cup and the Suncorp NSW Bar v Victoria Bar v Queensland Bar Annual Football Challenge and extended its unbeaten record in these contests. The game was ably refereed by Lo Surdo who not surprisingly selected Bedrossian as the Best and Fairest player from NSW and Lionel Wirth from Victoria.

Game 3 – Victoria v Queensland

Following the earlier victories by NSW, the third match of the day was a contest played purely for pride and bragging rights. To ensure that the tiring Victorians were not completely swamped

by the younger, fitter and more numerous Queenslanders, Magee, Fordham, Philips, Jackson, Lindsay SC and others from NSW joined Stanton, Harris, Marshall SC and Mahony in helping Victoria to keep the score respectable. This they did and restricted the rampant Queenslanders to a 3–1 win.

Special note must be made of the efforts of Nick Tiffen who traded his whistle for playing boots and took over as dead ball specialist for Victoria in a refreshing cameo in the second half.

The game was refereed by Burchett who selected Jim Fitzpatrick as Best and Fairest for Victoria and Johnny Selfridge for Qld.

Thanks

The organisers wish to thank all those whose support made the day a great success and especially the conference speakers for devoting their considerable time and expertise. Special mention should

be made of Peter Agardy of the Victoria Bar, John Selfridge and Paul Favell of the Queensland Bar and Lo Surdo of the NSW Bar for organising the day.

Thanks also to Nick Tiffen, Lo Surdo and Burchett who officiated.

NSW Bar FC acknowledges Suncorp, MLIG and Peter Steele for their continuing support. The Sports Law Conference and Bar Football 'State of Origin' heads to Victoria next year.

Cricket

By WG Grace

The 10th and 11th floors Wentworth opened the cricket season with a genteel match at St Andrews College, Sydney University in late October. Angus Lang set the pace early with some accomplished stroke play as the 11th floor's uniquely slow medium bowling attack was put to the test. A typically stylish and chanceless knock from Gyles SC, which included a spirit breaking partnership with Gyles junior, helped the 10th floor towards a comfortable score in the 120s.

The 11th floor top order were pinned down by the metronomic medium pacers Lang and newcomer Hilbert Chiu, before the mesmerically unpredictable Stuart Lawrance was unleashed. In a spell that kept everyone on the square guessing and occasionally ducking for cover, Lawrance snared a handful of wickets as the Wombats' wild ambitions proved greater than their talents. Fortunately there was wag in the tail as the junior Pikes and Tom Bell-Bird compiled some much needed runs.

The match culminated in an epic encounter of Ali-Foreman proportions, as King SC took up the ball against the lower order pairing of Poulos QC and Maconachie QC. Improbably, King accumulated three wickets from the exchange. Poulos was so impressed with his first dismissal that he demanded an action replay. King duly obliged.



Photos by IR Pike SC (score 0 [twice])

One game, two trophies and a rising star

By Andrew Scotting



On 12 November 2011, the NSW Bar Hockey team travelled to Hawthorn in Melbourne to defend the Rupert Balfe – Leycester Meares Cup that they had held since a stunning albeit unexpected victory in Sydney two years earlier. The Victorian Bar turned up in numbers intent on restoring their supremacy in the fixture that has been a regular one since its resurgence in 2000.

In the 2000 fixture, the NSW Bar fielded a wealth of legal experience, including Ireland QC, Bellanto QC, Justice Katzmann and Callaghan SC; a team later labeled by our opponents as ‘too old, too fat and too slow for hockey’. Both teams this year elected for more youth. The average age of the NSW team was lowered significantly by the addition of Tim and Miriam Pritchard. Mim was taken out in the warm up by a pass from her younger brother, and sidelined with a nasty bruise under her left eye. Some expert attention from her Mum, Laura, was required and we started the match with Mim ‘on ice’

and unexpected to take the field.

The first half started with NSW taking the ball and launching a brief attack that rebounded in a counter attack from the Victorians, resulting in a penalty corner. The Victorians opened the scoring from the penalty corner with an expertly executed drag flick. There was an audible sigh from a number of our team who had previously been the victims of superior Victorian firepower.

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The team responded well to launch a number of promising attacks in the remainder of the first half. The Victorian goalkeeper made a number of handy saves to keep us scoreless, but there were periods in which we dominated in attack, particularly being awarded a number of penalty corners. Our defence was also resolute and a

one-nil scoreline at half time was respectable. The heat thankfully slowed the pace of the game somewhat; both teams seeking out the shade for the half time talk.

NSW performed well again in the early part of the second half. After initially holding the Victorians at bay, we pushed forward. After about 10 minutes the scores were leveled, after a series of slick passes in the circle, finished at close range by one of our veteran ring-ins.

NSW then came into a period of dominance thanks to our ‘best on ground’ 12 year old, Mim Pritchard, who had managed to get a medical clearance from Laura around the half time interval. In a classic piece of right wing play, Mim trapped the pass, eliminated the fullback and drew the goalkeeper, before passing the ball across the face of goal to be slammed home by Gary Hill on the post. A few minutes later, the next goal was almost a carbon copy with Mim receiving the ball on top of

the circle after a fast break from the back and she calmly trapped it and slotted it home.

The Victorian spirit was broken. NSW continued to push forward and finished full of running. A late consolation goal to the Victorians came from a penalty corner, to



make the final scoreline 3–2 to NSW.

The game was followed by the presentation of the cup by the umpires and some causal rehydration, a catch-up and some consolation of our Victorian comrades. That night the fixture was celebrated at a dinner for both teams. A surprise guest of the NSW team was the ‘Enforcer’, Angus Ridley, formerly of 8 Wentworth and of NSW Bar Hockey and Gordon Eagles fame. Gus, now a wine maker at Coldstream Hills, brought with him a single vineyard

Chardonnay and a trophy winning Pinot Noir, as a peace offering for his absence on the field. Both wines were delicate and refined, in stark contrast to Gus’ abilities on the field, which could only be described as woody and robust, with a bitter after taste on the back palate of most of his opponents.

A great night was had by all and there was much discussion of the return fixture, and of game plans to beat the solicitors.

The NSW barristers and family members in the team

were Pritchard SC, Larkin SC, McManamey, Scotting, Neild, Hill, Mim and Tim Pritchard and our long term affiliate Ganasan Narianasamy. Thanks to our veteran ring-ins, Mohan, Alex, Andy, Greg, Theo and the Fish, and to the umpires Tony and Tony. A special thanks to Stuart Wood of the Victorian Bar, who has assumed the capataincy of the Victorians and made the arrangements for the game and the dinner.



The Bar Book Club

By David Ash

A book discussion club can pose difficulties:¹

Some members may regard them as opportunities to meet people for social contact and general conversation, partially veering off onto a wide variety of non-literary topics, while others wish to engage in serious literary analysis focused on the book in question and related works, with little non-literary interaction. Additionally, some members may suggest a book not because they are interested in it from a literary point-of-view but because they think it will offer them an opportunity to make points of personal interest to them or fit an external agenda. Also, different expectations and education/skill levels may lead to conflicts and disappointments in clubs of this kind.

The Bar Book Club has no acrimony. That this pleasant state exists is due to three things. First, we are advocates, trained to – and ethically obliged to – hide our personal shortcomings behind a veneer of robust and humoured politeness. Second, we were brought together by and continue to be guided by the velvet glove of Kafkas SC, a cat-herder in a previous life. Third, we have the hospitality of Lisa Allen, the Bar Library and the Association itself.

Looking back, the axe has fallen fairly evenly between fiction and non-fiction. The Christmas 2010 choice, for example, was *On Bullshit*. Though chosen by a silk, it is in fact a meditation by Princeton philosopher Harry G Frankfurt.

Our strength is not length. A biography of Patricia Highsmith, the author of the Ripley novels, was a struggle for most of us; it was too

long, and Ms Highsmith herself proved a disappointment.

Nor is our strength unanimity. Other choices proved unpopular, too. Yet this is where the agile advocate has full room to move. He or she is not the agent of their choice, merely a constrained mouthpiece, who is permitted to fall short of and – in this writer's case, even abandon – the championing of the choice without any charge of cowardice.

My own favourite was Charles Portis's *True Grit*. The triangle of the novella, John Wayne's Rooster and the recent Cohn brothers' return to the novella itself is an enduring threnody for an America which may never have existed.

As the club moves into its third year, it continues to cater to catholic taste, protestant modesty and jewish humour.

The diversity of the club provides a means of gauging – and, importantly, recalibrating – the accuracy of our own memories. One evening in particular sticks in my mind, the discussion of one of Wodehouse's Jeeves books. As an historical figure, Wodehouse is an icon of twentieth century English prose, an abiding influence for Orwell and Waugh, to name but two. As an afterthought of parents born in or soon after the Great War, I read, reread and laughed aloud these books in a distant youth. And yet, aided and abetted by much younger colleagues – themselves

offspring of much younger parents – I found myself not rekindling my joy, but trying to regather it.

Maybe at a more general level, humour – even brilliant humour – is the least timeless of genres. To explore the proposition, I expect my own suggestion for 2012 to be *Catch-22*. While it breaks the club rule of strength before length, I will be fascinated to see whether a highpoint of twentieth century satire, both in form and substance, has retained its resonance for me.

Like any successful organisation, the club has developed its own culture and ambitions. One of which we are particularly proud is Oakes SC's assembly of non-practice books by members of the New South Wales bar from now to time immemorial, or about 1827 at last glance. At the time of writing, it is in its seventh draft, and it is hoped to unleash a table on the wider bar for comment soon.

As the club moves into its third year, it continues to cater to catholic taste, protestant modesty and jewish humour. But no ink is dry in the bowels of this Bar. Here you can espouse Jewish modesty or Catholic humour or anything else. The gods of reading forbid nothing, not even Protestant taste. Come soon to the pantheon and publish your prostration.

Endnotes

1. en.wikipedia.org/wiki/Book_discussion_club [accessed 22/10/2011].