THE JOURNAL OF THE NSW BAR ASSOCIATION | AUTUMN 2017

barnews

WELLBEING
at the New South Wales Bar

PLUS

President Trump's executive action

Case management reforms in the Federal Court of Australia

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Contents

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EDITOR'S NOTE

Welcome to the first edition of *Bar News* for 2017. We are delighted to include in this issue an interview with the new attorney general, the Hon Mark Speakman SC MP.

Many readers will know the attorney from his long time at the bar. He practised for many years on Tenth Floor Chambers, with an exceptionally busy commercial practice.

In his interview the attorney identifies his key priorities as including reducing court delays, reducing rates of reoffending and reducing repeat domestic violence rates. The attorney also addresses the funding cuts to community legal centres, which have been announced by the Commonwealth government from July 2017. In New South Wales alone the cut in funding amounts to some $2.9 million per annum.

The start of 2017 saw the commencement of the Donald Trump presidency, an event which has inspired a number of members to go into print.

The attorney says that he is doing what he can to persuade the Federal Government to reverse these cuts, saying that: 'Community legal centres are a fabulous resource and they do a great job for our community.' In particular, in his *Bar News* interview the attorney refers to the role legal centres play in providing access to justice.

The start of 2017 saw the commencement of the Donald Trump presidency, an event which has inspired a number of members to go into print. This issue contains a piece by Justin Hewitt examining the nature of, and sources of power for, various executive orders issued by President Trump. These include his most controversial executive order to date, namely the travel ban which was announced on the evening of Friday, 27 January 2017, and which, among other things, suspended for 90 days the entry of persons into the United States from various Muslim majority countries and also imposed an indefinite ban on the entry of Syrian refugees. As recounted by Justin Hewitt this order was in due course stayed by the Court of Appeals for the Ninth Circuit.

Elsewhere, Dr Christopher Ward SC considers whether the election of President Trump will herald a Brexit style rush to withdraw from particular treaty obligations of the United States and, if so, what treaties might be exposed to a real risk of withdrawal or denunciation. In an opinion piece addressing criticisms of the judiciary Anthony Cheshire SC includes an examination of some of the criticisms President Trump has made of various judges in the US, including in relation to rulings on the travel ban discussed above.

In matters closer to home this issue also includes a piece by the senior vice president of the Bar Association, Arthur Moses SC, looking at the association's recent Wellbeing survey, which seeks to identify member concerns and to assist in managing their health and well-being. Moses SC observes: 'There has been a worrying increase in the incidence of mental health issues concerning barristers coming before the Bar Council and the Executive.'

In another piece, Ingmar Taylor SC describes a new policy recently implemented by Greenway Chambers which allows a member to take a period of six months leave free of rent and chambers fees following the birth or adoption of a child. Taylor SC comments that: 'The structure of the New South Wales Bar dissuades female law graduates from becoming barristers and makes it more difficult to retain those who do come to the bar'. Greenway Chambers' new policy is intended as a step towards changing this.

In the review section, we are pleased to include the address by the chief justice at the recent launch of Max Bonnell's book, *I Like a Clamour*, a biography of Judge John Walpole Willis. We also have the address given by the Hon Keith Mason QC at the launch of the new edition of Justice Paul Finn's *Fiduciary Obligations* and an accompanying volume, *Finn's Law*, a book of essays.

Lastly, this issue includes a piece by Justice Slattery commemorating the life of Colonel Henry Normand MacLaurin, who was killed by a Turkish sniper on 27 April 1915, just two days after landing at Gallipoli. At the time Colonel MacLaurin was one of Sydney's leading junior barristers. We hope to include in future issues of *Bar News* some further pieces documenting the lives of New South Wales barristers who fought in the First World War.

Jeremy Stoljar SC

Editor

Balancing fairness, affordability and efficiency in the new CTP scheme

By Noel Hutley SC

In my last *Bar News* column I provided a progress report on the New South Wales Government's plans to reform the compulsory third party system in this state. At that time I indicated that, although the government had put its plans on hold in the short term, there was no guarantee that it would not continue to progress a workers compensation-style model that would seriously impinge on common law rights.

Since that time, the legal profession has been working constructively with the government in recent months to provide extensive feedback on design features of the new scheme consistent with the aim of balancing fairness, affordability and efficiency.

At the time of writing, the government's Motor Accidents Injuries Bill 2017 has been introduced into the Legislative Assembly and is awaiting debate. The Bill as introduced represents an important advancement on the government's previous policy direction. In addition to preserving common law rights for the most seriously injured, the Bill also provides common law remedies for innocent victims of motor accidents who sustain more than minor injuries. The legal profession has campaigned in favour of this category of people – the tradesperson who suffers a fused ankle, the nurse who sustains damaged vertebrae and so on.

A number of other concerns of the legal profession have also been addressed in the Bill. The minister for finance the Hon Victor Dominello MP is to be congratulated on his consultative approach to the reforms and willingness to listen to the legal profession's arguments on behalf of injured motorists. Although there are a number of outstanding issues which have been the subject of further representations from the profession, the 2017 model is a significant improvement on previous proposals. The new scheme will retain acceptable levels of support for the more seriously injured, whilst delivering the premium reductions for motorists that the government seeks.

I would like to acknowledge the outstanding contribution of the association's Common Law Committee in the development of the legal profession's representations to government throughout the lengthy consultation process. The profession will monitor the implementation of the new scheme to ensure that it delivers on its objectives.

At the time of writing, our annual program of regional CPD conferences is coming to an end. As in previous years, regional conferences have been held at Ballina, Newcastle, Orange, Parramatta and Sydney throughout February and March, offering a wide range of speakers on a variety of topics. Importantly, these conferences also offer an opportunity for members of the Executive to update practitioners on recent policy issues and other current matters before Bar Council and allow those practitioners to ask questions and provide input on issues and concerns regarding the Bar Association.

The recent accession of the Trump administration poses many questions regarding US domestic policy and the future role of the United States on the international stage. This edition of *Bar News* features an analysis of President Trump's use of executive orders by Justin Hewitt and a piece by Dr Christopher Ward SC on the implications of the Trump presidency for the treaties of the United States.

Finally, the current edition also features a piece by senior vice-president on the recent health and wellbeing survey of practitioners conducted on behalf of the Bar Association. Health & wellbeing (and mental health more generally) within our profession is rarely spoken about, yet within our community everyone is affected by their own or colleagues' poor health. Many of us will at some time experience periods of distress during our working lives.

The minister for finance the Hon Victor Dominello MP is to be congratulated on his consultative approach to the reforms and willingness to listen to the legal profession's arguments on behalf of injured motorists.

This research will identify risk factors that impact on a barrister's professional practice. It will gather information regarding the quality of our working lives and provide Bar Council with a report on the issues raised. We then propose to use the data to inform future initiatives to develop more support for individuals as well as raise awareness of the impact of certain types of conduct on the wellbeing of colleagues.

LETTER TO THE EDITOR

Dear Sir,

My congratulations (whatever they be worth) to Bret Walker SC for his insightful article on lawyers and politics. His comments about professional connexion and social attachment are rendered the more pointed by Walker's reference to politicians in the United States, naming as he has, Madison, Marshall, Hamilton and Lincoln, as well as US constitutional practices. In my opinion, as literate lawyers we should maintain close attachment to the United States in both law and literature. The USA has produced some wonderful poetry, from Longfellow onwards, some of which is directly relevant to Australian politics and the way in which the electorate is treated. Take a few lines from the late Ogden Nash as an example:

> I remember daddy's warning
>
> That raping is a crime
>
> Unless you rape the voters
>
> A million at a time.

Perhaps a little less elegant than the Song of Hiawatha, but undeniably relevant to the present condition of both Australian and American politics. Indeed, with considerable prescience, Mr Nash in his verse focussed precisely on the present order of things. Perhaps Parliament could use more poets.

Ian Barker QC

NEWS

High Court welcome for the new silks

Newly appointed silks from every state and territory took their bows before the High Court in Canberra on Tuesday, 31 January 2017. For the occasion, Bar News had a special photographer - President Noel Hutley SC.

The decline of advocacy

By John Nader QC

In this article the word advocacy is restricted to forensic advocacy: advocacy in court or quasi court proceedings. I wish to explain why I believe the quality of advocacy as such has declined over many years. It is a decline which has in my opinion accelerated since the abolition of civil juries.

You are entitled to ask, 'Who are you to advise your fellows how to improve their ability as advocates?' I do so on the basis of more than 50 years as a barrister and as a judge, and before then as associate to Justice J H McClemens of the NSW Supreme Court. In that time I have seen innumerable barristers in courts and quasi courts, ranging through inspiringly good, middling, to embarrassing to behold.

Yet many in all categories, from the most to the least impressive, were excellent lawyers. Bad advocacy does not of itself bespeak an incompetent lawyer. Some judges who were highly regarded as lawyers were known to have been indifferent advocates.

I am convinced by my observations over time that the quality of advocacy, as an art, has been deteriorating.

Therefore a decline in the art of advocacy does not imply a decline in the quality of barristers as lawyers. I recall a very eminent silk, Kearney, who was, with everyone's approval, appointed because of his chamber practice. He did not go to court in ordinary circumstances, except perhaps to seek an adjournment or take a judgment. He was an equity barrister, known personally to me, who later became a Supreme Court judge. I am not to be thought to be making the mistake of assuming that every barrister is also an oral advocate; some are not.

However, I am convinced by my observations over time that the quality of advocacy, as an art, has been deteriorating.

Advocacy is the art of persuasion and it includes many subordinate components such as argument, questioning of witnesses, speeches to judges and juries. It is clear therefore that no single style or method of speaking by a barrister in forensic proceedings would satisfy all the components of advocacy.

No single *a priori* technique of elocution could possibly cover the multifarious components of advocacy even in a single case.

The method of the particular components that I have referred to is in the judgement of the barrister. He or she will always have in mind that their purpose is to make their words intelligible to the judge or jury: they will be guided by instinct.

One or two common faults may be mentioned. Some barristers do not project their voices clearly from the bar table. Some barristers run syllables and words together so that their meaning and therefore their force may be lost. In some cases aggressive language may destroy the clarity of submissions.

Advocacy is one of the great arts of civilised humanity. As an illustration that everyone will recognise, I mention Marcus Tullius Cicero, the great Roman advocate who prospered towards the end of the Roman Republic and the beginning of the Roman Empire. His prosecution and defence speeches are worth reading. Cicero is remembered 2000 years later chiefly because of his skill as an advocate.

The Bar Association, itself, has taken and continues to take active steps to assist barristers to improve the quality of their art as advocates. However, I think that more than a lecture or two from an expert is required to create the best standards of advocacy. Barristers having received such advice from the Bar Association should themselves continue to work to improve their advocacy skills.

The function of advocacy can be illustrated by a simple metaphor. If one has a valuable article to deliver to a person at a distance it may be placed in a parcel and physically delivered to the recipient. The parcel may be damaged because of poor packaging or rough delivery, and by the poor packaging the valuable article may itself be damaged and its usefulness reduced. The barrister's valuable article is their oral message to the court. The journey is the distance from their mouth to the judge or jury. If it is packed in clear, well articulated language it will arrive safely without annoyance to or misunderstanding.

I continue to describe advocacy as an art. I do so because, like all art, it is something made or created. It might be a barristers objective to convey a concept to the court. The forming of the concept in one's mind is not an art. The art is created in order to transmit the concept to the bench. It is the transmission of the concept which is the art of the advocate.

Given some useful introduction to the art of advocacy, which the NSW Bar Association provides, self-improvement remains best way to stay on the path. Every barrister should then be the chief critic of their own performance and ability as an advocate: if a barrister thinks that their performance falls short of the best they can do, he or she should take active steps to improve their delivery of submissions, arguments and other communications in court. Confidential advice by friendly, trusted colleagues can be useful.

Facility with the attractive and intelligible use of the English language is very useful. When I first came to the bar a very senior barrister of considerable age advised me always to read good

literature so that I might improve my use of the English language. I have taken his advice, and as bad as my use of English may now be, it is better than it would have been if I had not done so. It is a very personal thing but I found that the late 19th and early 20th century novelists were the most useful. Being somewhat old-fashioned about what is good English literature, I expect that most barristers would now choose something more modern. The extent to which the reading of good English can assist one's verbal fluency is quite amazing.

The extent to which the reading of good English can assist one's verbal fluency is quite amazing.

Reading into a recorder and playing it back can make us realise how much worse our spoken English is than it should be.

It is not to be thought that my comments suggest that the quality of the bar in all of its respects has fallen. In fact, in most respects the quality of barristers has improved remarkably.

Barristers as a class are more dedicated to the interests of society than they once were. Consider the large number of barristers who work *pro bono* for those who cannot afford to pay for legal representation.

The legal knowledge of barristers as a class has become much greater as matters governed by law become more numerous.

It seems to me that the dedication of barristers is far greater today than it once was.

This article is concerned only with court and quasi court advocacy: with the qualities that affect the efficiency of the communication from a barrister to the tribunals being addressed: in some cases a judge or arbitrator, and in other cases a judge and jury.

Criticism of the judiciary and contempt of court

By Anthony Cheshire SC

The last sitting of Bergin CJ in Eq concluded with a greeting from the bench to those assembled in the court of 'good morning'. That might not seem worthy of note, save that her Honour was well known for tearing a strip off any advocate who dared to wish her Honour a good morning rather than confining him or herself to the formalities of the matter in court. Still, an opponent would be unlikely to accuse such an exchange between bar and bench in breach of this rule as a 'sucking up' or a 'lapping up the Cristal champagne' with each other. There are at least three reasons for this.

First, when Malcolm Turnbull hurled those insults, he did so not at the judges in the *Spycatcher* case, but rather at Bill Shorten in parliament, where such behaviour seems to be acceptable, if not indeed the norm (see for instance 'a shiver waiting for a spine', 'a conga line of suckholes' and 'a boy in a bubble').

Secondly, as Pembroke J observed in *McLaughlin v Dungowan Manly Pty Ltd (No 3)* [2011] NSWSC 717:

> The promiscuous use of extravagant language tends to obscure the value that may exist in the underlying submission. It is timely to repeat the compelling wisdom of the words attributed to Lord Bingham of Cornhill by Lord Mackay of Clashfern in his address at the Thanksgiving Service for Lord Bingham; *The Times*, 26 May 2011:
>
> The effective advocate is not usually he or she who stigmatises conduct as disgraceful, outrageous, or monstrous, but the advocate who describes it as surprising, regrettable or disappointing.

Thirdly, any such accusation might well constitute a contempt of court as having a tendency to undermine public confidence in the administration of justice and also as scandalising the court.

In *R (on the application of the A-G (Vic)) v Herald & Weekly Times Ltd* [1999] VSC 432, Balmford J considered proceedings for contempt arising out of newspaper articles headed 'Never let him out' and 'Don't let him out' in the context of proceedings for a major review of a custodial supervision order.

Her Honour cited with approval at [63] the *dicta* of Myers CJ in *A-G v Tonks* [1939] NZLR 533 at 537:

> The Court must not only be free - but must also *appear* to be free - from any extraneous influence. The appearance of freedom from any such influence is just as important as the reality. Public confidence must necessarily be shaken if there is the least ground for any suspicion of outside interference in the administration of justice. Any publication therefore that states or implies that the sentences imposed by the Court are, or may be, affected by popular clamour, newspaper suggestion, or any other outside influence is, in my opinion, calculated to prejudice the due administration of justice.
>
> [Emphasis in the original]

She concluded at [73]:

> I have found that each headline would be read by most people as a recommendation or direction to the judge, and that finding, to my mind, carries with it an implication of a serious risk that the Court would appear not to have been free from the influence of that recommendation or direction.

Although her Honour's decision on this ground was overturned on appeal ([2001] VSCA 152), the Court of Appeal applied the same test, albeit in reaching a different conclusion on the facts.

The essence of the offence of scandalising the court has been described as including:

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

(see *R v Dunbabin; Ex parte Williams* [1935] 53 CLR 434 at 442 per Rich J, cited with approval by Gleeson CJ and Gummow J in *Re Colina ex parte Torney* [1999] 200 CLR 386 at 390).

A publication of material with a tendency to disparage the authority of the court will amount to a contempt even if published after a case is over, although 'the court takes far more seriously misrepresentations whilst the case is pending' (per Young CJ in Eq in *Yeshiva Properties No 1 Pty Ltd v Lubavitch Mazal Pty Ltd* [2003] NSWSC 775 at [49]). As Rich J continued in *Dunbabin*:

> The jurisdiction is not given for the purpose of protecting the Judges personally from imputations to which they may be exposed as individuals. It is not given for the purpose of restricting honest criticism, based on rational grounds, of the manner in which the court performs its functions. The law permits in respect of Courts, as of other institutions, the fullest discussion of their doings, so long as that discussion is fairly conducted and is honestly directed to some definite public purpose. The jurisdiction exists in order that the authority of the law as administered in the Courts may be established and maintained.

Thus in *Fitzgibbon v Barker* [1992] 111 FLR 191 a newspaper article implying that fathers were imprisoned by the Family Court for wanting to see their children was held to be a contempt when the true position was that a father had been imprisoned for repeated breaches of non-molestation orders protecting his wife, it being also held that intention was irrelevant; and in *AG (Qld) v Lovitt* [2003] QSC 279, a comment that a presiding magistrate

was 'a cretin' was held, even though it had not been heard by him, to impair the authority of the court and therefore to be a contempt.

Thus far, the boundary between the rough and tumble of politics and the more sensitive world of the law might seem clear and well-policed, but there has been a recent blurring of that boundary in the United Kingdom and the United States.

After the United Kingdom High Court's recent decision holding that the Brexit referendum could not be acted upon by the executive without the authority of parliament, photographs of the three judges were published in newspapers with headlines: 'Enemies of the people' and 'The judges versus the people'. Indeed one article included the following: 'The judges who blocked Brexit; One founded a European law group, another charged the taxpayer millions for advice and the third is an openly gay ex-Olympic fencer.'

While slurs about judges' sexuality are sadly not unknown, although one had hoped they were consigned to a different era, the use of 'ex-Olympic fencer' as an apparently derogatory term is novel. Amid a storm of protest that these criticisms of the judges rather than of the decision itself were unacceptable, the lord chancellor, whose duty it is to police these matters having sworn an oath to uphold the independence of the judiciary and the rule of law, responded belatedly after two days and then only in the following terms:

> The independence of the judiciary is the foundation upon which our rule of law is built and our judiciary is rightly respected the world over for its independence and impartiality. In relation to the case heard in the high court, the government has made it clear it will appeal to the supreme court. Legal process must be followed.

The president of the Supreme Court, Lord Neuberger, later responded with remarkable restraint and indeed understatement:

> After the [High] Court hearing, I think [the politicians] could have been quicker and clearer. But we all learn by experience, whether politicians or judges. It's easy to be critical after the event. They were faced with an unexpected situation from which, like all sensible people, they learned.
>
> [The judges] were certainly not well treated. One has to be careful about being critical of the press, particularly as a lawyer or judge, because our view of life is very different from that of the media. I think some of what was said was undermining the rule of law.

A former lord chief justice, Lord Judge, went further in claiming that the lord chancellor's silence constituted a 'very serious' failing in her legal obligations. Further:

> If I am right, the Lord Chancellor asked the Prime Minister or No 10 to have some sort of input into what she said about attacks on the judiciary. And the whole point of the Lord Chancellor's job is that he or she is there to take an independent line.

As the shadow lord chancellor, Richard Burgon, wrote:

> A mature democracy – and a mature government – doesn't stand by while the judiciary gets a roasting.

In the United States, President Trump had a few things to say about the judicial process by which his travel ban was challenged. After the first instance decision putting in place a temporary suspension on the travel ban, he tweeted:

> The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned.
>
> What is our country coming to when a judge can halt a Homeland Security travel ban and anyone, even with bad intentions, can come into US?
>
> Just cannot believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!
>
> Because the ban was lifted by a judge, many very bad and dangerous people may be pouring into our country. A terrible decision.

Even taking into account that these statements were made after the decision, it is difficult to see how this could be regarded as 'honest criticism, based on rational grounds, of the manner in which the court performs its functions' or 'discussion…fairly conducted and…honestly directed to some definite public purpose'.

Indeed it would appear clearly to 'detract from the authority and influence of judicial determinations' and to be 'calculated to impair the confidence of the people in the court's judgments' by 'lowering the authority of the court as a whole or that of its judges and excit[ing] misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office.'

Furthermore, given the invitation to the American population to blame the judge in the event of any person who would have been excluded by the travel ban committing for instance a terrorist atrocity, one might expect the judge to feel under considerable pressure in the event of being called upon to adjudicate in any future dispute concerning the executive.

Indeed, in addition to the issue of contempt, any litigant involved in proceedings against the executive might well be inclined to seek the disqualification of that judge on the basis that 'a fair-minded lay observer might reasonably apprehend that judge might not bring an impartial mind to resolution of question judge was

required to decide' (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337). Then after the hearing of the appeal, but before the decision, the president said:

> If these judges wanted to, in my opinion, help the court in terms of respect for the court, they'd do what they should be doing.
>
> I mean, it's so sad. They should be, you know, when you read something so simply and so beautifully written and so perfectly written…and then you have lawyers, and I watched last night in amazement and I heard things that I couldn't believe, things that really had nothing to do with what I just read.
>
> I don't ever want to call a Court biased, so I won't call it biased and we haven't had a decision yet but Courts seem to be so political and it would be so great for our justice system if they would be able to read a statement and do what's right.

This brings to mind that old chestnut of being asked what the first thing is that comes to mind when told not to think about a pink elephant, but it is worse than that since the president did not say that the court was not biased, but rather that he did not want to call it biased. One suspects that a comment to the presiding magistrate in *AG (Qld) v Lovitt* 'I don't ever want to call you a cretin, so I won't call you a cretin' would have been met with a similar finding of contempt. The presidents' comments during the appeal had the additional vice that they were made before the court had delivered its judgment. Then after the judgment on the appeal upholding the suspension of the ban, the president tweeted:

> SEE YOU IN COURT, THE SECURITY OF OUR NATION IS AT STAKE!

and then told reporters:

> It's a political decision.

Although these comments were moderate when compared with the president's response to the first instance decision, they were still, applying his epithets, 'bad' and 'so sad'. Stephen Miller, one of the president's senior policy advisers, was, however, not so restrained. He said:

> We have a judiciary that has taken far too much power and become in many cases a supreme branch of government. Our opponents, the media and the whole world will soon see as we begin to take further actions, that the powers of the president to protect our country are very substantial and will not be questioned.

It is difficult to know how best to characterise an assertion that 'the powers of the president…will not be questioned', but it certainly cannot be described as enhancing an appearance of the court as being free from any extraneous influence. Furthermore, during the hearing and before the decision of the 9th Circuit Court of Appeals, the Republicans on Capitol Hill pursued efforts to break up that circuit on the basis that it is too big, too liberal and too slow. Following the decision of that court, the president then said the following:

> Extreme vetting will be put in place. And it already is in place in many places. In fact we had to go quicker than we thought because of the bad decision we received from a circuit that has been overturned at a record number. I've heard 80 percent. I find that hard to believe. That's just a number I heard, that they are overturned 80 percent of the time. I think that circuit is — that circuit is in chaos, and that circuit is frankly in turmoil. But we are appealing that. And we are going further.

So the lesson of the process in the United States would seem to be that the court is not entitled to question the powers of the president; and if it does, then it is biased, it is exercising a political rather than judicial function, the relevant judges will be personally responsible for any atrocity that may result from the president's will being thwarted and action may be taken to break up the relevant court.

All of this diminishes the authority of the entire judicial system and would, at least in this jurisdiction, amount to a contempt of court. Further, given that the comments were not limited to the particular judges, any litigant opposing the executive in proceedings in the United States might fear that any judge might feel inclined to bow to this pressure. Although the doctrine of necessity would prevent a successful application for ostensible bias being made against every judge, this is not a particularly attractive proposition.

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

The pervasiveness of the internet makes effective policing difficult and means that any response or attempted enforcement action may simply provide unwarranted publicity and attention to an offending article.

Higher profile or more serious offences may, however, require the intervention of the chief justice at least with a rapid public response, but against a background where any contempt proceedings may be seen as reinforcing the divide between the establishment and populism that contributes to the problem in the first place.

Agency, commissions and a 'price beat guarantee'

Lucy Robb Vujcic reports on *Australian Competition and Consumer Commission v Fight Centre Travel Group Limited* [2016] HCA 49

This case arose out of a penalty proceeding commenced by the Australian Competition and Consumer Commission (ACCC) against Flight Centre Travel Group (Flight Centre) concerning Flight Centre's attempt to persuade three airlines to agree not to give discount prices on tickets sold directly by the airlines to customers.

The primary question on appeal was whether Flight Centre, as the airlines' agent, could be said to have acted in competition with them. A majority of the High Court (French CJ dissenting) held that, notwithstanding the agency relationship, Flight Centre was in competition with the airlines and had, as a result, contravened s 45(2)(a)(ii) of the former *Trade Practices Act 1974* (Cth).

Background facts

Flight Centre carried on business as a travel agent, operating from shop fronts and call centres throughout Australia and elsewhere. In practical terms, its business involved selling international airline tickets to customers.

Its authority to sell tickets derived from a standard form Passenger Sales Agency Agreement (PSAA), which it entered into with the International Air Transport Association on behalf of its member airlines.

In the PSAA, Flight Centre was referred to as 'the agent' of the airlines (which were called 'the carriers'). The PSAA provided that the agent was 'authorised to sell air passenger transportation on the services of the carrier and on the services of other air carriers as authorised by the carrier.' All services sold pursuant to the PSAA were 'sold on behalf of the carrier.'

Flight Centre was not obliged to sell tickets on behalf of the member airlines. Nor were the member airlines obliged to sell their tickets exclusively through Flight Centre. However, when Flight Centre did make a sale on behalf of an airline, it received an 'at-source commission.' The commission was calculated as a percentage of the published fare. The published fare was determined by the airlines and published to Flight Centre. It comprised a net amount and the at-source commission. Whenever Flight Centre made a sale, it would remit the net amount to the airline and retain the commission.

The PSAA did not require Flight Centre to sell tickets at the published fare. It was at liberty to set whatever prices it chose. However, the commercial consequence was that the higher the price, the greater its commission, while the lower the price, the more marginal became its commission. If Flight Centre elected to sell tickets below the net amount, it suffered a loss.

Flight Centre also entered into preferred airline agreements with certain airlines. Through those agreements, Flight Centre derived incentive-based commissions and other payments.

As part of its marketing strategy, Flight Centre adopted a 'price beat guarantee' whereby it promised to better the price of any airline ticket quoted by any other Australian travel agent or website by $1. It also promised to give the customer a $20 voucher.

At the same time, airlines were selling discount tickets directly to customers. This caused two problems for Flight Centre. First, the 'price beat guarantee' meant that Flight Centre had to undercut the airlines' price, while still remitting the net amount for each sale. Second, the direct sales prevented Flight Centre from earning commissions and other incentives through the preferred airlines agreements.

Fight Centre considered these developments to be an 'external threat'. Between August 2005 and May 2009, it attempted to confront the threat by sending a series of emails to the airlines involved, seeking to persuade them to abandon the discounts.

The ACCC considered this conduct to be in breach of s 45(2)(a)(ii) of the Trade Practices Act, being an attempt to induce the airlines to enter into a contract, arrangement or understanding that had the purpose of substantially lessening competition.

Legislative framework

The relevant legislative regime is set out in the joint judgment of Kiefel and Gageler JJ.[1] It is sufficient, for present purposes, to note two provisions of the Act.

Section 45(2)(a)(ii) 'prohibited a corporation from making a contract or arrangement, or arriving at an understanding, if a provision of the proposed contract, arrangement or understanding had the purpose, or would have or be likely to have the effect, of substantially lessening competition.'[2]

Section 45A(1) deemed a provision of a contract, arrangement or understanding to have the purpose, effect or likely effect of substantially lessening competition if, relevantly, two conditions were satisfied. The first was that the provision had the purpose, effect or likely effect of fixing, controlling or maintaining the 'price' for 'services supplied' by one party to the contract, arrangement or understanding. The second was that the services in relation to which the price was fixed, controlled or maintained were supplied 'in competition with' the other party to the contract, arrangement or understanding.'[3]

The crux of the litigation concerned the requirement that Flight Centre be 'in competition' with the airlines.

Procedural history

First instance

At first instance, Logan J found in favour of the ACCC. There

was little difficulty concluding that, by sending the emails, Flight Centre had attempted to induce the airlines to enter into a contract, arrangement or understanding to stop offering international customers a discount. This satisfied the first condition of s 45A(1).

The critical issue concerned the second condition of s 45A(1). In particular, whether the price fixed or proposed was in respect of services supplied by Flight Centre in competition with the airlines. This required the ACCC to identify the price fixed, the service to which the price related and the market in which the services were offered.[4]

The ACCC advanced two cases. Its primary case was that Flight Centre sought to fix, control or maintain its commission on the sale of airline tickets. It identified two complementary markets. One was an 'upstream market', identified as a market for 'distribution services to international airlines.' The other was a downstream market, identified as a 'booking service to customers.'

Whether an agent had legal capacity to compete with its principal was left to the general law and, in particular, the terms of the contract creating the relationship.

At trial, its secondary case was not identified with precision.[5] It concerned fixing the ticket price in a market described as 'international passenger air travel services.' This market had two stages: sale of the tickets and transportation of passengers.

Logan J rejected the second case on the basis that Flight Centre did not engage in actual carriage but accepted the essentials of the ACCC's primary case.

On appeal to the Full Federal Court

The decision of Logan J was overturned on appeal. The Full Federal Court held that the ACCC's characterisation of the relevant market in its primary case was artificial. At its core, the transaction was nothing more than a contract for the sale of tickets to customers. What the ACCC chose to refer to as the 'booking services' provided by the Flight Centre were an inseparable incident of the sale itself. The full court accepted that Flight Centre competed with the airlines for the sale of tickets to customers but held that Flight Centre acted as the airlines' agent. It could not, therefore, be in competition with its principal and the second condition of s 45A could not be met.

On appeal to the High Court

The principal question addressed on appeal was whether Flight Centre, as the airlines' agent, could have been acting in competition with them for the purposes of the Act.

A subsidiary question related to the proper definition of the relevant 'market'.

Agency and competition

Of the four judges in the majority, Kiefel, Gageler and Nettle JJ held that the agency relationship between Flight Centre and the airlines did not prevent competition arising between them in the market for the supply of international ticket sales. Gordon J did not accept that Flight Centre was an agent of the airlines at the relevant time, holding instead that 'Flight Centre was dealing with its own customers in its own right without reference to any interests of any airline.'[6]

According to Justices Kiefel and Gageler, the agency question was to be resolved by the terms of the agency agreement.

First, an agency relationship is ordinarily created by contract. That contract regulates the basic rights and liabilities of the parties, including fiduciary duties. As a result, it is not possible to say that all agents owe the same duties; it will be a question of the express and implied terms of the specific contract creating the relationship.

Second, the provisions of the Trade Practices Act were not inconsistent with notion that principals and agents could supply services in competition with one another. Their Honours considered s 84(2) of the Act, which deemed conduct engaged in by an agent of a corporate principal within the scope of the agent's authority to have been engaged in for the purposes of the Act *also by* the corporate principal. They concluded: 'Importantly, the provision did not deem the conduct not to have been engaged in by the agent.'[7]

Whether an agent had legal capacity to compete with its principal was left to the general law and, in particular, the terms of the contract creating the relationship. It was relevant to consider the scope of the agent's authority and the extent, if at all, to which the agent was bound by the duty of loyalty.[8] Their Honours held:

> To the extent that an agent might be free to act, and to act in the agent's own interests, the mere existence of the agency relationship did not in law preclude the agent from competing with the principal for the supply of contractual rights against the principal. Whether or not competition might exist in fact then depended on the competitive forces at play.[9]

The two critical factors in deciding the appeal were first, that Flight Centre had the discretion to decide whether or not to sell an airline's tickets, as well as to determine the price. Second,

there was no suggestion that Flight Centre was constrained in the exercise of that discretion to prefer the interests of the airlines. Flight Centre was free to act in its own interests and, in doing so, it competed with its notional principals.

Justice Nettle reached the same conclusion for similar reasons. To call Flight Centre an agent of the airline meant no more than that Flight Centre 'was endowed by the relevant airline with authority to create in favour of the customer the right to be carried by the airline on the flight for which the airline ticket was provided.'[10] The mere fact that airlines had entered the market to provide direct sales in order to avoid paying commissions showed that competition existed between the parties.[11] He concluded:

> Generally speaking, it may be correct that, where an agent has authority to sell for and on behalf of the agent's principal, it is less likely than in other circumstances that the agent and the principal compete with each other for the sale of the goods or services in question. But so to observe in the present case really takes the matter no further.[12]

Ultimately, the effect of the agency was determined by 'the nature, history and state of relations between the principal and the agent.'[13] In factual reality and legal substance, Flight Centre's practice of determining its own prices placed it in competition with its principals.

Defining 'the market'

Section 45A requires proof of competition between the parties engaged in the act of fixing, controlling or maintaining a price. Section 45(3), operating alongside s 4E of the Act, requires that the competition occur in a market.

The ACCC questioned whether, in rejecting its primary case, the Full Federal Court had failed to take a sufficiently functional approach to market definition.

Justices Kiefel and Gageler addressed this question in detail. They held that 'a market is a metaphorical description of an area or space (which is not necessarily a place) for the occurrence of transactions'.[14] Competition in a market is 'rivalrous behaviour' in respect of those transactions.[15]

Markets are defined by reference to their dimensions: product (the type of services provided), function (the level within a supply chain at which those services are supplied), geography (the physical area within which those services are supplied) and, occasionally, temporal (the period within which the supplies occur).[16] In *ACCC v Flight Centre*, the dispute concerned the characterisation of the first two dimensions.[17]

Their Honours emphasised that the definition of a market involves a value judgment, in light of commercial reality and the purposes of the law.[18] In characterising the market in its primary case as involving two complementary up- and downstream markets for ticket sales and distribution services, the ACCC adopted an economic theory that 'did violence to commercial reality.'[19] Their Honours held:

> The functional approach to market definition is taken beyond its justification, however, when analysis of competitive processes is used to construct, or deconstruct and reconstruct, the supply of a service in a manner divorced from the commercial context of the putative contravention which precipitates the analysis.[20]

The difficulty lay not in characterising Flight Centre's service as ticket sales with an upstream distribution component but in characterising the *airlines* as providing distribution services *to themselves*. 'Booking the flight, issuing the ticket and collecting the fare were part and parcel of the airline making the sale. They were inseparable concomitants of that sale.'[21] Their Honours ultimately concluded that, '[w]hatever other difficulties the ACCC's primary case might encounter, it was unsustainable because it rested on attributing to Flight Centre and to the airlines the making of supplies of services of a description which did not accord with commercial reality.'[22]In separate judgments, Nettle J and Gordon J agreed with the approach adopted by Kiefel and Gageler JJ.[23]

Justice Nettle separately addressed a different aspect of the market test. His Honour held that the Full Federal Court erred in rejecting the ACCC's secondary case. His Honour acknowledged that Flight Centre could not transport passengers but defined the relevant marked in terms of the supply of the right to convey the passenger.[24]

The question of competition was then a matter of the degree to which the service offered by Flight Centre was capable of substitution with the service offered by the airlines. 'The greater the degree of substitutability between goods or services, the greater the degree of competition between suppliers of those goods or services, and vice versa.'[25] His Honour considered that:

> From the point of view of a prospective customer, an airline ticket sold by Flight Centre on behalf of an airline would be in most respects functionally identical to an airline ticket sold directly by the airline. Apart, perhaps, from the prospective customer's perception of extra sales service and purchasing convenience, the only difference between the two offerings would be price. Consequently, from the point of view of the prospective customer, the airline ticket sold by Flight Centre on behalf of an airline would be close to perfectly substitutable for the airline ticket sold directly by the airline; and, in terms of generally accepted competition principles, that means that the cross-price elasticity of demand as between an airline ticket sold by Flight Centre and an airline ticket sold directly

> by the airline would approach positive infinity. Other things being equal, that connotes a high degree of competition between airline tickets sold by Flight Centre on behalf of airlines and airline tickets sold directly by each airline…

The dissent

Chief Justice French dissented on the agency question. He acknowledged the differential prices offered by Flight Centre and the airlines, the commercial pressure placed on Flight Centre and the apparent competition between them. However, he held that characterizing Flight Centre's conduct as anti-competitive 'assumes a concept of competition under the Act which is in tension with that of an agency relationship at law. It opens the door to an operation of the Act which would seem to have little to do with the protection of competition.'[26]

Endnotes

1. At [38]-[44].
2. At [38].
3. At [39].
4. At [47].
5. At [51].
6. At [152].
7. At [81].
8. At [83].
9. At [84].
10. At [125].
11. At [130].
12. At [147].
13. At [147].
14. At [66].
15. At [66].
16. At [67].
17. At [68].
18. At [69].
19. At [71].
20. At [70].
21. At [73].
22. At [75].
23. At [123] and [150], respectively.
24. At [124].
25. At [126].
26. At [23].

Sentencing: domestic violence now an aggravating factor

Jonathan Michie reports on *Jonson v R* [2016] NSWCCA 286.

Introduction

In *Jonson v R* [2016] NSWCCA 286 (*Jonson*), the Court of Criminal Appeal empanelled a five judge bench to resolve a tension which had developed regarding the ambit of s 21A(2)(eb) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which provides that an offence will be aggravated if it 'was committed in the home of the victim or any other person'.

The court's judgment empowers sentencing courts to play a greater role in deterring domestic violence, and serves as an important reminder of the principles of statutory interpretation, the doctrine of precedent, and the advocate's duty to fearlessly promote and protect his or her client's interests.

Common law position

In *R v Gazi Comert* [2004] NSWCCA 125 (*Comert*), the applicant had been convicted and sentenced for sexually assaulting his wife in their home. In his application for leave to appeal against sentence, the applicant submitted *inter alia* that the sentencing judge erred by concluding that '[a]n additional aggravating feature of the offence is that it was committed in the complainant's own home where she was entitled to feel and to be safe.'[1] Hidden and Hislop JJ allowed the appeal and, of the impugned conclusion, said:

> No doubt, that would have been an aggravating feature if the offender had been an intruder. However, we are unable to see how a sexual assault on a woman by her husband is rendered more serious because it was perpetrated in the matrimonial home.[2]

Section 21A(2)(eb) of the *Crimes (Sentencing Procedure) Act 1999* (NSW)

Section 21(A)(2)(eb) was inserted into the *Crimes (Sentencing Procedure) Act 1999* (NSW) upon commencement of the *Crimes (Sentencing Procedure) Amendment Act 2007* (NSW) (Amending Act) on 1 January 2008. In the Second Reading Speech for Amending Act, the then Attorney General said the purpose of s 21A(2)(eb) was to preserve 'the notion of sanctity of the home, whereby individuals are entitled to feel safe from harm of any kind', and to reflect the Legislature's view that:

> any offence committed in the home of the victim, even if it is also the home of the accused, or in the home of another person, violates that person's reasonable expectation of safety and security.[3]

The ambit of s 21A(2)(eb) was considered by the Court of Criminal Appeal on several occasions[4], however it was not until *EK v R* [2010] NSWCCA 199; (2010) 208 A Crim R 157 (*EK*) that its juxtaposition with *Comert* was considered. In *EK*, the court said:

> [*Comert*] was concerned with the common law treatment of aggravating factors, s 21A(2)(eb) not being inserted in the Crimes (Sentencing Procedure) Act 1999 until 1 January 2008, but nothing turns on that. Whether at common law or in terms of the statutory provision, it is an aggravating circumstance where an offender intrudes into the home and not where the offender and the complainant reside together. Again, the judge was misled by submissions by the then Crown Prosecutor and by the concurrence of the applicant's former counsel.[5] (*EK* construction)

The Court of Criminal Appeal applied the *EK* construction on several subsequent occasions[6], however a tension developed when, on other occasions, it doubted the correctness of the *EK* construction[7], or sought to distinguish remarks on sentence from findings that would have been at odds with it[8].

Jonson v R [2016] NSWCCA 286

Following a trial, Mark Jonson was found guilty of recklessly inflicting grievous bodily harm on his wife, Belinda Norman, as well as two counts of sexual intercourse without her consent. On sentence, Hanley SC DCJ found Mr Jonson to be a violent and controlling man, who had in the past slapped, punched, hit, kicked and thrown boiling hot tea on Ms Norman, and who would not allow her to contact her family.

The recklessly inflict grievous bodily harm offence was committed when Mr Jonson and Ms Norman were in their bedroom, and he slapped her so hard, and so many times, that one of her eardrums was perforated and she lost partial hearing in that ear. Although Mr Jonson called an ambulance, he told the triple-0 operator that Ms Norman had fallen down some stairs – a lie she repeated to hospital staff for fear that Mr Jonson would hurt their children by way of reprisal. Like the GBH offence, the sexual assaults occurred in the matrimonial bedroom.[9] Mr Jonson was sentenced to an aggregate term of imprisonment of 9 years, which comprised a non-parole period of 6 years and 5 months and a balance of term of 2 years and 7 months.

Mr Jonson sought leave to appeal against his sentence on the basis inter alia that Hanley SC DCJ erred by concluding that the offences 'were aggravated as a result of being committed in the home of the victim'.[10] Mr Jonson relied on Comert, which he said 'had been consistently followed both before and after the introduction of s 21A(2)(eb) into the Sentencing Procedure Act, albeit in some cases with reservations'[11]. He also submitted that:

> s 21A(2)(eb) should be read as either not extending to the situation where the offender was lawfully present at the victim's home or, if it was to be construed in that fashion, such that s 21A(4) limited the operation of the provision to circumstances where the offender was not lawfully present at the victim's home.

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Statutory interpretation

The Court of Criminal Appeal repeated the often-stated principle that statutory construction begins and ends with consideration of the text itself, and that although a statutory provision must be considered within its context – so that its construction is consistent with the language and purpose of the statute as a whole – that context does not displace the meaning of the text itself, and courts must not search for what the Legislature had in mind.[12]

Applying these principles, the court held that the text of s 21A(2)(eb) 'does not impose as a pre-condition for its operation that the offender be an intruder into the victim's home', and that the Legislature did not intend for s 21A(2)(eb) to be limited to offences committed by intruders because the section is expressed as extending 'to the home of any other person'.[13]

The court also rejected the limitation imposed by the *EK* construction on the basis that it was contrary to the purpose of the section, and the purpose of the Legislature as outlined in the Second Reading Speech for the Amending Act.[14]

Contrary to any Act or rule of law?

The Court of Criminal Appeal also rejected the submission that s 21A(2)(eb) was circumscribed by s 21A(4) and said that, in order for s 21A(4) to be enlivened, there would have to be an Act or rule of law which stated that:

> unless the offender was an intruder or unlawfully present at the home of the victim, the fact that the offence was committed at the victim's home **could not** be an aggravating factor on sentence.[15]

In this connection, with the exception of *Comert EK* and *Ingham v R* [2011] NSWCCA 88, the court held that there was no authoritative support for the *EK* construction, and noted that in *R v Kershaw* [2005] NSWCCA 56 the court had referred to the judgment of Hidden and Hislop JJ in *Comert*, and said that it was 'related to the case then under consideration and [was] not intended to establish and [did] not establish any general principle'[16].

Conclusion

The Court of Criminal Appeal held that the *EK* construction of s 21A(2(eb) was 'plainly wrong and should be overruled'.[17] It follows that, hereafter, s 21A(2)(eb) operates to aggravate:

> any offence committed in the home of the victim, even if it is also the home of the accused, or in the home of another person, [that] violates that person's reasonable expectation of safety and security.[18]

Endnotes

1. *Comert* at [21].
2. *Comert* at [29].
3. New South Wales, *Parliamentary Debates*, Legislative Council, 17 October 2007, page 2667, John Hatzistergos.
4. See *Aguirre v R* [2010] NSWCCA 115 at [52]-[59]; *Palijan v R* [2010] NSWCCA 142 at [21]-[22]; and *OH Hyunwook v R* [2010] NSWCCA 148 at [35]-[40].
5. *EK* at [79].
6. See *Ingham v R* [2011] NSWCCA 88 at [112]; *BIP v R* [2011] NSWCCA 224 at [61]; *MH v R* [2011] NSWCCA 230 at [34]; *DS v R* [2012] NSWCCA 159 at [145]; *Essex v R* [2013] NSWCCA 11 at [72]; *Pasoski v R* [2014] NSWCCA 309 at [54]; and *Erazo v R* [2016] NSWCCA 139 at [51].
7. See *Melbom v R* [2013] NSWCCA 210 at [2], [43]-[44]; *Montero v R* [2013] NSWCCA 214 at [42]-[47]; *Aktar v R* [2015] NSWCCA 123 at [45]-[64]; and *Erazo v R* [2016] NSWCCA 139 at [46]-[50].
8. See *NLR v R* [2011] NSWCCA 246 at [23]; *DJM v R* [2013] NSWCCA 101 at [9]-[10]; *Melbom v R* [2013] NSWCCA 210 at [51]-[53]; *Montero v R* [2013] NSWCCA 214 at [52]-[54]; *Monteiro v R* [2014] NSWCCA 277 at [94]-[95]; *Aktar v R* [2015] NSWCCA 123 at [65]; *GP v R* [2016] NSWCCA 150 at [66]-[67]; *Sumpton v R* [2016] NSWCCA 162 at [150].
9. *Jonson* at [65]-[66].
10. *Jonson* at [2].
11. *Jonson* at [12]-[13].
12. *Jonson* at [39].
13. *Jonson* at [40].
14. *Jonson* at [41]-[42].
15. *Jonson* at [45] (emphasis in the original).
16. *Jonson* at [24], [47].
17. *Jonson* at [50].
18. New South Wales, *Parliamentary Debates*, Legislative Council, 17 October 2007, page 2667, John Hatzistergos.

Is a reference date a precondition to the validity of a payment claim?

Jane Buncle reports on *Southern Han Breakfast Point Pty Ltd (in liquidation) v Lewence Construction Pty Ltd & Ors [2016] HCA 52*

Overview

The High Court unanimously allowed an appeal from the New South Wales Court of Appeal holding that the existence of a reference date is a precondition to the making of a valid payment claim under section 13(1) of the *Building and Construction Industry Security of Payment Act* 1999 (NSW) (Act).

Background

The appellant (Southern Han) and the respondent (Lewence) were parties to a construction contract for the construction by Lewence of an apartment block at Breakfast Point in New South Wales (contract).

The contract contained payment provisions, which provided Lewence could 'claim payment progressively' by making a 'progress claim' on the 8th day of each calendar month for work under the contract done to the 7th day of that month. The contract also contained provisions that entitled Southern Han to give Lewence a 'notice to show cause' in the event that Lewence committed a substantial breach of the contract. If Lewence failed to show cause, the contract provided that Southern Han could:

- take out of Lewence's hands the whole or part of the work remaining to be completed and suspend payment until it became due and payable; or
- terminate the contract.

On 27 October 2014, Southern Han gave Lewence notice purporting to exercise its right under the contract to take out of Lewence's hands the whole of the work remaining to be completed. Lewence treated that notice as a repudiation of the contract and, on 28 October 2014, terminated the contract.

On 4 December 2014, Lewence served on Southern Han a document that purported to be a payment claim which claimed payment for work carried out by Lewence up to 27 October 2014. The purported payment claim complied with the requirements of s 13(2) of the Act, but did not include a reference date. Southern Han provided a payment schedule in response to Lewence's payment claim indicating that the amount it proposed to pay Lewence was nil.

Lewence made an application for adjudication in respect of the payment claim.[1] Southern Han lodged a response which contained a submission arguing that the adjudicator lacked jurisdiction.[2] The adjudicator rejected an argument that he lacked jurisdiction and purported to determine the application.

Southern Han then commenced proceedings in the Supreme Court seeking a declaration that the adjudication was void or, alternatively, an order of certiorari under s 69 of the *Supreme Court Act 1970* (NSW) quashing the determination. One basis upon which Southern Han sought relief was that the document Lewence served on 4 December 2014 was not a payment claim because of the absence of a reference date.

Primary judge decision

In the Supreme Court, Ball J construed the Act as requiring a reference date as a precondition to the making of a valid payment claim. Accordingly, in the absence of a reference date and, therefore, a valid payment claim, Ball J held that there could not be a valid adjudication application under s 22 of the Act.[3]

Court of Appeal decision

Lewence appealed. Ward, Emmett JJA and Sackville AJA allowed the appeal, set aside the declaration and dismissed the originating summons determining that the existence of a reference date was not a precondition to the making of a valid payment claim under the Act.[4] Relevantly, the Court of Appeal considered that 8 November 2014 was an available reference date for the payment claim on the basis that there was no provision in the contract that precluded the exercise of the statutory right to make a payment claim in accordance with the contractual provisions.[5] Southern Han was successful in its application for special leave to appeal to the High Court.

The need for a reference date

Kiefel, Bell, Gageler, Keane and Gordon JJ unanimously held that the existence of a reference date is a precondition to making a valid payment claim. Their Honour's determination turned on the opening words of s 13(1) of the Act: '*a person referred to in section 8(1)*'.

The Court agreed with Southern Han's submissionsthat the reference in the opening words of s 13(1) is to a person who, by operation of s 8(1), is entitled to a progress payment: a person who has undertaken to carry out construction work or supply related goods and services under a construction contract in respect of which a reference date has arisen.[6]

The court then stated as follows:

> The description in section 13(1) of a person referred to in section 8(1) is of a person whom section 8(1) makes entitled to a progress payment. Section 8(1) makes a person who has undertaken to carry out construction work or supply related goods and services under a construction contract entitled to a progress payment only on and from each reference date under the construction contract. In that way, the existence of a reference date under a construction contract within the meaning of section 8(1) is a precondition to the making of a valid payment claim under section 13(1).[7]

The court's interpretation was based on the legislative history of the Act[8] and amendments made in 2002[9] that aimed to ensure that a person entitled to a progress payment could make a valid

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The court's interpretation was based on the legislative history of the Act and amendments made in 2002 that aimed to ensure that a person entitled to a progress payment could make a valid payment claim even though it may be proven that the party was not entitled to any payment under the construction contract.

payment claim even though it may be proven that the party was not entitled to any payment under the construction contract.[10] The court stated that this interpretation was emphasised by the structure of Part 2 and Part 3 of the Act, which the court said draws the distinction between present entitlements to progress payments, and a future ascertainment of the amount of the payment to which the present entitlement relates.[11]

The court also stated that the above construction afforded to s 13(1) was harmonious with s 13(5) of the Act. The court noted that s 13(5) had been held to produce the result that 'a document purporting to be a payment claim that is in respect of the same reference date as a previous claim is not a payment claim under the Act'.[12] Section 13(1) therefore produced the corresponding result that a document purporting to be a payment claim, that did not have a reference date, was not a payment claim under the Act and was therefore ineffective.[13]

Determining the available reference date

Having concluded that the existence of a reference date is a precondition to the making of a valid payment claim under s 13(1) of the Act, the court then examined how the reference date couldbe determined and whether a reference date existed in this case.

The court noted that s 8(2)(b) of the Act had no application as the contract made express provision for fixing the date for the claiming of progress payments. Rather, the question was whether the reference date arose by the application of s 8(2)(a) of the Act.[14] That section provides that the reference date is to be determined in accordance with the terms of the construction contract as the date a claim for a progress payment may be made in relation to work carried out under the contract.[15]

This analysis then led to the question of whether the provisions in the contract regarding progress payments continued to operate so as to fix 8 November 2014 as a reference date, notwithstanding the repudiation and termination of the contract. That question fell to be determined by two alternative hypotheses, previously considered by Ward JA in the Court of Appeal.

These alternative hypotheses were as follows:

- Southern Han was entitled to take work out of the hands of Lewence on 27 October 2014, and therefore did not repudiate the contract, with the result being that the contract was not terminated because of Lewence's attempt to rely on that repudiation to terminate; or
- Southern Han repudiated the contract by taking the work out of the hands of Lewence, and the contract was terminated validly by Lewence on 28 October 2014.

The court held that, in either scenario, no reference date arose on which Lewence could rely as a basis for the payment claim.

In respect of the first scenario, the contract provided that if Southern Han took work out of the hands of Lewence, all further obligations to pay Lewence were suspended until completion of the process. The court held that this suspension was a suspension of the totality of the rights conferred and obligations imposed in respect of the payment provisions in the contract, including Lewence's right to make a progress claim under the contract for the work carried out up to the time of the work being taken out of its hands.[16] The court noted that the practical and commercial purpose of this suspension was to provide Southern Han security in the event the costs of completion of the work taken out of Lewence's hands were greater than the amount Southern Han would have had to pay if Lewence had completed the work.[17]

As to the second scenario, the court held that the effect of termination was that Lewence and Southern Han were both discharged from further performance of the contract and Lewence's rights under the Contract were limited to those which had then already accrued under the contract, except in so far as the contract was properly interpreted to the contrary.[18] The court noted that Lewence's right to make a payment claim under the contract would have only accrued in the event the contract had not been terminated on 28 October 2014, which would have meant the right would have accrued on 8 November 2014.

Finally, the court held that the terms of the contract did not indicate a contractual intention that the payment provisions would survive the termination of the contract. Rather, the court stated that the primary judge was right to observe that to the extent the contract adverted to its termination at all, the assimilation of the rights of the parties following termination under the contract to their rights following termination of the contract on acceptance of repudiation suggested that the parties were content to abide by the default position at common law in the event that the contract was to be terminated on acceptance of repudiation.[19]

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Endnotes

1. Section 17(1) of the Act.
2. Section 22 of the Act.
3. *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* [2015] NSWSC 502 at [40].
4. *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288 at [46]-[62], [118]-[120], [127]-[142].
5. *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288 at [74]-[82].
6. At [46].
7. At [61].
8. At [52]-[54]; New South Wales, Department of Public Works and Services, *Review Discussion Paper: Operations for Enhancing the Building and Construction Industry Security of Payment Act 1999* (2002) at 19.
9. At [54], *Building and Construction Industry Security of Payment Amendment Act* 2002 (NSW), Sched 1 [1], [22].
10. At [54]-[57].
11. At [60]-[63].
12. At [62] citing *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190 at 194 [14].
13. At [9].
14. At [73]-[74].
15. Section 8(2)(a) of the Act.
16. At [78].
17. At [76], citing Ball J in the primary judge decision *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* [2015] NSWSC 502 at [46].
18. At [79], citing *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476-477; [1933] HCA 25; *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd* (1936) 54 CLR 361 at 379; [1936] HCA 6.
19. At [80].

Anshun estoppel and representative proceedings

Louise Hulmes reports on *Timbercorp Finance Pty Ltd (in liquidation) v Collins & Anor; Timbercorp Finance Pty Ltd (in liquidation) v Tomes* [2016] HCA 44

Overview

The appellant in both appeals (Timbercorp) was part of the Timbercorp Group of companies and invested in agribusiness schemes on behalf of investors. Each respondent in each appeal (Mr and Mrs Collins and Mr Tomes) was an investor and a party to a loan agreement.

The respondents were group members in aproceeding commenced under Part 4A of the *Supreme Court Act 1986* (Vic) (Act) against Timbercorp, among others, in relation to the agribusiness schemes. The group proceeding was unsuccessful and Timbercorp subsequently commenced recovery proceedings against each of the respondents, alleging the respondents were in default of their loan agreements.

The issue for determination by the High Court was whether the respondents were precluded from relying on certain defences in the recovery proceedings, on the basis that the respondents did not raise those issues in the group proceeding, or opt out of the group proceeding. Timbercorp appealed to the High Court from the Court of Appeal of the Supreme Court of Victoria, submitting that the respondents should be so precluded, either because an *Anshun*[1] estoppel arose against them, or because relying on the defences was an abuse of process.

The High Court unanimously dismissed the two appeals, French CJ, Kiefel, Keane and Nettle JJ delivering a joint judgment and Gordon J delivering a separate judgment.

Facts

In 2009, companies comprising the Timbercorp Group went into liquidation and then administration. In October 2009, a group proceeding was commenced in the Supreme Court of Victoria by a lead plaintiff, Mr Woodcroft-Brown, as plaintiff on his own behalf and on behalf of group members including the respondents. The group members were defined as all persons who at any time during the period 6 February 2007 to 23 April 2009 acquired and/or held an interest in a managed investment scheme of which Timbercorp Securities was the responsibility entity. The respondents did not opt out of the group proceedings.

Common questions of fact or law were identified in relation to the group proceeding. The allegation in the group proceeding was essentially that Timbercorp Securities had failed to disclose information about risks, which it was required to disclose in compliance with its statutory obligations. The group proceeding was unsuccessful at trial and on appeal.

Timbercorp then commenced the two recovery proceedings, and Mr and Mrs Collins and Mr Tomes filed their respective defences. Mr and Mrs Collins' defence contains two principal claims: that they did not acquire an interest in the project in which they sought to invest through Timbercorp Securities, and that no loan was advanced to them by Timbercorp for that purpose. They contend, in the alternative, that the loan offers constituted unconscionable conduct.

Mr Tomes, in his defence, alleged that no loan agreement was concluded between him and Timbercorp, because the person

who purported to execute the loan documentation on his behalf had not been appointed his attorney. He also pleaded that a series of representations was made to him by a person who was an agent of Timbercorp and Timbercorp Securities, to the effect that Timbercorp would not seek recourse against Mr Tomes in the event of his default, as the value of the lots acquired by him would exceed the amount of the loan and those lots could simply be re-sold.

The arguments before the High Court

Timbercorp's first argument was based on the principle of *Anshun* estoppel. *Anshun* estoppel operates to preclude in a later proceeding the assertion of a claim, or the raising of an issue of fact or law, if that claim or issue was so connected with the subject matter of the first proceeding so as to have made it unreasonable in the context of the first proceeding for the claim not to have been made or the issue not to have been raised in the first proceeding.[2]

Timbercorp contended, in two different ways, that it was unreasonable, in the context of the group proceeding, for the respondents not to have raised the issues they now sought to raise:

- Timbercorp contended that the group members were privies in interest of the lead plaintiff, including with respect to their individual claims, and that it was unreasonable for the lead plaintiff not to raise the issues in the group proceedings on behalf of the respondents; and
- Timbercorp contended that it was unreasonable for the respondents themselves to have not either raised the issue in the context of the group proceeding, or opted out of the group proceeding.

Timbercorp's second argument was that the respondents' defences constituted an abuse of process, even if the group proceedings did not give rise to an estoppel.

The High Court's decision in relation to Anshun estoppel

In relation to the first limb of the *Anshun* argument (that the group members were privies in interest of the lead plaintiff and that it was unreasonable for the lead plaintiff not to raise the issues in the group proceedings on behalf of the respondents), the joint judgment accepted that a person who seeks to make a claim in later proceedings (the 'second party') may be bound by an action of a party in earlier proceedings if the party in those proceedings represented the second party such that they could be described as the privy in interest of the second proceeding.[3]

In considering Timbercorp's arguments, both judgments in the High Court considered in some detail the statutory scheme relating to group proceedings in the Supreme Court of Victoria. Against that background, the High Court determined that the lead plaintiff in the group proceeding was not a privy in interest of the respondents.[4] Sections 33C(1) and 33H of the Act, in particular, were considered in the judgment of French CJ, Kiefel, Keane and Nettle JJ. Those provisions identify the subject matter of a group proceeding as a claim which gives rise to common questions of law and fact. Their Honours held that the plaintiff represented the group members with respect to their interests in that regard and the group members claimed through the plaintiff to the extent of those interests. Their relationship is therefore that of privies in interests with respect to that claim, but not with respect to their individual claims.[5] In addition, their Honours held that other provisions of the Act made it clear that group members may have other, individual, claims which do not form part of the subject matter of the group proceeding.[6]

In Gordon J's separate judgment, her Honour stated that the legal interests of a group member and the lead plaintiff only aligned to the extent that each had an interest in the resolution of the common questions.[7]

In relation to the second limb of the argument (that it was unreasonable for the respondents themselves not to have raised the issue in the context of the group proceeding, or to have opted out of the group proceeding), French CJ, Kiefel, Keane and Nettle JJ emphasised that *Anshun* makes clear that there can be no estoppel unless 'it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it'.[8] Their Honours said that it could not have been expected that the respondents would raise their individual issues about their loan agreements in the group proceeding, where the common issues were undisclosed risk and misrepresentations affecting the entry of investors into the schemes.

Further, their Honours held that even if the respondents' claims were relevant to those in the group proceeding, it is not clear that they should have been raised. There can be a variety of circumstances which may justify a party refraining, reasonably, from litigating an issue in the earlier proceeding.[9] Timbercorp's submission that the respondents should have opted out of the group proceeding was also not accepted, as it was based on the assumption that the lead plaintiff represented the respondents with respect to their unpleaded claims as well as the common claims.[10]

Gordon J stated that the circumstances which pointed away from an *Anshun* estoppel arising against the respondent included the scope of the group proceeding as determined by the definition of the group members and the common questions, the role of the group members in a group proceeding, the counterclaim and its management in this group proceeding and the nature of the opt out procedure.[11]

Louise Hulmes, 'Anshun estoppel and representative proceedings: *Timbercorp Finance Pty Ltd (in liquidation) v Collins & Anor; Timbercorp Finance Pty Ltd (in liquidation) v Tomes [2016] HCA 44'*

The High Court's decision in relation to abuse of process

French CJ, Kiefel, Keane and Nettle JJ referred to the fact that *Tomlinson v Ramsey Food Processing Pty Ltd*[12] had recognised that an abuse of process may exist even in circumstances which did not give rise to an *Anshun* estoppel. This is because abuse of process is inherently broader and more flexible than estoppel and is capable of application in any circumstance in which the use of a court's procedure would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute.[13]

Timbercorp submitted that an abuse of process arose because the Supreme Court was denied the opportunity, in the group proceeding, to determine how best to manage the issues raised in the defences, in the context of all the common claims.

The High Court disagreed. French CJ, Kiefel, Keane and Nettle JJ noted that Part 4A of the Act provided the Court with overall management of group proceedings, however, it could not be said that the failure to bring the respondents' claims to the attention of the Court affected the case management decisions open to the Court.[14] Similarly, Gordon J stated that there was nothing in either the statutory scheme or the group proceeding that suggested that the respondents should have raised their claims in the context of the group proceedings. In fact, Part 4A recognised that individual claims may need to be resolved in separate proceedings. Accordingly, raising the defences in the recovery proceedings did not amount to an abuse of process.[15]

Endnotes

1. After *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 148 CLR 589; [1981] HCA 45.
2. per French CJ, Kiefel, Keane and Nettle JJ at [97], referring to *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 89 ALJR 758 at 756-757 [22]; 323 ALR 1 at 7-8; [2015] HCA 28 and *Anshun* at 598, 602-603.
3. French CJ, Kiefel, Keane and Nettle JJ at [36].
4. French CJ, Kiefel, Keane and Nettle JJ at [39]; Gordon J at [142].
5. French CJ, Kiefel, Keane and Nettle JJ at [49] and [53].
6. French CJ, Kiefel, Keane and Nettle JJ at [50].
7. French CJ, Kiefel, Keane and Nettle JJ at [141.
8. French CJ, Kiefel, Keane and Nettle JJ at [56], referring to *Anshun* at 602.
9. French CJ, Kiefel, Keane and Nettle JJ at [59] and [65]-[66].
10. French CJ, Kiefel, Keane and Nettle JJ at [67].
11. Gordon J at [115].
12. (2015) 89 ALJR 758 at 757-758 [25]-[26]; 323 ALR 1 at 8-9.
13. French CJ, Kiefel, Keane and Nettle JJ [69].
14. French CJ, Kiefel, Keane and Nettle JJ at [72]-[73].
15. Gordon J at [144]-[145].

Annulment of conviction and disqualification from parliament

David Birch reports on *Re Culleton [No 2]* [2017] HCA 4

In the 2016 election, Rodney Norman Culleton was elected as a One Nation senator for Western Australia. However, prior to his nomination, Senator Culleton had been convicted, in his absence, in the Local Court of New South Wales, of the offence of larceny. After the 2016 election, the Local Court granted an annulment of the conviction. In *Re Culleton [No 2]* [2017] HCA 4, the High Court, sitting as the Court of Disputed Returns, held that Senator Culleton was 'incapable of being chosen' as a senator under s 44(ii) of the Constitution.

Consequently there was a vacancy in Western Australia's Senate representation, which the court held must be filled by a special count of ballots. That has since been conducted and the second candidate on the WA One Nation ticket, Peter Georgiou (Mr Culleton's brother-in-law), will fill the vacant senate seat.

The decision is of interest for the characterisation of the annulment procedure under the *Crimes (Appeal and Review) Act 2001* (NSW). The decision also provides an example of the rigid and somewhat arcane nature of s 44, the Constitutional provision for disqualification from parliament.

Background

Section 44(ii) of the Constitution provides:

> Any person who … has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer … shall be incapable of being chosen or of sitting as a senator.

On 2 March 2016 Mr Culleton was convicted of larceny. Under s 117 *Crimes Act 1900* (NSW) the offence of larceny is punishable by imprisonment for a period of up to five years. However, the maximum term of imprisonment that the Local Court could impose in the circumstances was two years: s 268 *Criminal Procedure Act 1986* (NSW). The Local Court, having convicted Mr Culleton of larceny, issued a warrant for his arrest in order to have him brought to the court for sentencing.

On 16 May 2016, Mr Culleton was nominated as a candidate in a group nomination for Pauline Hanson's One Nation party for the Senate. The election occurred on 2 July 2016. On 2 August 2016, the writ for the election of senators was returned, Mr Culleton was noted as elected and he sat as a senator from that date.

On 8 August 2016, Senator Culleton presented himself before the Local Court and the warrant was executed. Pursuant to s 8 of the *Crimes (Appeal and Review) Act 2001* (NSW), the Local Court granted an annulment of Senator Culleton's conviction. The matter was dealt with afresh and Senator Culleton subsequently pleaded guilty at a final hearing.

The decision

Senator Culleton argued that the effect of the annulment on 8 August 2016 was to render the conviction void *ab initio*, so that it was treated as having never occurred.

Section 10(1) of the *Crimes (Appeal and Review) Act 2001* provides that: '[o]n being annulled, a conviction ... ceases to have effect and any enforcement action previously taken is to be reversed.'

The High Court approached the effect of the annulment as a matter of statutory construction.[1]

The High Court plurality (Kiefel, Bell, Gageler and Keane JJ) held that the annulment did not retrospectively treat the conviction as if it had never occurred.[2] Rather, the annulment operated prospectively, only operating to reverse any action taken by way of enforcement against the defendant.[3] In particular, the plurality noted that to say that 'the annulment "ceases to have effect" is to acknowledge that it has been in effect to that point.'[4] Accordingly, at the time of his nomination (the relevant time for s 44), the conviction recorded against Senator Culleton was legally in effect, Senator Culleton was 'subject to be sentenced' and was therefore disqualified by s 44(ii).

While agreeing in the result, Nettle J's reasons were somewhat different. Nettle J agreed that the annulment was not retrospective in that the conviction continues to have effect until and unless it is annulled.[5] However, Nettle J held that the annulment would operate retrospectively for purposes of events occurring *after* the annulment.[6] Thus, if the conviction had been annulled before his nomination, Senator Culleton would have been entitled to stand, even if the charge of larceny had still been pending against him. However, as Senator Culleton's annulment occurred after his nomination, he was at that point 'subject to be sentenced' within the meaning of s 44(ii) and therefore ineligible.

Senator Culleton raised two alternative arguments, neither of which found favour with the High Court.

First, Senator Culleton argued that because he had at no time actually been sentenced to imprisonment for the offence of larceny, s 44(ii) of the Constitution had no application to him. This submission flew in the face of the words of s 44(ii), and the High Court had no difficulty rejecting it.[7]

Second, Senator Culleton argued that he was not 'subject to be sentenced' because he had been convicted as an 'absent offender' and under s 25(1)(a) of the Crimes (Sentencing Procedure) Act 1999 (NSW), a sentence of imprisonment may not be imposed upon an 'absent offender'. The High Court observed that this did not provide Senator Culleton with immunity from imprisonment.8 A warrant had been issued for the purpose of

having Senator Culleton brought before the Local Court for sentencing. Accordingly, 'the processes of the law pursuant to which he might lawfully be sentenced to imprisonment were set in train' and Senator Culleton was 'subject to be sentenced' at the relevant time.[9]

Endnotes

1. Re Culleton [No 2] [2017] HCA 4 at [25] (Kiefel, Bell, Gageler and Keane JJ), [60]-[61] (Nettle J).
2. Ibid at [29] (Kiefel, Bell, Gageler and Keane JJ).
3. Ibid at [29] (Kiefel, Bell, Gageler and Keane JJ).
4. Ibid at [29] (Kiefel, Bell, Gageler and Keane JJ).
5. Ibid at [62] (Nettle J).
6. Ibid at [61] (Nettle J).
7. Ibid at [16]-[22] (Kiefel, Bell, Gageler and Keane JJ); [64]-[66] (Nettle J).
8. Ibid at [33] (Kiefel, Bell, Gageler and Keane JJ).
9. Ibid at [36] (Kiefel, Bell, Gageler and Keane JJ).

Verbatim

Smith v The Queen; R v Afford [2017] HCATrans 40 (28 February 2017)

Mr Odgers: Of course, your Honour. I am just attempting to respond to the proposition that because you know there is something in the suitcase, the element of intention is met. I just – you can see I am struggling with this. I am saying that cannot be enough.

Kiefel CJ: We know you are struggling, Mr Odgers.

Mr Odgers: I will cease to struggle. I have attempted, manfully, to respond to that.

Nettle J: That is gender normative, Mr Odgers.

Mr Odgers: Yes. Gender – I have struggled personally – whatever the word is – 'person-fully'.

Which way to Brexit?

Daniel Habashy reports on *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5

On 1 January 1973, the United Kingdom joined the European Economic Community, now the European Union (EU). This was achieved by government ministers signing a Treaty of Accession, and Parliament enacting the *European Communities Act 1972* (1972 Act).

Section 2 of the 1972 Act provides, in summary, that whenever EU institutions make new laws, those new laws become part of UK law, and take precedence over all domestic sources of UK law. The 1972 Act therefore makes EU law an independent and overriding source of UK law and operates as a partial transfer of law-making power by Parliament to EU institutions, until Parliament decides otherwise.

Over the next 40 years, developments in the EU resulted from further treaties, many of which were adopted in subsequent Acts of Parliament, through the medium of an amendment made to the 1972 Act by a short, appropriately worded statute passed by Parliament, and the treaty was then ratified by the UK. Some of those Acts curbed the exercise of the powers of UK ministers in EU institutions.

One of those Acts, namely the European Union (Amendment) Act 2008, approved the inclusion of Article 50 into the 'Maastricht Treaty on European Union' of 7 February 1992. In broad terms, Article 50 provided that a country wishing to leave the EU, must give a notice in accordance with its own constitutional requirements, and that the treaties which govern the EU (EU treaties), will cease to apply to the country within two years.

On 23 June 2016, a UK wide referendum, undertaken pursuant to the *European Union Referendum Act 2015*, produced a majority in favour of leaving the EU, and the UK government then announced its intention to trigger Article 50. The outcome of the referendum and the government's proposed mode of giving notice were, to put it lightly, controversial.

Within days after the referendum, proceedings were commenced in the Divisional Court of England and Wales, against the UK Government's intention to trigger Article 50 without a parliamentary vote. On 3 November 2016, the court (Lord Thomas of Cwmgiedd LCJ, Sir Terence Etherton MR and Sales LJ) ruled against the UK Government on the basis that the 1972 Act fundamentally changed UK law by granting EU rights to UK citizens that are enforceable in domestic law, and withdrawal from the EU would effectively change (in most cases remove) those domestically enforceable rights, and therefore such a decision could not be taken by the UK Government exercising its prerogative powers. The ruling produced further controversy, including personal attacks on the judges in major newspapers.

On appeal to the Supreme Court, the issues in the proceedings were:

- whether the government could trigger Article 50 without the prior authority of an Act of Parliament. This was expressed to be the main issue; and
- whether the UK Government was obliged, under the devolution legislation, to consult the legislatures in Scotland, Wales and Northern Ireland before triggering, or attempting to trigger, Article 50.

A. The main issue

It was common ground that, as a general principle of constitutional law in the UK, the government has a prerogative power to withdraw from international treaties as it sees fit, but that it cannot exercise that power if it would thereby change UK laws, unless it is authorised to do so by Parliament.

The claimants argued that as a result of leaving the EU, UK law will change, and legal rights enjoyed by UK residents will be lost. Accordingly, the claimants contended that the government cannot trigger Article 50 unless authorised by Parliament.

In reply, the government argued that the 1972 Act does not exclude the power for ministers to withdraw from the EU treaties, and that s 2 of the 1972 Act actually caters for the exercise of such a power as it gives effect to EU law only so long as the power of withdrawal is not exercised.

By a majority of eight to three, the Supreme Court ruled that the government cannot trigger Article 50 without an Act of Parliament authorising it to do so (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge in the majority, with Lord Reed, Lord Carnwath and Lord Hughes dissenting in separate judgments).

The majority

The majority reasoned that, when the UK withdraws from the EU treaties:

- a source of UK law will be cut off; and
- further, as was common ground, certain rights enjoyed by UK citizens will be affected,
- and therefore, the government cannot trigger Article 50 without Parliament authorising that course.

The majority rejected the government's argument that s 2 of the 1972 Act caters for the possibility of the government withdrawing from the EU treaties without prior parliamentary approval.

The majority said that there is a vital difference between changes in UK law resulting from variations in the content of EU law arising from new EU legislation (which is authorised by s 2 of the 1972 Act), and changes in UK law resulting from withdrawal by the UK from the EU treaties. The former was said to involve

changes in EU law, which are then brought into domestic law through s 2 of the 1972 Act. The latter involves a unilateral action by the relevant constitutional bodies, which effects a fundamental change in the constitutional arrangements of the UK, by cutting off the source of EU law. The majority '[could] not accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by parliamentary legislation'.

The majority also said that another ground for justifying that conclusion is that withdrawal from the EU treaties effects changes to EU law, and therefore domestic law, and therefore the rights of UK citizens, and it was not permissible for Ministers to do this by a unilateral act, without approval by an Act of Parliament.

On both counts, namely the constitutional alteration and the change in domestic law that would be effected by triggering Article 50, the UK's constitutional arrangements require such changes to be authorised by Parliament, and the 1972 Act does not do that.

The majority observed that the Act of Parliament which established the 2016 referendum did not say what should happen as a result of the referendum, and accordingly any change in the law to give effect to the referendum must be made in the only way permitted by the UK constitutional principles, namely by an Act of Parliament, and to proceed otherwise would be a breach of constitutional principles.

The minority

The dissenting justices considered the government can trigger Article 50 without an authorising Act of Parliament. Their view was that the 1972 Act, taken with the 2008 Act, renders the domestic effect of EU law conditional on the EU treaties applying to the UK. In their view, Parliament has not imposed any limitation on the government's prerogative power to withdraw from the treaties, and if Article 50 is triggered, EU law will cease to have effect in UK law in accordance with the 1972 and 2008 Acts.

B. The devolution issues

The devolution issues concerned whether:

- the terms on which powers had been statutorily devolved to Scotland, Wales and Northern Ireland; or
- the Sewel Convention (which preserved the power of the UK Parliament to make UK-wide laws even where within the legislative competence of the devolved states),
- required consultation with or the agreement of the devolved legislatures before Article 50 can be triggered.

On the first issue, the Supreme Court unanimously ruled that UK ministers are not legally compelled to consult the devolved legislatures before triggering Article 50. The devolution statutes were enacted on the assumption that the UK would be a member of the EU, but they do not require it. Relations with the EU and other foreign matters are reserved to the UK Government and Parliament.

On the second issue, the majority reasoned that the Sewel Convention provides that the UK Parliament will not normally exercise its right to legislate with regard to devolved matters without the agreement of the devolved legislatures. While it therefore plays an important part in the operation of the UK Constitution, and operates as a political constraint on the activity of the UK Parliament, it does not to give rise to a legally enforceable obligation, and the policing of its scope and its operation is not a matter for the courts.

C. Outcome

Two days after the judgment, the government published details of the European Union (Notification of Withdrawal) Bill 2017 that would, once enacted, confer on the government the authority to give notice pursuant to Article 50. Two days were allocated in the following week for second reading debate in the House of Commons.

The Bill was passed and at the time of writing the Article 50 Notice was scheduled to be presented to the EU on 29 March 2017. The next stage for the UK Government is negotiation with the EU as to the details of the exit, which are anticipated to commence in May 2017.

Case management reforms in the Federal Court of Australia

By Daniel Tynan

In 2016, the Federal Court implemented a range of case management reforms as part of the court's National Court Framework (NCF). Under the NCF, the work of the court has been organised into nine National Practice Areas (NPAs) with some practice areas (Commercial and Corporations and Intellectual Property) divided further into sub-areas, based on established areas of law. The court has put this structure in place in order to foster consistent national practice, the utilisation of specialised judicial and registrar skills and the effective and expeditious discharge of the business of the court.

The nine NPAs are:

- Administrative and Constitutional Law and Human Rights
- Native Title
- Employment and Industrial Relations
- Commercial and Corporations
- Taxation
- Intellectual Property
- Admiralty and Maritime
- Federal Crime and Related Proceedings
- Other Federal Jurisdiction.

The Commercial and Corporations NPA sub-areas are: Commercial Contracts, Banking, Finance and Insurance; Corporations and Corporate Insolvency; General and Personal Insolvency; Economic Regulator, Competition and Access; Regulator and Consumer Protection and International Commercial Arbitration.

The Intellectual Property NPA sub-areas are: Patents and Associated Statutes; Trade Marks and Copyright and Industrial Designs.

When commencing proceedings, an applicant is required to nominate the relevant NPA and sub-area, although the court will check this. Specialist judges are assigned to matters in each NPA or sub-area. The individual docket system remains, so matters are allocated to a particular judge and will generally remain with that judge.

A key component of the NCF reforms has been the review of all the court's practice documents. Following consultation with the profession, on 25 October 2016, the Federal Court issued 26 new national practice notes. These practice notes replace the 60 pre-existing practice notes and administrative notices.

The new practice notes fall into three categories:

> 1. The Central Practice Note (CPN-1) sits at the core of all of the practice notes and addresses the guiding NCF case management principles applicable to all NPAs. One of its main aims is to ensure that case management is not process-driven or prescriptive, but flexible - with parties and practitioners encouraged and expected to take a common-sense and co-operative approach to litigation to reduce its time and cost. CPN-1 emphasizes that the court's rules and processes should not be viewed as inflexible and that the court is open to innovative solutions to case management as long as those solutions facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible in accordance with the terms of ss 37M and 37N of the *Federal Court Act 1976* (Cth).
>
> 2. NPA Practice Notes. Interlocking with the Central Practice Note are the new NPA practice notes. Each of the NPAs, except Federal Crime and Related Proceedings and Other Federal Jurisdiction, have a NPA practice note. The NPA Practice Notes raise NPA-specific case management, however, parties may also seek to adopt the processes set out in one NPA practice note for use in a different NPA. For example, the use of concise statements for commencing proceedings which is set out in the Commercial and Corporations Practice Note (C&C-1) may be used in other NPAs where appropriate.
>
> 3. General Practice Notes (GPNs). There are 17 new or amended GPNs. These practice notes apply across all NPAs. A number of GPNs set out new or more comprehensive arrangements in a variety of key areas, such as Class Actions, Expert Evidence, Survey Evidence, Costs, Subpoenas and Notices to Produce and Access to Documents.

Set out below are some key features of the new practice notes.

Concise statements - commencing proceedings

One of the most important changes introduced by the court is the method of commencing proceedings. The *Commercial and Corporations Practice Note (C&C-1)* provides that proceedings may be commenced using an application accompanied by a concise statement, affidavit or statement of claim.

Clauses 5.4 and 5.5 of C&C-1 provides that:

> The purpose of a concise statement is to enable the applicant to bring to the attention of the respondent and the court the key issues and key facts at the heart of the dispute and the essential relief sought from the court before what might be the considerable cost of preparation of detailed pleadings is incurred. While the form of the concise statement is described in more detail below, it must first be emphasised that the concise statement is not intended to substitute the traditional form of pleading with a short form of pleading, but instead should be prepared more in the nature of a pleading summons, and may be drafted in a narrative form.

> If a concise statement is filed with the originating application, no further originating material in support (whether by statement of claim or affidavit) is required to be filed until the Court orders that to be done.

The Federal Court anticipates that the majority of commercial and corporations matters will be assisted by being commenced with a concise statement. Concise statements are limited to five pages and must set out: the material facts giving rise to the claim; the relief sought; the legal grounds for the relief sought; and the alleged harm suffered by the applicant, including, if possible, a conservative and realistic estimate or range of loss and damage. When a concise statement is filed an expedited case management hearing will take place within two to three weeks.

The Federal Court expects that in a minority of matters which are simple, have narrow grounds of dispute, may be in the lower range of quantum claims and will benefit from a one-step pleading process, a short statement of claim not exceeding 15 pages may be used.

Since the introduction of the new NPAs arguments have been raised by respondents that the concise statement fails to sufficiently identify the case to be met. In the process of "triaging" a matter at the first case management hearing (cl 6.9), however, the court is open to considering the claim (or aspects of it) which may warrant further elucidation by means of traditional pleading procedure, amendment to the concise statement or other processes, for example, by the provision of particulars or a schedule of material facts which supplements the concise statement.

The ACCC has already used concise statements in a wide range of matters including consumer protection cases, product safety and franchising matters as well as competition cases.

In *ACCC v Cornerstone Investment Aust Pty Ltd* [2016] FCA 445, a case concerning allegations of systemic unconscionable conduct and misleading or deceptive conduct, Gleeson J ordered that the ACCC's concise statement be amended and supplemented by further material particulars of aspects of the case against the respondent.

In *ACCC v Volkswagon*, a misleading or deceptive conduct case, at the first case management hearing, Foster J noted that the concise statement filed by the ACCC was helpful in identifying the key issues in dispute, but considered that the matter should be pleaded by way of a statement of claim.

In *ACCC v Oakmoore & Ors*, a cartel and exclusive dealing case commenced by concise statement, Dowsett J ordered the ACCC to file a statement of claim. His Honour observed that it was not intended that the court would spend a lot of time at the beginning of proceedings deciding whether or not the matter should proceed by way of a statement of claim or concise statement. This is essentially an instinctive process and if it is not immediately clear that the case is appropriate to proceed by way of concise statement then it should be pleaded.

In *ACCC v Phoenix* Institute of Australia Pty Ltd and Anor, an unconscionable conduct case, at the first case management hearing the respondents sought an order that the ACCC file a statement of claim. Yates J did not make this order and noted that the concise statement provided sufficient detail of the alleged conduct. His Honour said that a statement of claim would not necessarily provide any further detail given the nature of the case. Yates J said that the ACCC's evidence will further assist the respondent to understand the case it is to meet. His Honour said that these matters could be reviewed at subsequent case management hearings. His Honour ordered that the respondents file a concise statement in reply.

The point is that the court, with the parties' assistance, will focus on finding the most efficient method of identifying the ambit of the dispute between the parties and will balance that with the need to ensure that the dispute is set out with sufficient particularity to afford procedural fairness. And as noted above, concise statements may be used, if appropriate, to commence proceedings in any NPA.

Expert evidence

The *Expert Evidence Practice Note* (GPN-EXPT) applies to any proceeding involving the use of expert evidence, and includes the *Harmonised Expert Witness Code of Conduct* and the *Concurrent Evidence Guidelines*. It replaces Practice Note CM7 – Expert Witnesses in Proceedings in the Federal Court of Australia.

This practice note incorporates similar principles to the former Practice Note CM7, but emphasises that:

- An expert should be given all relevant information (whether helpful or harmful to a party's case) and that any questions or assumptions provided by an expert should be provided in an unbiased manner and in such a way that the expert is not confined to addressing selective, irrelevant or immaterial issues.
- If an expert report is lengthy or complex, a brief summary is to be provided at the beginning of the report.
- Parties are now expected to collaborate and inform the court at the earliest opportunity on a range of issues relating to the use of experts, including consideration of using a conference of experts and/or a joint report. It will often be desirable, before any expert is retained, for the parties to attempt to agree on the questions to be proposed to be the subject of

expert evidence, as well as the relevant facts and assumptions.

The new Code of Conduct will require changes to the wording of the expert's acknowledgement that they have read and agreed to be bound by the Practice Note and the Code of Conduct.

The new practice note provides non-exhaustive guidance on the types of orders the court might make. Unless ordered by the court, the parties' lawyers will not attend expert conferences.

Costs

The *Costs Practice Note (GPN-COSTS)* provides that:

- Parties are expected to make a genuine effort to resolve costs issues between them early and are encouraged to use formal offers of compromise or other offers. Parties are also encouraged to use alternative dispute resolution.
- Where appropriate, the court will make consolidated cost orders which have the effect of consolidating multiple or competing costs entitlements as between the parties.
- Where costs cannot be agreed, the court has expressed a preference to make lump-sum costs orders to avoid lengthy taxation processes.

The use of technology

The Technology and the court Practice Note (GPN-TECH) promotes the effective use of technology at all stages of proceedings as well as within the court. It incorporates a number of former practice notes, including CM6 Electronic technology in litigation, CM22 Video-link hearing arrangements, CM23 Electronic Court File and preparation and lodgement of documents, GEN2 Documents and GEN3 Use of court forms.

The Federal Court embraces the use of technology and views it as an important tool in achieving the quick, inexpensive and efficient resolution of proceedings. The court aims to be flexible and adaptable to changes in technology and to the addition of emerging technology.

Parties are encouraged to utilise eLodgement, electronic exchange of material, videoconference facilities, advanced forensic and analytics technologies to minimise the document review process and to conduct hearings electronically.

Prior to the provision of discovery, parties are expected to discuss and agree on a practical cost-effective discovery plan, including the protocols to be used for the electronic exchange and efficient management of documents.

In preparation for the pre-trial case management hearing, parties are to consider the ways in which technology can be used to reduce the length of the hearing, for example, by using electronic court books, uploading documents to an electronic court-based platform or engaging an external provider to assist in conducting an eTrial.

All of the Federal Court's practice notes can be found at http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes.

Attracting the best and brightest women lawyers to the bar

By Ingmar Taylor SC

On 8 March 2017 Greenway Chambers adopted a policy that allows a chambers member to take a period of six months leave free of rent and chambers fees following the birth or adoption of a child.

Professor George Williams' recent analysis of gender equality among barristers before the High Court reveals how rarely women appear and speak before the High Court, despite the fact that for years more than half of all law graduates have been women.[1] His research shows that in more than half the matters heard by the High Court over the 2015-16 financial year, not a single female barrister appeared for any party and in the matters in which women did appear, very few had speaking parts.

His research did not extend to examining the reasons for this, but when Professor Williams discussed his findings at a recent Bar Association seminar he said that female (but not male) law students regularly questioned him about whether they should go to the bar. Why? Because they are worried that it is 'not family friendly'. Women make up less than 22 per cent of the New South Wales Bar and less than 11 per cent in

the ranks of senior counsel. The majority of women barristers have less than 10 years experience.

The structure of the New South Wales Bar dissuades female law graduates from becoming barristers and makes it more difficult to retain those who do come to the bar. I discussed the reasons for this in some detail in an article for Bar News: Parental Responsibilities at the bar[2]. One of those reasons is the financial effect of taking parental leave, something that usually occurs before a barrister has become senior and well established. Not only is there no paid leave for barristers, who are sole practitioners, they are likely to have significant ongoing costs to meet while on leave, in particular the responsibility to pay for their room and chambers fees.

It has recently been suggested that a woman who takes six month's maternity leave at the bar will be about $250,000 worse off than her contemporary who is a senior associate at a large law firm. The senior associate will receive paid leave and will return to work at the same level of income. The barrister will receive no income during leave, reduced income while she rebuilds her practice and working part-time due to parental responsibilities, and must continue to pay practice expenses while on leave.

It has recently been suggested that a woman who takes six month's maternity leave at the bar will be about $250,000 worse off than her contemporary who is a senior associate at a large law firm.

In the UK, where Barristers Chambers are regulated by a central authority, all chambers must offer six months leave free of rent and chambers' fees.[3] In Victoria, where most barristers are in rooms they rent (but do not purchase) from a Bar owned company, barristers can retain their room and pay 25 per cent of their rent for six months.[4]

For those taking parental leave the Bar Association waives the requirement to pay an annual membership fee[5]. The Bar Association, however, is not empowered to require individual chambers to adopt any particular policies in respect of parental leave. As a consequence there are no standard rules or policies that apply to chambers in NSW. The Bar Association publishes 'Best Practice Guidelines'[6] (BPG) which includes guidelines on Model Parental and Other Extended Leave. The Bar Association encourages the various chambers to adopt the BPGs, with mixed success.

There remain chambers in Sydney that discourage barristers licensing their room (ie subletting it) for any reason, and many refuse to allow sharing of a room for those who have returned from a period of leave and wish to reduce costs while working part-time.

Most chambers will do what they can to assist a member to licence their room, and so cover or defray those costs during a period of parental leave. However, the risk remains on the parent taking leave where no licensee can be found. I am not aware of any other chambers that has adopted a policy of allowing a chambers member to be relieved of floor fees and rent during parental leave.

The New South Wales Bar has historically prided itself as being the home of the best and brightest legal minds in the country. But if it wishes to attract and retain the best of the 50 per cent of graduates who are women it needs to address the structural issues that dissuade many of them from coming to the bar.

And so I was very pleased that, on International Women's Day, my fellow floor members agreed to my proposal to adopt the new policy. The policy assists members taking leave to licence their rooms, permits rooms to be shared, and removes from members the obligation to pay rent and floor fees while taking parental leave for six months.

Endnotes

1. Thomson Reuters, *Gender equality among barristers before the High Court* (27 February 2017) available at: http://blog.thomsonreuters.com.au/2017/02/gender-equality-among-barristers-high-court/?utm_campaign=ret_loyalty_value_insider-research-newsletter_070317&utm_medium=email&utm_source=Eloqua&elqTrackId=4431b576983742c9a14e58359f795634&elq=ebf702f4a07
2. I Taylor SC, *Parental responsibilities and the bar* [2015] (Winter) *Bar News* pp30-31; available at : http://www.nswbar.asn.au/docs/webdocs/BN_022015_feature1.pdf
3. UK Bar Council Equality and Diversity Guides – Parental Leave as at January 2015; available at: http://www.barcouncil.org.uk/media/323036/bar_council_ed_guides_parental_leave_policies_2015.pdf
4. Parental Leave Policy of the Victorian Bar published on 7 October 2008; available at: http://static1.1.sqspcdn.com/static/f/556710/21174829/1354704097000/VicBar_parental_leave.pdf?token=gikEBqYBzInyJXXBzAHx18oAhxw%3D
5. http://www.nswbar.asn.au/docs/webdocs/pcfeewaiver.pdf
6. New South Wales Bar Association Best Practice Guidelines are available at http://www.nswbar.asn.au/for-members/bpg

Improving wellbeing at the New South Wales Bar

The Bar Association has launched an initiative to identify the concerns of its membership and assist the profession with managing their health and wellbeing. Arthur Moses SC, senior vice-president of the Bar Association, provides this overview.

There was a time when the mental health and wellbeing of the legal profession was rarely spoken about. Yet within the relatively small community that is the New South Wales Bar, everyone has been affected by their own or their colleagues' poor mental health. This occurs in different ways, but it is nearly always associated with severe stress, substance abuse (drugs and alcohol), the breakdown of relationships and, in more extreme cases, suicide. Legal Aid cuts have served to place further pressure on those in the profession who practise in the already difficult areas of criminal and family law where they are exposed to traumatic events.

There has been a worrying increase in the incidence of mental health issues concerning barristers coming before the Bar Council and the Executive. The overwhelming majority of these have come to light during a conduct investigation or when a barrister has experienced a breakdown which has had tragic consequences. One of the more confronting aspects of the Bar Council's role is to read the medical reports of colleagues, which detail their attempts to grapple with mental health issues. Still more distressing for a member of the Executive is to receive a late night call from the Executive Director that one of our number has attempted an act of self harm or passed away because of an act of self harm.

It is imperative that members of the New South Wales Bar encourage colleagues to feel comfortable to speak about issues that are causing them concern, stress or anxiety. It is only when you feel that you are able to speak about such matters without a fear that you will be labelled as weak or not a good lawyer that we would have done our job as a profession in ensuring that people do not go without help or suffer in silence.

The bar, by its very nature, is a stressful place to work and barristers are acutely at risk from performance-inhibiting factors. Those who practise at the criminal bar are often exposed to the details of crimes, traumatic events, suffering and loss. There are the demands of continuing professional development, such as remaining up to date with leading cases and legislative amendments. To these pressures can be added the isolating nature of being self-employed and managing what is essentially a small business. When the pressure becomes extreme, we don't perform at our best and this may impact on our ethical and professional obligations.

Public awareness and concern regarding the mental wellbeing of law students and legal practitioners began rising after October 2004 and the tragic suicide of Tristan Jepson. The subsequent formation of the Tristan Jepson Memorial Foundation was

formed through the tireless work of Tristan's parents, Marie and George, who I admire greatly. Through its engagement with the profession and the annual lectures it promotes, there has been an increase in anecdotal evidence of a link between studying and practising law and depression, drug and alcohol abuse and mental illness. In 2006 beyondblue contributed to a Beaton Consulting report on levels of depression among the professions.[1] In 2008 Vrklevski and Franklin studied the incidence of vicarious trauma on criminal defence lawyers and prosecutors who work regularly with traumatised clients. In 2009 the Brain and Mind Institute published *Courting the Blues: Attitudes Towards Depression in Australian Law Students and Lawyers*.[2] That study was based on a survey of 924 solicitors and 756 barristers (including 97 senior counsel) and found that 42 per cent of barristers had experienced depression.

My concern was heightened when I reviewed the results of the Bar Association's *2014 Member Profile Report*, which was written by the social and market research firm Urbis. The 2014 survey was the first time that the Bar Association sought this information from its membership. The express purpose was to obtain data, which can be used to develop, support and justify initiatives of the Bar Association for its members. The association collected and collated the 1,174 responses received to the survey and provided Urbis with the raw data, which they then analysed in the course of the preparation of the report.

DEPRESSION

37% of respondents reported suffering from depression while at the bar. While most of these respondents were male (74%), a similar proportion of all females (35%) and male (37%) reported experiencing depression whilst at the bar.

DIVORCE

21% of respondents reported experiencing divorce or separation while at the bar.

We drilled down on the figures to see what the rates of depression were by years of admission. The higher rates of depression appear to be those that have practised for 20 years or more in that 1986-1995 and 1975-1985 range. The two highest age groups were 50-60 and over 60, although the other age groups were worryingly high.

We then compared the rate of depression at the bar to the medical profession. The study by beyondblue in October 2013 found that 20 per cent of the medical profession have been diagnosed with depression.[3] It should be noted that the NSW Bar Association's Urbis survey relied on 'self-diagnosis': we asked our members to indicate whether they *believed* they had suffered from depression at the bar, rather than having been diagnosed. This may explain the disparity. We then looked at how barristers compared with the general public – as you will see from this beyondblue study – it estimates that 14 per cent of Australians experience depression during their lifetime.

Clearly, the rates of depression in our profession are high. The Bar Council has determined that we now need to examine why this is occurring and what we can do to reduce these rates. I think it is important that the bar, the legal profession, and law schools use the figures from the Urbis survey to shine a light on how we deal with our colleagues who suffer from depression and how we can improve what we do because in some respects, and in relation to some of our colleagues, we are obviously failing.

What are the main causes of depression within the profession and how we could do better to deal with practitioners who suffer from mental illnesses? We don't know this but can only speculate based on what we are told. These may include, but are not limited to:

- Secondary trauma associated with constant exposure to details of crimes, traumatic events, suffering and loss experienced by clients. These factors are especially present in criminal law and family law matters
- Isolated nature of work undertaken as a barrister
- Pressures associated with decisions having to be taken in relation to ethical matters, which may conflict with interests of clients
- Stress and anxiety related to work pressure and nature of work being undertaken for clients.
- Bullying by judicial officers
- Bullying and harassment by colleagues
- Financial pressures relating to either not being paid for work undertaken or not having sufficient work

One of the issues we have seen impacting on the mental health of our colleagues is conduct by other members of the profession or judges. What this demonstrates is that we all have to be mindful as to how our words and conduct may impact on the wellbeing of others. The NSW DPP had to confront this in 2013 when a survey found that one-third of staff had been bullied, which arose in light of two staff committing suicide.

The present regulatory system

There is no requirement in the *Legal Profession Uniform Law (NSW) 2014* (Uniform Law) that legal practitioners report other legal practitioners suspected of substance abuse or mental health issues. This is to be contrasted with the medical profession.[4] The National Law requires health practitioners to notify the Australian Health Practitioner Regulation Agency ('AHPRA') of notifiable

conduct of another health practitioner. Notifiable conduct under the National Law for health practitioners includes:

- practising whilst intoxicated by alcohol or drugs. This is a constant theme because a lot of practitioners in both the medical and legal profession deal with stress through the taking of drugs or alcohol;
- sexual misconduct in the practise of the profession; and
- placing the public at risk because of an impairment

On 1 July 2015 the Uniform Law commenced operation. Barristers are now required to have regard to the matters set out in rule 13(1) of the *Legal Profession Uniform General Rules 2015* ('Uniform Rules') when renewing their practicing certificates.

Self-reporting

Rule 13(1)(m) provides that the barrister must consider:

> (m) whether the applicant is currently unable to carry out satisfactorily the inherent requirements of practice as an Australian legal practitioner'

This Rule would require self-reporting at the time of renewal of practising certificates. The difficulty is that some practitioners with a mental health issue would not necessarily be self-aware. Further, there is a reluctance to disclose such matters in the event that it may impact upon an ability to practise.

Power of the Bar Council to have barristers medically examined

Section 95 of the Uniform Law provides:

> 95. Consideration and investigation of applicants or holders
>
> In considering whether or not to grant, renew, vary, suspend or cancel a certificate, the designated local regulatory authority may, by notice to the applicant or holder, require the applicant or holder:
>
> (a) to give it specified documents or information; or
>
> (b) to be medically examined by a medical practitioner nominated by the designated local regulatory authority; or
>
> (c) to provide a report from a Commissioner of Police as to whether the applicant or holder have been convicted or found guilty of an offence in Australia; or
>
> (d) to cooperate with any inquiries by the designated local regulatory authority that it considers appropriate.
>
> (2) a failure to comply with a notice under subsection (1) by the date specified in the notice and in the way required by the notice is a ground for making an adverse decision in relation to the action being considered by the designated local regulatory authority.

The Bar Council has used this power in a number of instances to require barristers to be medically examined in relation to issues concerning their mental health.

The Power of the Bar Council to impose conditions on practising certificates

Section 53 of the Uniform Law states:

> 53. Discretionary conditions
>
> (1) The designated local regulatory authority may impose discretionary conditions on an Australian practising certificate granted in this jurisdiction in accordance with the Uniform Rules, but those conditions must be of a kind permitted by this Law or specified or described in the Uniform Rules for the purposes of this section.
>
> (2) Discretionary conditions may be imposed on an Australian practising certificate at its grant or renewal or during its currency and must be reasonable and relevant.

Type of conditions that can be imposed on practising certificates

Section 16 of the Uniform Law states:

> 16 Discretionary conditions on Australian practising certificate
>
> For the purposes of section 53 of the Uniform Law, the discretionary conditions that the designated local regulatory authority may impose on an Australian practising certificate are any one or more of the following:
>
> …
>
> (b) a condition that the holder undertake and complete one or more of the following:
>
> (i) continuing legal education;
>
> (ii) specific legal education or training; and/or
>
> (iii) a specified period of supervised legal practice.
>
> …
>
> (e) a condition requiring the holder to undergo counselling or medical treatment or to act in accordance with medical advice given to the holder,
>
> …
>
> a condition agreed by the holder

The Bar Council has imposed conditions on practising certificates using these powers.

Workplace bullying

The profession's conduct rules expressly prohibit certain type of behaviour within the workplace that could impact upon the wellbeing of a barrister.

Arthur Moses SC Senior Vice-President NSW Bar Association, 'Improving wellbeing at the New South Wales Bar'

Council of the NSW Bar Association v BRJ [2015] NSWCATOD 73: A Case Study

On 12 December 2013 pursuant to s 551 of the *Legal Profession Act 2004* (the Act) the Bar Council commenced an Application for Original Decision against BRJ, former barrister in the then New South Wales Administrative Decisions Tribunal (the Tribunal). The application to the Tribunal arose out of the investigation of two complaints the Legal Services Commissioner made against BRJ on 24 August 2011 and 6 December 2011 respectively. Those complaints, and the proceedings in the Tribunal, related to BRJ's conduct during the period from July 2010 to December 2011 which involved:

- BRJ presenting late for rostered duty at courts as a member of the Specialist Domestic Violence Practitioner Panel on several occasions; and
- BRJ entering into a lease with a client in circumstance where there was a conflict of interest, in breach of her fiduciary duty; and
- BRJ continuing to act for that client notwithstanding the ongoing conflict of interest.

BRJ admitted this conduct and admitted that it amounted to unsatisfactory professional conduct. However, she submitted that the Tribunal should make no formal finding of unsatisfactory professional conduct. The Bar Council contended that findings should be made and that the Tribunal should reprimand BRJ pursuant to s 562 of the Act.

The Tribunal delivered its decision on 16 July 2015: *Council of The New South Wales Bar Association v BRJ* [2015] NSWCATOD 73. The Tribunal made findings of unsatisfactory professional conduct, but declined to reprimand BRJ because:

The Tribunal concludes from the medical evidence that the respondent's judgment and cognition were affected by the anorexia nervosa with the result that she did not have sufficient comprehension of her conduct nor the ability to properly reason in relation to her conduct. In those circumstances the Tribunal is of the view that it would not be appropriate that she be reprimanded for her conduct.

If the respondent's judgment and cognition had not been affected, a reprimand would be an appropriate order to make.

The Supreme Court of NSW dismissed an appeal against the decision of the Tribunal in *BRJ v Council of the NSW Bar Association* [2016] NSWSC 146

This decision is important on two levels:

- There was a recognition by the Tribunal that a person who has engaged in unsatisfactory professional conduct which has been caused in part by an illness which did not allow the person to comprehend their conduct, that they should not be punished for their conduct by a reprimand finding; and
- The medical report which the tribunal relied upon was a medical report which came about because the Bar Council directed the barrister to attend a medical examination with a psychiatrist. Had that not occurred, the reason for her conduct would not have come to light because there had been a sustained non acceptance by the barrister that she was ill.

It is hoped that this reasoning may encourage other barristers to come forward early in relation to their illnesses.

Rule 123 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* states the following:

> A barrister must not in the course of practice, engage in conduct with constitutes:
>
> discrimination;
>
> sexual harassment; or
>
> workplace bullying.

Rule 125 defines workplace bullying as meaning:

> unreasonable behaviour that could reasonably be expected to intimidate, degrade, humiliate, isolate, alienate, or cause serious offence to a person working in a workplace.

Current programs

Best Practice Guidelines

The NSW Bar Association on 19 June 2014 approved Best Practice Guidelines (BPG) to deal with issues concerning bullying, harassment, discrimination and victimisation. These issues impact upon the health of members and staff. BPG are voluntary, however, the Bar Association encourages its members and their chambers to adopt them. The guidelines are aimed at ensuring that the workplace of barristers do not contribute to unnecessary stress and mental health issues. The BPG are to be found on the website of the NSW Bar Association.

In 2015, the NSW Bar Association became a signatory to the Tristan Jepson Memorial Foundation's Psychological Wellbeing: Best Practice Guidelines for the Legal Profession. A working party is reviewing BPG of the NSW Bar Association.

Promotion of health and wellbeing initiatives

This is done through activities promoted by the Health and Wellbeing Committee.

BarCare

This service provides confidential assistance to barristers and their families who are experiencing difficulties. The information which is provided to BarCare, either by concerned colleagues, family members or the barrister who is suffering difficulties is meant to be confidential and not disseminated to the Professional Conduct Department of the NSW Bar Association. Assistance to practitioners is facilitated either through access to psychologists, psychiatrists or financial assistance through the Benevolent Fund.

Statutory powers

From time to time, the NSW Bar Council has exercised its powers pursuant to s 95 of the Uniform Law to have barristers medically examined and impose conditions on practising certificates. This ordinarily arises in the context of a complaint that has been lodged.

The Wellbeing Survey

In late 2016 the New South Wales Bar Council resolved to review the quality of the working life of our profession. This was triggered by the results of the Urbis survey. We are assisted with the design and delivery of the program by a team from the United Kingdom, who conducted similar work on behalf of the General Council of the UK Bar. Their project has been incredibly beneficial to the profession in terms of engagement with their members, representation with government and other third parties, which utilised the data gathered.

The survey uses an established survey, which was undertaken by the UK Bar in partnership with the Quality of Life Working Unit of the University of Portsmouth. It has been adopted to the NSW Bar and the subject of road-testing amongst a cross-section of the bar with the chair of the UK Bar's Wellbeing at the Bar Project, Rachel Spearing, who spent a week in the NSW Bar Association's offices in February 2017 to assist staff to implement it. Rachel's interest in this area occurred following the suicide of a Queen's Counsel who was leading her in a large case. He committed suicide during that case. Rachel had to continue the case after a short adjournment.

Rachel initiated and led the successful research into measuring the wellbeing of barristers at the UK Bar, summarised in the following link, www.barcouncil.org.uk/wellbeing. The UK Bar produced an in depth empirical study yielding valuable data following this research.

The Bar Council launched a Wellbeing Portal on 15 October 2016 at their annual bar conference at www.wellbeingatthebar.org.uk with a significant amount of information for the bar regarding its wellbeing. The Bar of England and Wales has also conducted training at the Advocacy Training Council during the summer vacation in vicarious and secondary trauma. This training is now being reviewed by the UK Bar and may be implemented as a mandatory exercise to safeguard the resilience of lawyers dealing with vulnerable victims and witnesses.

Project outline

The project initiated by the NSW Bar Council involves three phases.

Research *(March 2017)*

Practising barristers were sent a survey to identify the 'individual' and 'environmental' workplace risk factors that impact on performance and directly support or impinge on their professional practice. The survey used a link to a confidential online platform. Participants cannot be identified by their link. The data is stored in secure facilities and can only be accessed through password-protected login.

Strategy *(July-Aug 2017)*

The NSW Bar Council will receive a report, which will analyse the data generated by the survey. The Bar Council will review the report analysing the data of the survey and presenting the thematic issues affecting the current profession and provide a strategic review and response to safeguard the profession.

Delivering Resources *(February 2018)*

The NSW Bar Council and the stakeholders will seek to provide a positive approach to:

- Highlight the resources available to support the profession;
- Seek to normalise the recognition of and investment in 'psychological wellbeing' as being central to sustaining performance as a barrister;
- Engage with education and training to improve the capacity and capability of barristers in managing their ethical responsibilities and performance.
- Advise government on the impact of policy, such as how inadequate legal aid funding can adversely affect the wellbeing of members
- Consult with the judiciary in relation to courtrooms as workplaces.
- Provide strong leadership with expectation and encouragement of practitioners to take notice & attend CPD.

Matters for debate within the profession

In light of the high rate of depression and instances of self-harm

and threats of self-harm, the following proposals have been advanced from time to time in order to deal with mental health issues confronting the profession. The proposals are raised in this article to encourage debate within the profession. These are not proposals of either myself or the Bar Council. Once the data is received from the Wellbeing survey, the data may assist the profession to debate these matters as well as other proposals that may be advanced for the consideration of the profession.

An Impaired Registrants Program (IRP)?

The medical profession has an impaired registrants program established under the Health Practitioner Regulation National Law (NSW). This facilitates notifications concerning mental health issues relating to medical practitioners being dealt with confidentially outside of the professional conduct stream. Would this promote disclosure of mental health issues by barristers or is it best to leave the present regulatory system in place and focus on wellness management within the profession?

Judicial conduct

Should the Bar Association work with the Judicial Commission of NSW and heads of federal jurisdictions to raise awareness amongst judicial officers as to how their conduct may impact upon others? Is there a need for a protocol between the Bar Association and the Courts as to how these issues may be dealt with so that there is transparency and in order to avoid members of the Bar being concerned that they may be victimised if they raise an issue concerning the conduct of a judicial officer?

Legal Aid fees

Are the low rates of legal aid fees forcing practitioners to take on heavy caseloads in stressful family and criminal law cases in order to conduct a viable practice? Is this in turn having an impact on the health of practitioners?

Increased awareness of the BPG

Should it be mandatory for each chambers to adopt Best Practice Guidelines? Do we need to review the rules which already exist prohibiting bullying and harassment?

Increased awareness of BarCare and the Benevolent Fund

Barristers should be made more aware of services and funds that they can access should they be feeling under stress.

Conclusion

The legal profession is an incredibly exciting and rewarding career both intellectually and financially. However, it is important, that we do not forget that there are aspects of it that are incredibly stressful and rather than attempt to sweep problems under the carpet, we should look to see how we can improve the profession to limit instances of mental health issues. On behalf of the NSW Bar Council, I would like to thank members for completing the Wellbeing survey. The NSW Bar Council will be engaging with our colleagues once we receive the results of the survey. This will assist the Bar Council and other stakeholders to develop a strategy to safeguard the health of barristers.

Endnotes

1 Beaton Consulting, Annual Professions Study (2007) featured the results of a survey by beyondblue assessing levels of depression and non-prescripton drug use among 7,500 Australian professionals surveyed.

2 Followed in 2010 by research published by Medlow, Kelk and Hickie: 'Depression and the Law: Experiences of Australian Barristers and Solicitors', [2011] *Sydney Law Review* 771 at 772-73.

3 https://www.beyondblue.org.au/docs/default-source/research-project-files/bl1132-report---nmhdmss-full-report_web

4 See s 141 of the Health Practitioner Regulation National Law (NSW)

President Trump's Executive action

By Justin Hewitt

President Donald Trump signs his first executive order as president, ordering federal agencies to ease the burden of President Barack Obama's Affordable Care Act, in the Oval Office at the White House in Washington, DC on January 20, 2017. Photo by Kevin Dietsch/MediaPunch Inc/Alamy Live News.

On 20 January 2017, Donald Trump was sworn in as the 45th president of the United States. This followed an election campaign in which Mr Trump made many promises that were well outside the mainstream positions of both the Democratic and Republican Parties. To name a few, Mr Trump promised to ban Muslims from entering the United States, to build a wall along the border with Mexico, to deport undocumented immigrants, to get rid of the North American Free Trade Agreement and to 'drain the swamp' in Washington DC with restrictions on political lobbying. During the campaign, supporters of Donald Trump said they took many of the candidate's most far-reaching promises seriously but not literally. One of the questions in the early days of the Trump presidency was whether Mr Trump's promises should indeed be taken literally and, if so, how he might go about implementing them in the face of widespread opposition including the possibility of opposition from the Republican controlled Congress and the likelihood of legal challenges.

President Trump wasted no time answering some of those questions. He quickly set about issuing a series of executive orders and presidential memoranda designed to make good on his campaign promises including some of the most controversial parts of his agenda.

An executive order is a written order issued by the president to the federal government without congressional approval. Article II of the United States Constitution vests 'the executive power' in the president but does not define it. While there is no express reference in the Constitution to the power of the president to issue directions by executive order, every president since George Washington has used the power to issue executive orders. Franklin D Roosevelt issued 3,721 executive orders during his presidency. Most presidents since have issued a few hundred such orders. George W Bush issued 291 and Barack Obama 277. It is also not unprecedented for a president to issue a flurry of executive orders in the first days of a presidency. President Obama signed 19 executive actions in his first 12 days in office in 2009. President Trump signed 18 executive orders and memos in his first 12 days in office.

There are significant constraints on what can be done by a president by executive order. The orders can only exercise powers given to the president by the Constitution or laws passed by Congress. One significant consequence is that the orders cannot spend money that has not been appropriated by Congress. The order must comply with the Constitution. Congress can also override an executive order although the president can in turn veto any such law.

The preparation and presentation of executive orders is itself covered by an executive order. Once an executive order is proposed, it is required to be sent to the Office of Management

and Budget, an executive branch agency, for review. The OMB sends it along to affected agencies for comments, which it usually compiles into a report and returns to the president. Those steps are designed to ensure that the agencies that will eventually carry out the order consider it to be effective and realistic to implement. It is also typical for the president's staff to reach out to their party's congressional leaders for feedback.

While executive orders frequently deal with mundane matters of government, they have been employed on occasion to address matters of great moment. In 1861 President Lincoln used an executive order to suspend the writ of habeas corpus during the Civil War. And in 1942, in the aftermath of the Japanese bombing of Pearl Harbor, President Franklin Roosevelt signed an executive order authorising the removal of people from military areas 'as deemed necessary or desirable'. The military in turn defined the entire West Coast of the United States, home to the majority of Americans of Japanese ancestry or citizenship, as a military area. By June 1942, more than 110,000 Japanese Americans were relocated to internment camps. That executive order was upheld by the Supreme Court in *Korematsu v United States* 323 US 214 (1944). It later emerged that the government had submitted incomplete and false evidence to the court in claiming military necessity for the internment program when in fact the allegations of Japanese-American espionage had been refuted by the FBI and military intelligence. The Supreme Court was also told that military authorities feared an invasion of the West Coast, which they did not. Justice Stephen Breyer recently described the decision as 'discredited'. Mr Korematsu's conviction for evading internment was eventually overturned in 1983 and in 1988 Congress passed legislation to pay reparations to detainees.

The first target of President Trump's executive orders was Obamacare. Within hours of taking the oath of office, President Trump issued an executive order titled 'Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal'. This order effectively called on the secretary of Health and Human Services and other agencies to interpret regulations as loosely as possible to minimise the financial burden on individuals, insurers and health care providers of Obamacare pending the repeal of the legislation. The impact of this executive orders was likely to be mainly symbolic because the repeal of Obamacare requires legislation.

On 25 January 2017, President Trump issued an executive order directing the secretary of Homeland Security to 'take all appropriate steps to immediately plan, design, and construct a physical wall along the southern border, using appropriate materials and technology to most effectively achieve complete operational control of the southern border'. The practical effect of this order is unclear because the building of a wall along the

People with signs protesting President Trump's immigration ban at LAX Airport in Los Angeles, California, on 29 January 2017. Credit: Jim Newberry/ Alamy Live News

border with Mexico would require substantial funding which rests in the hands of Congress. Another executive order issued on the same day directed increased enforcement of federal immigration law and appears designed to find, arrest and deport those in the United States illegally regardless of whether they had committed serious crimes.

President Trump's most controversial executive order to date was the travel ban, which was announced on the evening of Friday, 27 January 2017. Executive Order 13769, titled Protecting the Nation from Foreign Terrorist Entry into the United States, made several changes to the policies and procedures by which non-citizens could enter the United States including:

- suspending for 90 days the entry of persons from seven Muslim-majority countries: Iraq, Iran, Libya, Somalia, Sudan, Syria and Yemen;
- suspending for 120 days the refugee admissions program and capping the number of persons admitted under that program for 2017;
- an indefinite ban on the entry of Syrian refugees.

The impact of this order was immediate and widespread. It was reported that thousands of visas were immediately cancelled,

hundreds of travelers with such visas were prevented from boarding planes bound for the United States or denied entry on arrival and some travellers were detained on arrival. During the weekend after its issuance, there was considerable confusion over the scope of the ban. Officials at the Department of Homeland Security initially interpreted the order to not apply to permanent residents (green-card holders). However, the White House initially overruled that reading meaning that some green-card holders were denied entry into the United States or not permitted to board planes because they were nationals of one of the seven nominated countries.

The travel ban was prepared in an unconventional manner. *Politico* reported that the draft order 'was so tightly held that White House aides, top Cabinet officials, Republican leaders on Capitol Hill and other Trump allies had no idea what was in it even when it was signed — and that was just how top advisers and aides wanted it'. That added to the chaos and confusion over the weekend as executive officials, travellers, airlines and others struggled to understand the scope of the ban. It also resulted in criticism from Republican Congressional leaders. Senate Foreign Relations Chairman Bob Corker said, 'We all share a desire to protect the American people, but this executive order has been poorly implemented, especially with respect to green card holders'.

The legal challenges to the travel ban commenced immediately. From January 28 to 31 many cases were filed in federal courts across the United States. A number of courts granted temporary restraining orders enjoining the enforcement of major parts of the executive order. The most comprehensive order was made by Judge James Robart of the United States District Court in Seattle in cases brought by the States of Washington and Minnesota. On 3 February 2017 Judge Robart effectively restrained the enforcement of the executive order. That prompted an early morning Twitter attack from President Trump who said the 'opinion of this so-called judge' was 'ridiculous and will be overturned'. In the ensuing appeal the Court of Appeals for the Ninth Circuit ruled against the president.

The legislative authority for the travel ban was section 212(f) of the Immigration and Nationality Act, which is entitled 'Suspension of Entry or Imposition of Restrictions by President'. The section reads:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

These statutory words amount to a broad grant of power in the area of national security where courts typically give a great deal of deference to the president. The executive order recited President Trump's proclamation that the entry into the United States of the persons covered by the order 'would be detrimental to the interests of the United States'.

In the initial challenges to the travel ban, Justice Department lawyers appearing for the Administration were challenged to point to an evidentiary basis for the ban. At a hearing in Virginia, District Court Judge Leonie Brinkema said that 'the courts have been begging you to provide some evidence, and none has been forthcoming' and noted that the only evidence provided by the government in support of the ban was the order itself. Justice Department lawyers argued that the claimants had no standing to challenge the ban and that the president's authority to suspend the entry of any class of aliens was conferred by Congress and was unreviewable.

In the appeal from the decision of Judge Robart, the Ninth Circuit Court of Appeals focussed on the constitutional challenges to the president's executive action.

The Fifth Amendment prohibits the United States Government from depriving individuals of their liberty without due process of law. The Court of Appeals held that the executive order did not provide what due process requires 'such as notice and a hearing prior to restricting an individual's ability to travel'. The government's case on this issue was weakened by the order's apparent application to lawful permanent residents. The main target of the order was refugees, visa applicants and visa holders and they are unlikely to have the same due process rights as green-card holders. However, the Court of Appeals while acknowledging that the order made by Judge Robart 'might be overbroad in some respects' was not willing to try to rewrite the executive order.

The Constitution also prohibits the state establishment of religion or impermissible discrimination among persons based on religion. A 'Muslim ban' would most likely not pass muster. However, the travel ban did not in terms refer to Muslims. One of the issues that was raised by the court challenges was the extent to which the president's Twitter feed and public statements made by him and members of his team could be used as evidence to demonstrate the intent of the travel ban. In their court filings, the plaintiffs included statements Mr Trump made as a candidate in December 2015 calling for 'a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on.' The plaintiffs argued that the executive order was intended to disfavor Muslims and pointed to numerous statements by the president about his

intent to implement such a ban as well as evidence suggesting that the executive order was intended to be that ban. The Court of Appeals referred to that evidence and noted authority to the effect that evidence of intent including statements by decision makers may be considered in evaluating whether a governmental action was motivated by a discriminatory purpose. That was one of the reasons it left the stay on the ban in place.

After the order was issued by Judge Robart but before the appeal judgment, Rudolph Giuliani disclosed publicly that President Trump had initially asked for 'a Muslim ban'. 'I'll tell you the whole history of it,' Giuliani said in an interview on Fox News. 'So when [Trump] first announced it, he said, "Muslim ban". He called me up. He said, "Put a commission together. Show me the right way to do it legally".' Giuliani said he assembled a 'whole group of other very expert lawyers on this … And what we did was, we focussed on, instead of religion, danger — the areas of the world that create danger for us … Which is a factual basis, not a religious basis. Perfectly legal, perfectly sensible. And that's what the ban is based on. It's not based on religion. It's based on places where there are substantial evidence that people are sending terrorists into our country.'

Following news of the Ninth Circuit ruling, President Trump had a range of legal options including appealing the Ninth Circuit ruling to the Supreme Court or returning to the District Court for a final hearing of the challenge to the travel ban. President Trump tweeted, 'SEE YOU IN COURT, THE SECURITY OF OUR NATION IS AT STAKE!' That appeared to foreshadow an appeal to the United States Supreme Court. However, it now seems that the president has decided against an appeal to the Supreme Court. The Justice Department has informed the Ninth Circuit Court of Appeals that the administration intends to rescind the order and replace it with a revised executive order 'to eliminate what the panel erroneously thought were constitutional concerns'.

There are likely to be many more legal challenges ahead as President Trump seeks to implement his agenda. The experience with the travel ban is an early lesson that unlike 'the court of public opinion', decisions in courts of law are based on facts, evidence and the law.

President Trump and international law: implications for the treaties of the United States

By Dr Christopher Ward SC, 6 St James' Hall Chambers Adjunct Professor, Australian National University, Canberra

In this short article I address the question of whether the election of President Trump will herald a Brexit style rush to withdraw from particular existing treaty obligations of the United States, and if so, what treaties might be most exposed to a real risk of withdrawal or denunciation. These comments are made in early February 2017.

One of the features of the international legal system that provides stability and security is the understanding among states that a change in government does not affect existing treaty obligations. In other words, a treaty, once signed and ratified by a state, binds that state in accordance with the rules of international law whether or not the government of that state changes in the future. The only recognised exception to the rule involves a government consequent upon the formation of a new state – the most recent example being the creation of the State of East Timor.

The alternative model, by which states are free to renegotiate international terms on every change of government, is plainly unworkable and would destroy the fabric of the rules based system of international law – a rules based system that small and middle powers such as Australia rely upon for security and prosperity.

President Trump chose to give prominence during his election campaign to several treaty obligations of the United States. He suggested that he may, upon taking office, conduct a review of all multilateral treaties entered into by the United States. He indicated his hostility to the rules-based system of international law when, after the Brussels terror attacks in 2016 he was reported to have said: 'the eggheads who came up with this international law should turn on their television and watch CNN.'

It must be accepted that President Trump's statements during the campaign, and now more recent statements made following his inauguration, reveal a serious possibility of withdrawal from, or termination of, a number of very significant international treaties.

It is beyond the scope of this short paper to consider the security and strategic implications in the event that the United States did choose to terminate particular treaty relationships. Let it just be said that they are obviously significant and withdrawal would be likely to fracture security and trade relationships which have served the world well for several decades.

A small number of treaties seem more exposed to risk than others. During the election campaign, President Trump announced his intention to withdraw from the Paris Climate Change Agreement. He indicated he would withdraw from the Iran Nuclear Agreement. Other agreements that President Trump raised as deserving of criticism and scrutiny included the NAFTA, the US-Japan Defence Treaty and, surprisingly,

United States President Donald Trump shows the executive order withdrawing the US from the Trans-Pacific Partnership (TPP) after signing it in the Oval Office of the White House in Washington, DC on Monday, January 23, 2017: Photo: Ron Sachs/Consolidated News Photos/Alamy Live News

NATO. In an interview in June 2016 he suggested that he would consider withdrawing the United States from the World Trade Organisation.

It is useful to look at what President Trump has actually said about the various treaties before considering whether or not he actually has the power and ability to cause the USA to withdraw from those treaties.

NAFTA is a treaty between the US, Mexico, and Canada. It came into force in 1994 under the presidency of Bill Clinton, although it was negotiated by President George Bush. NAFTA essentially eliminates tariffs between the three states. During the election campaign President Trump described NAFTA as 'the worst trade deal in the history of the country.' The White House website carries the following statement:

> President Trump is committed to renegotiating NAFTA. If our partners refuse a renegotiation that gives American workers a fair deal, then the President will give notice of the United States' intent to withdraw from NAFTA.

Recently President Trump said: 'NAFTA has been a catastrophe for our country; it's been a catastrophe for our workers and our jobs and our companies.'

The Paris Climate Change Agreement builds upon the United Nations Framework Convention on Climate Change, adopted in New York on 9 May 1992. The primary goal of the Paris Agreement is to mitigate the effect of climate change by holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels.

The Paris Agreement has now been ratified by 129 parties. It entered into force on 4 November 2016.

It seems clear that President Trump intends to withdraw the United States from the Paris Agreement. Mr Myron Ebell, who advised President Trump on climate change, said last week that an executive order in relation to the Paris Agreement was expected 'within days'. During the election President Trump also suggested that he wished to withdraw all funding from the UN Framework Convention on Climate Change and redirect climate programming funds to infrastructure projects.

There have been numerous media reports suggesting that President Trump may wish to withdraw the United States from the NATO alliance. Such a step would of course have serious security implications for Europe which are beyond the scope of this short paper to address.

On March 23 in an interview with Bloomberg Politics, President Trump said:

> I think NATO may be obsolete. NATO was set up a long time ago - many, many years ago when things were different. Things are different now. We were a rich nation then. We had nothing but money. We had nothing but power. And you know, far more than we have today, in a true sense. And I think NATO — you have to really examine NATO. And it doesn't really help us, it's helping other countries. And I don't think those other countries appreciate what we're doing.

More recently, there are some suggestions that President Trump is backing away from his earlier rhetoric surrounding NATO. For example, it has been reported that President Trump spoke with the NATO Secretary General and referred to the United States' 'strong support for NATO' according to the White House press office.

It seems that President Trump's main concern with NATO may be to achieve what he considers to be a more equitable cost sharing structure, rather than a full withdrawal.

The nuclear deal with Iran is also heavily exposed to risk of termination. In July 2015, Iran agreed to the Joint Comprehensive Plan of Action (the 'Iran Deal'). Iran agreed to serious limitations on its stockpiles of enriched uranium and agreed to decommission a number of centrifuges. In return, the most severe sanctions against Iran were lifted.

Throughout the campaign President Trump repeatedly criticized the Iran deal and stated that he would terminate it upon election. Last week in an interview with Fox News he said:

> I think it was the worst deal I've ever seen negotiated. I think it was a deal that never should have been negotiated. I think it's a shame that we've had a deal like that and that we had to sign a deal like that and there was no reason to do it and if you're going to do it, have a good deal.

So, can President Trump follow through on these pledges, or are they simply campaign rhetoric?

The starting point is that there are two separate questions. The first question is whether the United States can withdraw from a treaty at the international level in a manner consistent with international law. The second is whether the United States can cease participating in, or complying with, treaty regimes as a matter of US domestic law.

As to the first issue, public international law permits a state to withdraw from a treaty in two main circumstances. The first is where the treaty itself provides for termination upon particular terms. That is the most common scenario. It is the subject of Article 54 of the Vienna Convention on the Law of Treaties which provides that:

> The termination of a treaty or the withdrawal of a party may take place:
>
> (a) in conformity with the provisions of the treaty; or
>
> (b) at any time by consent of all the parties after consultation with the other contracting States.

Where the treaty does not expressly make provision for termination or withdrawal, the position is more complex. There, Article 56 of the Vienna Convention on the Law of Treaties provides that:

> 1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
>
> (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
>
> (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.
>
> 2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

It may well be that President Trump is capable of issuing executive orders to terminate particular treaties within the US

domestic legal system. Others may require the involvement of Congress. However, unless international law also recognises the withdrawal, such domestic acts would merely place the United States in breach of its international obligations.

So what of the various agreements now under consideration?

NAFTA

NAFTA provides expressly for termination.

Article 2205 provides that:

> A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties.

It follows that for the purposes of international law it would be possible to withdraw from NAFTA upon the provision of six months' notice.

However in practice, that notice may be difficult to trigger in light of the requirements of US domestic law. The starting point is that by Article VI of the US Constitution any treaty ratified by Congress is a part of US domestic law as well as international law.

NAFTA has been implemented within the United States by domestic law. Those laws would remain in force in the United States even if President Trump notified an intention to withdraw from NAFTA. Whether or not the President even has the power to withdraw from a treaty without the involvement of Congress is an open point within the United States. The question seems not to have been addressed by the United States Supreme Court and may provide another obstacle to executive withdrawal from NAFTA.

Because of the existence of US domestic law implementing NAFTA, it is simply not possible for President Trump to re-impose tariffs and other trade barriers without legislative amendment. It may not be as simple as President Trump suggests to withdraw from NAFTA.

The Paris Agreement was entered into by President Obama as an executive act. It follows under the domestic law of the United States that President Trump is entirely capable of reversing that executive act and indicating, without the involvement of Congress, the intention of the United States to withdraw from the Paris Agreement.

However at international law the withdrawal would not be immediately effective. The Paris Agreement is an example of a treaty that makes express provision for withdrawal. Article 28 provides:

> At any time after three years from the date on which this Agreement has entered into force for a Party, that Party may withdraw from this Agreement by giving written notification to the Depositary.
>
> Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.
>
> Any Party that withdraws from the [Framework] Convention shall be considered as also having withdrawn from this Agreement.

It follows that written notification of intention to withdraw would not be effective for a period of four years from 4 November 2016.

Article 28(3) raises a different possibility. The Framework Convention has parallel provisions (Article 25) on termination requiring twelve month's notice of termination of that treaty. Because Article 28(3) of the Paris Agreement provides that withdrawal from the Framework Convention amounts to withdrawal from the Paris Agreement, it is possible that President Trump may attempt to withdraw from the Framework Convention itself, thereby reducing the time to withdraw from the Paris Agreement, from four years, to one.

However that may not be such a simple matter. Because the Framework Convention was ratified by the United States in accordance with its own constitutional requirements, it seems arguable that any attempt to withdraw from the Framework Convention may require the approval of Congress – an approval which may not be forthcoming.

Because President Trump seems now to have softened his rhetoric surrounding NATO I will merely note that any party to NATO may now withdraw upon twelve month's notice as a result of Article 13 of the NATO Treaty which provides:

> After the Treaty has been in force for twenty years, any Party may cease to be a Party one year after its notice of denunciation has been given to the Government of the United States of America, which will inform the Governments of the other Parties of the deposit of each notice of denunciation.

Finally, there is the position of the Iran Deal. That is the most susceptible to immediate withdrawal. The Iran Deal was a treaty, signature of which was an executive act of President Obama binding the United States. As such it is susceptible to withdrawal by another executive act. The fact that the deal was arguably implemented for the purposes of United States domestic law by the Iran Nuclear Agreement Review Act of 2015 raises domestic complications within US law which are beyond the scope of this paper.

There is no doubt at all that the Iran Deal is a treaty for the purposes of international law. It was embodied in a written document and was intended to be legally binding. The treaty is

silent as to withdrawal, and it is not easy to find an implication that withdrawal is permitted within the meaning of the Vienna Convention on the Law of Treaties.

However it appears that both under Section C of the Iran Nuclear Agreement Review Act and under the terms of the treaty itself, there is some scope for the United States to force the re-imposition of sanctions on Iran. To the extent that some sanctions were lifted by President Obama using executive orders, they may be re-imposed relatively easily by President Trump. My colleagues at the International Bar Association who have looked at this issue suggest that: 'Technically, the Iran nuclear deal is only a political commitment, so Trump surely has the power to reinstate US sanctions.'

Even within the terms of the agreement and the implementing Security Council Resolutions, there remain the possibility of re-imposing sanctions against Iran in the event of a finding of significant non-compliance by Iran.

The attitude of the Trump White House to treaties is a matter that must be of international interest and concern. President Trump displays overt hostility to international law as a system, suggests the making of an executive order reviewing all existing multilateral treaty commitments and exhibits strong rhetoric about existing treaties upon which middle powers like Australia found their prosperity. The election of an individual with protectionist and isolationist tendency to the Presidency of a superpower is a shock to the international legal system and one which will provide a severe test to the resilience of international law.

Attorney General Mark Speakman SC MP

Talitha Fishburn, Caroline Dobraszczyk and Arthur Moses SC recently spoke with the Hon Mark Speakman SC MP who was appointed as attorney general of New South Wales in January 2017.

Bar News: The 'Strategic Plan' of the Department of Justice for 2015–19 refers to 'Court and Tribunal Modernisation' as being a key priority. What are some of the key aspects of this strategy, including for 2017?

Attorney General: The government's main focus for court and tribunal modernisation is not so much a matter of 'hardware', but cutting court delays, especially in the District Court. At the moment, a criminal matter in a District Court takes on average close to 350 days to come on for trial after committal. That's clearly unsatisfactory from a timing and resources perspective. The Productivity Commission has a target that no more than 10 per cent of matters should be more than 12 months old.

In addition, we're examining Law Reform Commission reports dealing with sentencing, parole (for instance, greater use of appropriate intensive correction orders) and the entry of appropriate early guilty pleas. I anticipate we'll determine our responses to these reports in the coming months. We hope that alleviation of court delays will be among the benefits from our responses to these reports.

Bar News: What do you see as some of the major areas for criminal justice law reform in the immediate future?

Attorney General: I don't contemplate any immediate widespread changes in substantive criminal law, for example, any widespread amendment or expansion on the definitions of certain offences.

However, as I mentioned, we're considering a range of procedural reforms for the criminal justice system. A stand out area of this procedural reform is to address the delays in the court system, in particular the prosecution of criminal matters in the District Courts.

One procedural reform we're examining is encouraging offenders to enter appropriate guilty pleas earlier, in order to help reduce court backlogs. At the moment, approximately one third of guilty pleas are entered 'late', that is, after committal. Of these 'late' pleas, about two thirds occur on the day of trial. Around 63 per cent of the guilty pleas made are to charges that are different from the original charge.

In the Local Courts, approximately 98 per cent of matters are disposed of within the year. It is a far speedier jurisdiction than the District Court.

I don't anticipate further significant change to bail laws in New South Wales in the near future. The tightening of bail laws has contributed to significantly more people being held on remand. However, given community expectations that bail laws be tight in the interests of public safety, we're looking at addressing the consequent demands on our court and prison systems in ways other than by relaxing bail laws.

Bar News: You have referred to a 'funding cliff' in the decease of funding available for community legal centres in New South Wales. What are your thoughts on this?

Attorney General: The Australian Government has announced funding cuts to community legal centres from 1 July 2017. In New South Wales, this amounts to a decrease of about $2.9 million of funding per annum. We're imploring the federal government to reverse these cuts. Community legal centres are a fabulous resource and they do a great job for our community. They're a means of access to justice for our community. Also, from an economic perspective, they're a means of ultimately saving time and money by allowing people the opportunity to deal affordably with their disputes in a practical and professional manner upfront.

Bar News: Do you see a nexus between the reduction in the entry of early guilty pleas and the decrease in funding for community legal centres?

Attorney General: Yes. If there is a systemic reduction in access to legal representation in the criminal justice system, it follows that other things being equal there'll be a lower likelihood of pleas being entered early.

Bar News: Do you consider that the current level of legal aid funding in criminal and civil matters is adequate?

Attorney General: No, it's not enough. It's a serious issue. But governments have to budget competing priorities. From my perspective, the more we can spend on legal aid the better. Aside from any altruistic commitment to fairness and justice, which of course is valid in itself, there's a compelling business case for increasing legal aid funding in order to reduce other costs. Often with government deploying such a business case, with a quantified cost-benefit analysis, is the most persuasive way to

'Attorney General Mark Speakman SC MP'

achieve an outcome when competing with other prospective budget measures.

Bar News: There have been some recent judicial comments about the delays in the preparation and hearing of certain native title cases in which the State of New South Wales is involved as a party. Can you explain some of the options that you propose to address some of these delays?

Attorney General: It's on my list of things to do. I've already had some exposure to examples of some delay in the preparation of these cases in my previous role as the Environment Minister. Some of the cases involve claims which are more than a decade in duration. There's often a flurry of activity towards the end of the litigation. I'd like these matters to be dealt with as expeditiously as possible and we need to be on the front foot to achieve more timely outcomes.

Bar News: Do you have any plans for addressing the high rates of Aboriginal imprisonment in NSW?

Attorney General: This is a significant issue of concern and a priority. However, it's not only an issue for our courts and prison systems. It's a matter arising from systemic social disadvantage, which needs to be addressed holistically across various government departments.

Bar News: The rates of Aboriginal incarceration are alarmingly high, and higher than they were at the time of the Royal Commission into Aboriginal Deaths in Custody. Are there any specific laws being reviewed in order to avoid or minimise the high incidence of Aboriginal incarceration in our state?

Attorney General: Yes. An example is driver disqualification offences. There's a possibility of changing the way these offences are dealt with in order to reduce the high rates of Aboriginal incarceration.

We'll be reviewing a broad range of issues that tend to result in disproportionate Aboriginal incarceration. The primary issue is social disadvantage, which requires addressing with a whole of government approach.

Bar News: What are your thoughts on the Equitable Briefing Policy?

Attorney General: The government currently has an equitable briefing policy which dates back to 2008. I'm currently being briefed on the policy more recently promulgated by the Law Council of Australia. I'm closely reviewing this new policy. We intend to make a decision about it within the coming months. In the meantime, we're most certainly committed to our current equitable briefing policy.

Bar News: There have been comments made in the media and elsewhere about the desirability of ethnic diversity being reflected in the composition of the judiciary. Is this government committed to increasing ethnic diversity on the bench and what are your views on this?

Attorney General: I'm committed to achieving greater diversity, both in ethnicity and in other respects such as gender. Many ethnic groups are still underrepresented in the legal profession and this is an area for reform. It's desirable that the composition of the judiciary broadly reflects the diversity of the population. I'll continue to make or recommend appointments on merit. My preferred way to increase diversity on the bench is to increase diversity in the profession as a whole, including from the point of entry for law graduates. This might be a gradual approach, but it should in time result in a widespread and effective increase in diversity.

Bar News: Do you have any comments about the structural changes in the Department of Justice and the restoration of the seniority of the role of attorney general?

Attorney General: The changes are more about perception than reality. The Department of Justice operates as a cluster of which I'm the head. My independence is not compromised. Nor did the previous structure compromise the independence of my predecessor. The advantage of having an integrated department is that justice issues can be addressed holistically. For example, issues like reoffending traverse several portfolios within the Department of Justice: it's more effective for an integrated department, rather than a collection of silos, to deal with issues like this.

Bar News: What do you want to achieve as attorney general?

Attorney General: I hope my term of office as attorney general will extend at least until the next election, if not beyond. However, one thing you can be certain of about any political career is that it will end and it's likely to end at the time of someone else's choosing. So I want to seize every opportunity I can and to do as much as I can within what will be the limited time available to me. My key priorities include reducing court delays, reducing rates of reoffending and reducing repeat domestic violence rates.

Colonel Henry Normand MacLaurin

On 10 November 2016 the Supreme Court commemorated the sacrifice and service of the New South Wales legal profession in the First World War. Justice Slattery, Justice Lindsay and Justice Brereton recounted stories of barristers who served in the Great War. The following speech was delivered by Justice Michael Slattery.

On Wednesday 5th of May 1915, a little over 101 years ago, the then Chief Justice of New South Wales, Sir William Cullen summoned together the judges of this court. He stopped the court's business at 10 o'clock that morning to convene a special sitting in the Old Banco Court. Sir William's purpose was simple: he wished to honour the sacrifice of Colonel Henry Normand MacLaurin, who had been killed by a Turkish sniper a week earlier.

MacLaurin was not only an Army reservist on full time service. He was also one of Sydney's leading junior barristers. MacLaurin had died on 27 April 2015, barely two days after wading ashore with the first troops at Gallipoli. News of his death had just reached Sydney.

MacLaurin was also one of the NSW legal profession's first casualties of the First World War. His death had profound significance for everyone practising in Phillip Street. One example will suffice: Sir William Cullen would shortly have two of his own sons fighting at Gallipoli.

That May 1915 Banco Court audience knew MacLaurin well. He was their friend-in-law. They already knew his story. Let me tell you that story now.

MacLaurin was born in Sydney on 31st October 1878 into a family with a deep tradition of public service. He bore the same name as his father, Sir Henry Normand MacLaurin, a distinguished physician and conservative NSW statesman of Scottish descent. Sir Henry later became the chancellor of the University of Sydney. MacLaurin Hall there still bears his name.

Young Henry Normand was schooled by family choice, partly at Blair Lodge School, in Polmont, near Edinburgh in Scotland. But he completed his secondary education back at Sydney Grammar School, before matriculating to Sydney University.

Foreshadowing his later energy and military disposition, MacLaurin was an active university student. Whilst studying for his Arts degree he joined the Sydney University Cricket Club. He played in second grade over several seasons but with the occasional creditable performance in first grade. He enlisted in the New South Wales Scottish Rifles in 1899 at the age of 21. As was typical of the day, MacLaurin did not undertake a law degree but was admitted to practise after a further period of study and pupillage in law.

MacLaurin progressed his legal and military lives in equal measure throughout his twenties and thirties. He was admitted to the New South Wales Bar on 26 May 1904 at the age of 26. By then, after five years military service, he had already attained the Army rank of captain. After four years at the bar and nine years military service, he was promoted to the rank major.

Even at a century's distance MacLaurin's life as a barrister sounds startlingly familiar to us. Here is Phillip Street looking South in about 1900, just a few years before he commenced practice. MacLaurin first took chambers at 93 Elizabeth Street and then moved to 151 Phillip Street. From 1907 to 1914 he practised from Wentworth Court, a building long demolished but which was located between Phillip and Elizabeth Streets, immediately to the South of what is now Frederick Jordan Chambers, at 53 Martin Place.

When he left for war in 1914, he was about to turn 36. He had 10 years' experience at the bar behind him. We would call him one of the 'go to' junior barristers of his day. He was not just a junior showing promise. He was already very successful. He had the kind of varied junior's practice that suggests that his appointment as king's counsel would probably not have been far away. He appeared in common law, in crime, in equity, at first instance and on appeal, including in the High Court. He had a strong mathematical and financial bent, appearing often in cases that required accountancy expertise.

The law reports show the breadth of his practice. In November 1905 he appeared in a defamation case examining circumstances in which malice would defeat a defence of qualified privilege: *Hay v The Australasian Institute of Marine Engineers* (1906) SR (NSW) 30. In February 1912, he appeared in a criminal appeal, seeking to overturn the conviction of one Moir, by challenging the prosecution's comments about the failure of the accused to give any account of himself: *R v Moir* (1912) SR(NSW) 111. In April 1914, exactly one year before his death, the *Commonwealth Law Reports* show MacLaurin appearing as junior counsel to Adrian Knox KC in a constitutional dispute in the High Court of Australia in *The Builders' Labourer's Case* (1914) CLR 223, a case concerning the powers of the then Commonwealth Court of Conciliation and Arbitration.

Long before war broke out MacLaurin anticipated and was preparing for possible conflict. Together with his good friend, the solicitor Major Charles MacNaughten, MacLaurin was, as the war historian of this period Tony Cunneen colourfully describes, 'shaping the ragged clumps of inner city [Sydney] youth into functioning soldiers as part of the pre-war militias.'

News of the declaration of war reached Sydney at noon on 5 August 1914. Ten days later, on 15 August MacLaurin was appointed to the First Australian Imperial Force, given command

'Colonel Henry Normand MacLaurin'

of the 1st Infantry Brigade (of 1 Division) and promoted to the rank of full colonel.

MacLaurin must have already seemed a remarkable leader to his contemporaries. Australia's 1st Division was comprised of three brigades. At 35 MacLaurin was the youngest of the division's three original brigade commanders. And within his own brigade he was more than a full decade younger than any of the four battalion commanders who were immediately subordinate to him. To blend some experience around the relatively youthful MacLaurin, Army's Senior Command posted into 1 Brigade as brigade major, a veteran British regular Army officer, Major Irvine from the Royal Engineers.

MacLaurin had just assumed an awesome responsibility. On 20 October 1914 two months after his appointment he led 1Brigade, comprising 60 officers and about 1300 other ranks on board HMAT *Euripides*, bound for Egypt. What he achieved in those two months between his assuming command and the Brigade's embarkation is astonishing by any standard. Modern litigation is rarely prepared this quickly.

MacLaurin had clear priorities. He scaled back his practice, returned his briefs and took direct personal responsibility for the final recruiting, training and appointment of the officers and men he needed to complete the force he now commanded. From his chambers and from the nearby Australian Club he actively built his Brigade of four battalions.

He practised his men in the sand hills in the suburb of Kensington. He was photographed during these manoeuvres, controlling his men from horseback, together with a fellow Colonel Onslow-Thompson, the 4th Battalion Commander and his Majors, MacNaughten and Irvine. This photograph is a poignant reminder of 1 Brigade's sacrifice in war. Onslow-Thompson, MacLaurin and Irvine were all killed in action. MacNaughten was so often wounded he ultimately suffered a mental collapse.

MacLaurin's 1st Brigade was ready. He marched them up and down Macquarie Street. Not surprisingly it was a pretty lawyer-friendly force. It embarked in October 1914 with a number of the solicitors that MacLaurin knew well. One was Hector Clayton, who would return from the war and later found the firm Clayton Utz. Another was Bertie Vandeleur Stacey who was articled to Dibbs, Parker & Parker and after the war became a barrister and a District Court judge.

No doubt with the wisdom of having witnessed more than one legal disaster in his ten years at the Bar, MacLaurin showed a relaxed and tolerant attitude to the high spirited mischief of his men on their way to war. He recorded a positive view of their unruly behaviour in Cairo. In a letter back to one of the judges in Sydney he wrote: 'with 20,000 men it can be seen that some would play up a bit while their money lasted…'.

He was keen for action. When the Anzac landing orders finally came through, the war historian Charles Bean records him as enthusiastically volunteering for detailed war planning in Cairo. A war photographer even captured him during an informal on-deck planning meeting.

He is one of the army officers on the far right of this photograph taken on the deck of the cruiser HMS *Queen Elizabeth*, during her voyage from Egypt to Lemnos, on the way to Gallipoli.

Charles Bean later described MacLaurin as 'a man who showed himself a brave and energetic leader'. This was no more evident than in the way he communicated with his men. He dispatched his final pre-battle message to 1 Brigade on 20 April, when they were garrisoned at Mudros Bay, on Lemnos. With blunt but inspiring words this is how he exhorted his men.

To the men of 1 Brigade

> 'Men, - You are soon to go into action. Your training has made you fit for it and I have the greatest confidence in your courage and resolution. Just one word – keep a cool head, and listen to the fire orders of your officers. When you shoot, let every bullet find its mark; when you use the bayonet, see that you stick it in. Good luck!'

But he had seen many enterprises go wrong, both in the court room and on the field. So, he had separate words of caution for his officers. What he told them has the flavor of a lawyer counseling a client about to be cross-examined.

To the officers of 1 Brigade

> 'I want you to remember that upon you will depend the control of ammunition and water. It may be that some of the men will be excited at first and inclined to fire wildly. Check this.
>
> It certainly will be that some will endeavour to drink all their water the first day, and if they succeed they will surely wander off in search of more. Look to it, therefore, that this does not happen.
>
> Make your fire orders clear, keep touch and direction, and send in information of the enemy's movements. Above all, remember to keep cool yourselves. Good luck!'

To the extent that you can know a soldier by his commands, MacLaurin's were models of clarity and simplicity, especially those he issued to his men on the eve of the landing. With an elegant precision that would do justice in the grant of an equity injunction, his directions to his troops on landing and in the boats commenced as follows:

> 1 (a) Troops will land in service dress.

'Colonel Henry Normand MacLaurin'

(b) Horses will be landed harnessed.

(c) All entrenching tools will be landed under battalion arrangements.

(d) All wire cutters will be carried.

(e) All canvass water bags and receptacles will be takenm ashore filled.

(f) All vehicles will be packed before disembarkation.

2. In boats.

(a) Silence will be observed.

(b) No one is to stand.

(c) Rifles will be carried in the hand and not slung.

(d) Rifles will not be loaded and magazines will not be charged.

(e) Equipment will be loosened and shoulder-straps unbuttoned.

(f) A military officer will be in the bows of each boat, and will be the first to land.

(g) On arrival at the beach all troops are to remain seated until the naval officer or petty officer in charge of the boat gives the order to land.

His officers and men knew exactly what was expected.

Finally they arrived at Gallipoli. MacLaurin's Brigade was the last to come ashore. The pre-trial nerves of MacLaurin the barrister were as nothing compared with the anxiety of his long first day waiting for action. When 1 Brigade landed on the beach the chaos at the Australian's and New Zealander's ground zero was evident everywhere. The Commander of the ANZAC troops, Major General Bridges, was already ordering units, as soon as they arrived, to fill the growing gaps in the line.

Working from the impromptu headquarters in the sands of Anzac Cove, shown in the foreground of this photograph MacLaurin ably managed 1 Brigade's first deployment. General Bridges sent 1 Brigade straight into one of the gaps he had identified, up near Steele's Post, in the central sector, due East from Anzac Cove. 1 Brigade were the last reserves available that day.

MacLaurin's death 48 hours later was part of a 1 Brigade double tragedy: both MacLaurin, the Brigade commander and Irvine, the Brigade major, were killed within 10 minutes of each other.

On the afternoon of 27 April Australian commanders feared a Turkish counter attack. Under MacLaurin's direction Irvine collected some 200 men who had dispersed from other decimated units, and was planning to send then forward. But news arrived that they were no longer required. So Irvine climbed up to Steele's Post to get a better view of the source of sniper fire coming from Russell's Top, an area across a valley to the North recently penetrated by the enemy, and somewhat behind 1 Brigade's position. He was shot whilst standing, surveying the enemy positions.

MacLaurin was pinned down by the same enemy fire as Irvine. It is reasonably certain that he was unaware of Irvine's death when he too stood up in shirtsleeves on the Southern side of the nearby slope that to this day bears his name, MacLaurin's Hill. He too was trying to see the enemy on Russell's Top and to direct his men. A moment later he was shot from the same direction as Irvine, from about 300 metres across the valley. No one knows but the speculation at the time was that he may have been hit by the same sniper as Irvine. And like Irvine he died within minutes.

Let us look together at this scene for a moment. In the final instant of his life MacLaurin was selflessly executing his duty as the double-professional that he was. He was using his military and his legal mind to gather the evidence, to put himself in the best position to help his men and prosecute their cause. He was standing up, simply because he saw no other effective way to gather the intelligence he needed, to direct operations and to ensure his men stayed under cover.

To our 21st century eyes MacLaurin was miserably equipped. He had no access to drone surveillance, no radar and no spy satellites. He had no radios to convey orders, merely his barrister's voice and little notes such as he would write in Court. He had no body armour to protect him against the worst.

Without any of the support we would take for granted, he made the very bravest of choices: he chose to risk his own life rather than to ask his men to risk theirs. He volunteered to stand himself to survey the sniper-infested slopes of nearby Russell's Top. It was the last choice he made in this life.

MacLaurin's immediate superior in command, Brigadier John Monash, felt his death keenly. Monash was a triple-professional. He had been an army reservist before the war, an engineer and a lawyer. By 27 April Monash's Gallipoli landing force of 4000 was already depleted to only 2300. Monash well appreciated and valued MacLaurin's special mix of experience and leadership and could ill afford such a loss.

Monash reacted quickly. He immediately ordered his senior officers to avoid 'unnecessary exposure'. He lamented that such deaths would 'seriously impair morale'.

In the terrible way of war, MacLaurin was buried within metres of where he died. The AWM archives hold a photo of his simple temporary grave.

He was posthumously promoted to the rank of Brigadier General.

'Colonel Henry Normand MacLaurin'

In 1919 his grave was moved into the 4th Battalion Parade ground cemetery. But his legal and military friends remembered the alert, energetic and thoughtful figure that still engages us in this officer's photograph taken at Victoria Barracks just before he embarked for war.

MacLaurin was not the first NSW lawyer to be killed at Gallipoli. Sydney Solicitor, Lieutenant Alan Dawson was shot near Russell's Top on the first day. Lieutenant Karl Fourdrinier, a law clerk, was shot on 26 April, charging a Turkish trench near Walker's Ridge.

Nor was MacLaurin the last. Only 10 days later, on 6 May 1915, a law student, Lieutenant Laurence Street, son of Justice Philip Street and after whom another Chief Justice would later be named, was also killed, while repelling a Turkish attack on Australian trenches.

In retrospect, Chief Justice Cullen's Banco Court ceremony came at a time of comparative innocence. The Court and the legal profession stopped that day in May 1915 and remembered a single man. That became impossible later. There were just so many. The Court could not stop for them all. Sydney was overwhelmed by news of casualties.

The war news swept down Phillip Street. In 1915 the Sydney University Law School campus was less than 200 metres from here. Scores of law students enlisted in May, June and July 2015.

One of them, a second year law student heard of MacLaurin's heroic death. In May 1915 he left behind his Real Property studies and joined up. He reached the Western Front, a century ago this year. He later distinguished himself, winning a Victoria Cross during the April 1918 Australian counteroffensive near Villiers Brettoneaux. After the war that student, Lieutenant Percy Valentine Storkey, returned to Australia, completed his law degree, became a Crown prosecutor and then later served as a District Court judge.

MacLaurin's death touched the lives of his friends in the law. Adrian Knox, the King's Counsel who led MacLaurin in *The Builder's Labourers Case* was one such. Knox was too old for military service himself. But by 1916 he had put his legal practice to one side to devote himself entirely to assisting the war effort. He travelled to Egypt and served as a Commissioner with the Red Cross. In 1919, just after the war, he was appointed the Second Chief Justice of Australia.

The War Historian C.E.W. Bean was a shrewd judge of the personalities of the WW1 soldiers whose lives he so carefully chronicled. And as a fellow barrister, Bean's writing shows he was alive to MacLaurin's special skills and his character. Bean said that MacLaurin was: '…a man of lofty ideals, direct determined, with a certain inherited Scottish dourness… but an educated man of action of the finest type that the Australian Universities produce.'

In conclusion may I return to Chief Justice Cullen's words to that packed Banco Court in May 1915. In words that still resonate, he said this of MacLaurin:

> 'He won a high place in the esteem of this community, and he worthily upheld the honourable name bequeathed to him by his distinguished father, the late Sir Normand MacLaurin. No success or prosperity he might have won in this country had his life been spared could have gained for him a higher place in the affection and esteem of his countrymen than his devotion to duty, and the last best gift a brave man can give to his country - his life - at this most critical juncture in her affairs.'

In 2016, Colonel Henry Normand MacLaurin's life provides a standard that still both inspires and measures us. We continue to remember him and all those in the NSW legal profession who went with him to war. Like MacLaurin, so many of them never returned.

Lest we forget.

The Hon Justice Susan Kiefel

In a ceremonial sitting of the High Court of Australia on 30 January 2017, her Honour Susan Mary Kiefel AC QC was sworn in as chief justice of the High Court of Australia. In addition to the judges of the High Court, sitting on the bench were the Hon Sir Gerard Brennan AC KBE, the Hon Robert French AC, the Hon William Gummow AC, the Hon Michael Kirby AC CMG, the Hon Kenneth Hayne AC QC and the Hon Susan Crennan AC QC.

Senator George Brandis QC, Commonwealth attorney-general spoke on behalf of the government.

He noted that:

> In the more than 113 years that have passed since Sir Samuel Griffith was sworn in as the first Chief Justice of this Court on 6 October 1903, only 12 people have occupied that highest of judicial offices. Your Honour will be the 13th Chief Justice of this Court, the fourth from Queensland and the first woman.

In a narrative that is now familiar but no less remarkable, it is now well known that her Honour left school at the age of 15, worked as a legal secretary, during which time her Honour completed her secondary schooling at night, and having decided to become a barrister, undertook study then provided by the Barristers' Admission Board.

Her Honour was called to the Queensland Bar in 1975, at the age of 21, and went into fulltime practice. After a decade in practice her Honour attended Cambridge University to undertake further legal studies obtaining a Masters of Law and was awarded the CJ Hamson Prize in Comparative Law and the Jennings Prize.

Her Honour returned to practice at the bar. In 1987 her Honour became the first female appointed silk in Queensland. In 1993, her Honour was appointed to the Supreme Court of Queensland, the first woman appointed directly from the bar to be a judge of that court. In 1994, her Honour was appointed to the Federal Court of Australia, serving in that court for 13 years before, in 2007, being appointed to the High Court of Australia.

Mr Brandis observed:

> In your various judicial capacities, your Honour has displayed the qualities which those who worked with you at the Bar remember so well – intelligence, diligence, discipline, and an unerring instinct for the critical issue in a case. Whether as a barrister or as a judge, you have always embodied a spirit of collegiality. You are a person of great integrity.
>
> You are exceptionally courteous and a delight to work with and to appear before. But beneath your Honour's famously calm demeanour lies a demanding intelligence and a rigorous insistence upon the very highest standards from those who appear before you…
>
> In your judicial work, the intellectual influence upon you of your study of comparative law has been evident. We look forward to the development of the jurisprudence of the Kiefel Court, and the influence which civilian notions, such as proportionality, will have upon it.

Ms Fiona McLeod SC, speaking on behalf of the Law Council of Australia acknowledged the 'landmark moment for women in the history of this nation.' Ms McLeod noted that her Honour's oath was administered by the next most senior puisne judge of the court, Justice Bell, which 'presenting a powerful and enduring image of equality and an inspiration to many'. Ms McLeod also observed that with her Honour's appointment to chief justice 'women have filled the three highest constitutional offices appointed in this land'.

Mr Patrick O'Sullivan SC, president of the Australian Bar Association noted that during her Honour's 18 years at the bar, her Honour was known as an excellent cross-examiner and for her preparation and planning.

Mr Christopher Hughes QC, president of the Bar Association of Queensland stated that her Honour:

> was a popular figure at the Bar and, as we have heard, your Honour served on the Council of the Bar Association of Queensland and served for a period as the Honorary Secretary. In 2004, your Honour was made a life member of our association. We are proud to repeat that you were the first woman to be made Queen's Counsel in Queensland, the first woman barrister to become a Supreme Court judge and the first woman from Queensland to sit on this Court.

The chief justice remarked:

> At the opening of the High Court in 1903 the first Chief Justice, Sir Samuel Griffith, said that '[w]e know that we shall be expected to solve difficult questions, to compose strife between states, and possibly between the states and the Commonwealth'. Sir Samuel was right on each count. There have also been important historical events affecting the Court, such as when the right to appeal to the Privy Council was finally abolished. It was important because it enabled the High Court to assume its present position as the final arbiter of appeals in Australia and more confidently to develop the common law of Australia.
>
> In the year preceding the opening of this Court, Australian women were given the right to vote at federal elections. It was then that they truly became part of 'the people' to whom our Constitution refers. That year also saw the first woman graduate in law from an Australian university. It

would not be until 1987 that a woman, the Honourable Mary Gaudron, was appointed to this Court.

When I came to the Bar in 1975 there were very few women members of the profession. This is not the occasion to consider why this was so. The point presently to be made is that this has changed and so has the composition of this Court. In more recent times the appointment of more women to this Court recognises that there are now women who have the necessary legal ability and experience, as well as the personal qualities, to be a Justice of this Court. There seems no reason to think that that situation will not be maintained in the future. It may well improve.

Sir Samuel Griffith also spoke of the 'weighty and responsible duties' the new Justices had undertaken. Chief Justices, like the other Justices, give a part of their lives to the service of this Court and thereby to the people of Australia. That service is not given for the purpose of personal acknowledgment or the enhancement of reputation. It is given to ensure that this Court is maintained as an institution in which the government, the legislature, the legal profession and the people of Australia can have confidence.

Her Honour acknowledged the great responsibility she has assumed, and the high integrity and ability of the chief justices who have preceded her. Her Honour concluded that with 'the co-operation of my colleagues I trust that I shall discharge it well and justify the confidence that has been reposed in me'.

The Hon Justice James Edelman

On 30 January 2017 the Honourable James Edelman was sworn in as a justice of the High Court of Australia at a ceremonial sitting in Canberra.

In his speech on the occasion the attorney-general of Australia, the Honourable George Brandis QC, observed that Justice Edelman's appointment: 'at the young age of only 43, is yet another significant moment in what has been, by any measure, already a remarkable career'. The attorney further pointed out that in the 114 year history of the High Court only three persons have been appointed at a younger age: Sir Edward McTiernan, H V Evatt and Sir Owen Dixon.

Justice Edelman was born and raised in Perth, where he attended Scotch College. Upon completing school his Honour attended the University of Western Australia, graduating with a Bachelor of Economics in 1995 and a Bachelor of Laws, with first class honours, in 1997. After completing his articles at the firm then known as Blake Dawson Waldron, Justice Edelman became associate to Justice Toohey of the High Court.

In 1998 Justice Edelman travelled to the United Kingdom, where he studied at Oxford University, obtaining a D Phil. His Honour then joined the Western Australia Bar, practising from the chambers of Malcolm McCusker QC.

In 2005 Justice Edelman returned to Oxford University, taking up a position as lecturer in law and becoming a fellow of Keble College. His Honour was in due course appointed Professor of the Law of Obligations at Oxford University, at the age of 34. While in the United Kingdom Justice Edelman also practised as a barrister at the London Bar, from One Essex Court Chambers.

In 2011 Justice Edelman returned to Perth upon his appointment as a judge of the Supreme Court of Western Australia. In 2015 Justice Edelman joined the Federal Court, in its Brisbane registry.

In addition to his work as a barrister and judge, Justice Edelman has found the time to publish widely, having published numerous books and articles, often in the area of restitution. As was observed by Patrick O'Sullivan QC, President of the Australian Bar Association in his speech at the swearing-in:

> As we have heard, your Honour brings a breadth of academic knowledge to the Court. Your Honour's continued academic output is impressive, having authored numerous books, book chapters and scholarly articles over a range of topics. During your doctorate, your Honour was editor of the Oxford University Commonwealth Law Journal of which you are now a patron.

In his remarks at the swearing-in, Justice Edelman reflected on the role of a judge in creating the common law:

> Ronald Dworkin once described the process of adjudication by a metaphor of a chain novel with each judge writing a part of the story. Where the story contradicts itself, to use the words of Isaac Isaacs in different context, the judge needs to evolve order out of chaos. The metaphor may not be perfect but, looking backwards, the continuity of the common law can seem like a chain novel. As judges decide

> cases between litigants the story evolves, usually slowly, as each judge attempts to write that which is true to the story and, when the texture is truly open, both true and right in the sense of consistent with the underlying values of the law. I am deeply conscious of the increased responsibility that I now bear in that process.

His Honour also commented on his youthful age in taking up the position, observing:

> Mention has been made today of the potential length of service that comes with an appointment at the age of 43. Twenty seven years as a Judge of this Court might seem to be a long time when measured against a single lifetime, but in the life of the law it will not be much more than a blink of the eye. Many principles of our law have been developing for centuries. Indeed, in three cases in England and another in Australia only since the turn of this century, the House of Lords and High Court of Australia relied upon the work of jurists who worked on similar problems in the classical period of Roman law nearly two millennia ago.

The attorney-general concluded his speech at Justice Edelman's swearing-in as follows:

> Respected judge, internationally esteemed scholar, teacher, prolific author, champion lifesaver and adored husband and father, it is difficult to find something your Honour has not mastered. The common threads to your achievements are a love of the law and a commitment to public service. God willing, you will be a member of this Court until the year 2044. So, your Honour has the opportunity before you, vouchsafed to very few, to shape the jurisprudence of Australia for decades to come. I have no doubt that, with your immense intellectual gifts and your fine human qualities, your Honour will seize that opportunity and accomplish it with distinction.

The Hon Justice Michael Walton

On 8 December 2017 the Hon Justice Michael Walton was elevated from president of the NSW Industrial Commission and Court to a judge of the Supreme Court at a ceremonial sitting in the Banco Court. Arthur Moses SC, senior vice-president of the New South Wales Bar Association, spoke on behalf of the bar, while Gary Ulman, president of the Law Society, represented the solicitor branch of the profession.

In September 2016, State Parliament legislated to invest in the Supreme Court the dwindling judicial functions of the Industrial Relations Commission (IRC). The Industrial Relations Commission's workload had declined since 2006 when the Commonwealth took over the state's industrial relations powers in relation to the majority of the private sector. The commission's jurisdiction is now limited to the public sector and local government. In 2011 the Industrial Court's occupational, health and safety jurisdictions were transferred to other courts.

The Hon Justice Walton is descended from three generations of tradesmen: his father was a plumber and his paternal grandfather and great grandfather were bricklayers. He was educated at Our Lady of Lourdes Earlwood and Christian Brothers High School Lewisham. He graduated with a Bachelor of Economics degree from the University of Sydney in May 1979. He became increasingly interested in industrial relations and completed a fourth year honours thesis on shearers' communities in the late nineteenth and early twentieth century.

Upon graduation, he worked as an industrial officer at the Australian Workers Union then senior industrial officer at the Gas Industry Salaried Officers Federation. It was there that he first impressed Jeff Shaw QC with his adroit and persuasive advocacy before the Industrial Relations Commission.

His Honour's fascination with industrial relations soon translated into raw ability at the bar table. He enrolled to study law and attained a Bachelor of Legal Studies from Macquarie University in May 1987.

His Honour worked for a short time as a legal clerk at the specialist industrial law firm of Turner Freeman Solicitors. He was called to the bar in March 1989 and read with Paul Blackett. He took a room in HB Higgins Chambers, where the late Jeff Shaw QC was then head of chambers.

His Honour appeared in a number of significant High Court cases, such as *Nationwide News Pty Ltd v Wills* in which he was led by Jeff Shaw QC and David Jackson QC; *Re: Australian Education Union Ex parte the State of Victoria*; and *Printing and Kindred Industries Union; Ex Parte Vista Paper Products*, with Stephen Rothman and against Ian Callinan QC.

His Honour was counsel assisting the Cash in Transit inquiry in 1995-96, as well as the Inquiry into Pay Equity in November 1997 to August 1998. Both these inquiries have led to long-term benefits for employees in this state. One led to the implementation

of safety measures, which have minimised the risk to security guards, while the other led to pay equity for women in a number of industries.

His Honour was appointed as vice-president of the Industrial Relations Commission in December 1998 and in the ensuing years industrial relations in New South Wales benefited greatly from his insight and innovation. An excellent illustration was the resolution of a significant industrial dispute at Port Kembla Steelworks in 2001-2002.

Arthur Moses SC described the appointment of Justice Walton as more of a transition, not just from one judicial role to another, but from one era of industrial relations to another.

> Your Honour is the last of your kind. In February 2014 you were sworn-in as the 12th and ***final*** president of the Industrial Court and Industrial Commission. You now join on the bench of this court Justice Schmidt, who previously was a long-standing judge of the Industrial Court.

District Court Appointments

On 31 January 2017 Tanya Bright was sworn in as a judge of the District Court of New South Wales. Arthur Moses SC spoke on behalf of the New South Wales Bar.

Before being appointed her Honour worked in criminal law, most recently as prosecutor in the Office of the NSW Director of Public Prosecutions, Gosford. Her Honour practised in criminal law for 24 years and prosecuted over 140 trial including, among other notable cases, *Toomey*, a difficult and complex arson case involving the deliberate lighting of over 30 fires by the accused in Central Coast national parks in 2006 and in which her Honour successfully secured a conviction.

As a Crown prosecutor her Honour appeared before Judge Roy Ellis, whom she now joins on the Bench. His Honour has described her Honour in her capacity as a prosecutor as understanding the obligations to conduct cases fairly and someone who was always thoroughly prepared.

With the swearing in of Judge Bright, there are now twenty-four female Judges of a District Court bench of seventy-six.

Local Court appointments

Rodney Brender was sworn in as a magistrate of the Local Court of New South Wales on 27 February 2017. His Honour had a commercial and equity practice at the bar, encompassing banking, insolvency, consumer, trade practices and competition law, fair trading and real property.

Susan Horan was sworn in as a magistrate of the Local Court of New South Wales on 31 January 2017. Before her Honour was appointed, she practised primarily in criminal law, including as a senior federal prosecutor of the Office of the Commonwealth Director of Public Prosecutions.

James Gibson was sworn in as a magistrate of the Local Court of New South Wales on 23 January 2017. Before being appointed his Honour was a Crown prosecutor at the Office of the NSW Director of Public Prosecutions.

Brett Thomas was sworn in as a magistrate of the Local Court of New South Wales on 6 February 2017. His Honour previously practised in the areas of criminal law, and also personal injury, workers compensation and family law.

Julia Virgo was sworn in as a magistrate of the Local Court of New South Wales on 23 January 2017. Before her Honour's appointment she worked in civil litigation as a senior lawyer at Clayton Utz as the professional support lawyer of the civil litigation group.

James Merralls QC (1936-2016)

James Merralls was a Renaissance man: tutor, queen's counsel, horse breeder and owner, raconteur, and late-in-life, husband and father. He was a barrister for 56 years, a silk for 42 of them and collapsed as he was leaving chambers for the evening – his wish to die 'with his wig on' granted.

The only child of Nora Hurstfield Holden, from Rushworth in the Goulburn Valley, and Colin Merralls, a bank manager, James Donald Merralls was born in Canberra. The family moved as his father advanced in his career. He became a bank inspector. James spent his primary years principally in Parramatta, where he attended The King's School. He attended Melbourne Grammar on a scholarship. The headmaster, Sir Brian Hone, had been a student of C.S. Lewis' in Magdalen College, Oxford, where Lewis had insisted that he teach his Australian students how to write. As a result James's prose was, in the words of his friend, Edwin Kennon, 'almost Swiftian in its simplicity'.

At 16, he won one general and two special exhibitions and elected to study law at Melbourne University, and eventually took up residence in Trinity, his home for the next 15 years. After almost a year as research assistant to David Derham and article clerkship at Whiting and Byrne, James was admitted to practice on April 1, 1960. He signed the Bar Roll and commenced reading with Richard Newton but this was cut short when he became associate to Sir Owen Dixon, arguably the greatest judge Australia has produced. Sir Owen was an abiding influence on James but as Justice Santamaria has said, '… it would be a mistake to think that Jim became but a cipher for Dixon. Jim himself had a powerful intellect and his own judgment which he exercised confidently throughout his life.'

This confidence extended to his work in the 1950s as a film critic for Melbourne University's Film Journal and in the 1960s as a critic for Nation. His reviews 'Mrs Everage on Tour', 'Patrick White's Charade', and My Fair Lady were as dazzling and original as they were eclectic.

Another consuming interest, outside the law, was in bloodstock and the breeding of thoroughbreds. He bred a number of winners, among them Beer Street, who won the 1970 Caulfield Cup and the Queen Elizabeth Stakes in front of the Queen in Launceston. For over a decade, he was also the Australian correspondent for the British Racehorse, writing as 'Tim Whiffler', the horse that won the Melbourne Cup in 1867.

He was a popular tutor at Trinity and finally Dean. At the Bar, he became a master of the Common Law. His interest was not in legal philosophy but the decided case. In the 1960s and early 70s, he appeared in practically every constitutional case in the High Court; thereafter his expertise was in equity. Timesheets were as alien to him as inflated fees.

After about 15 years at Trinity, James returned to Mont Albert to care for his parents until their deaths, months apart, in 1988, repaying them the love they had lavished on him in his infancy and childhood. In 1993, his life was transformed when at the age of 56, he married Rosemary, and they had a daughter, Nora (in honour of his mother) and a son, James.

There was an incongruity between James' appearance and his personality. He was tall and appeared aloof and detached, yet his greatest gift was his capacity for friendship. And while he loved the Bar, its traditions, anecdotes and camaraderie – he treasured his life at Mont Albert. He loved watching cricket – his idol was Arthur Morris while Keith Miller in action could not be bettered – and listening to Dietrich Fischer-Dieskau. His beloved wife quoted Cicero – 'If you have a garden and a library, you have everything you need' – as if it were written for him.

In 1999, James was appointed a member of the Order of Australia and, in 2013, although initially loathe to accept, he was awarded an honorary doctorate in law by his alma mater. The following year his friends and admirers established a visiting fellowship in his name, in perpetuity.

James' professional legacy is his 47 years as editor of the Commonwealth Law Reports – the authorised reports of judgments from the High Court, a record in the common law world. He reported and edited for almost half the life of the court and through the tenures of half of its 12 chief justices. Three successive chief justices paid tribute to his work. Chief Justice Gleeson said his editorship was marked by his 'professional eminence as a barrister, his extensive legal knowledge and his personal integrity and commitment'. In fact, Chief Justice French convened an unprecedented ceremonial sitting of the High Court to mark 'its sadness at the passing of a fine Australian lawyer who practised his profession at the highest levels, and gave unstintingly of his time and talents in the public interest'.

By Mark McGinness

[The author is indebted to Justice Joseph Santamaria whose eulogy formed the basis of this obituary]. *Bar News* is grateful for the use of this obituary, which appeared in the *Sydney Morning Herald* on 30 January 2017.

Norman Ernest Palmer CBE QC (1948-2016).

Celebrated English academic and barrister Norman Palmer QC died of motor neurone disease, aged 68, on 3 October 2016 in Wales in the UK.

Norman Ernest Palmer was a tall man, neatly dressed, erect of carriage with elegant diction. Whether in his native Chancery Lane or in a remote village in the Indus Valley inspecting artefacts, he presented like a version of Phineas Fog - the insouciant, yet observant traveller, fascinated by his fellow humanity.

He was the eponymous author of Palmer on *Bailment*, the esteemed legal text on every aspect of bailment. This book allowed Palmer to carve a life as the quintessential expert in all aspects of art law. It was his domain. He knew every aspect of the rights of sale, possession, transfer/ownership and loan of important chattels and museum policy. The text has been continuously cited since 1978 by high appellate courts of the common law world..

Bailment was conceived in Australia. It was written and edited in Palmer's first years as a fledgling academic in the 1970s at the University of Tasmania. He used to joke that Hobart in the late 1970s was the perfect setting, an escape into the *Never Never* to write and edit unhindered by the dictates of big city life.

Palmer maintained a lifelong connection to Australia and to the Sydney Bar. Palmer began visiting Australia as a child. His most enduring memories included visiting his grandmother in an old double-entranced house at Mosman in Sydney.

He was Sir Anthony Mason's cousin. He knew Gordon Samuels and Dennis Mahoney among others. Many Australian students collaborated with him in the countless essays, books and cases whilst studying in England. He was generous and lively with time and knowledge. He cared as much as he captivated. Palmer could often be seen dining with friends in his favourite Greek restaurant near to the British Museum. Palmer regaled his guests with sparkling anecdotes, learned commentaries and humorous asides. Outside of the law, his knowledge of literature, fable, spirituality was vast. A little known detail of Palmer - he was an avid collector of prestige vintage cars and owned a great number of them. Ever the eccentric, Palmer never knew how to drive and had no licence. He always toured with a chauffeur.

Palmer was born in Grays in Essex to Muriel and Norman senior. Palmer showed great promise from the outset at the Palmer Endowed School. He went to Magdalen College Oxford with a scholarship to study law. There he shone as a scholar with emphasis on common law subjects: tort and contract.

Palmer was called to the Bar of England and Wales at Lincoln's Inn in 1973. He later held chairs at Reading, Essex, Birmingham and Southampton Universities then, in 1991, occupied a chair in commercial law at University College London.

By that time, Palmer was already travelling the world and advising on art and antiquities from the earliest traces of civilisation to the Holocaust. In 1991 he took silk *honoris causa* for his contribution to the law outside court work. And in 2006 he was awarded the CBE for his services to art and the law. He kept chambers in 3 Stone Buildings in Lincoln's Inn. Palmer was awarded a doctorate by the University of Geneva.

Latterly, Palmer QC with Geoffrey Robertson QC and Amal Clooney were retained in 2015 to opine and advise the Greek government on the position of the Elgin Marbles at international law and under English law. Apart from that, his membership in committees and boards was fervent and continuous, addressing claims of chattels and inheritances, and spoliations arising from the Holocaust era.

Throughout his career he facilitated many a restitution of priceless property. His noteworthy cases include *Government of Islamic Republic of Iran v Barakat Galleries Ltd* [2009] QB 22; [2007] EWCA Civ. 1374 where a Mayfair gallery was found in possession of valuable carved vessels about 4,500 old. Palmer with Sir Sydney Kentridge QC achieved repatriation of the objects. They also include *Marcq v Christie Manson & Woods Ltd* [2004] QB 286 in the English Court of Appeal and *Photo Productions Ltd v Securicor* [1980] AC 827. He also acted for the Tasmanian Aboriginal Centre who successfully claimed back bones of their dead taken by early explorers and displayed in the Natural History Museum in London.

His most recent success was his collaboration with his spouse Ruth Redmond Cooper in establishing the Institute of Art and Law (IAL). It is the hub that brings together all aspects of practice, management and academic matters related to art, antiquities and the law. The institution's spirit reflects much of Palmer's life work.

He is survived by his second spouse Ruth Redmond Cooper, whom he married in 1994, and their daughter Lillian. His eldest daughter from his first marriage to Judith Weeks survives him as do his three grandchildren.

By Kevin Tang

John James Webster SC (1935-2016)

The following eulogy was delivered at a tribute to John Webster, which was held at St James Anglican Church, King Street, on 16 November 2016.

Ann and John's family have asked me to give a tribute to John today. I regard it as a great honour and privilege. Whenever I am confronted by word of which meaning I am uncertain I usually consult the *Macquarie Dictionary* which says that a tribute is a testimonial, compliment, or the like given as if due. I hope I am able to discharge the brief that I have been given.

John Webster was born on 18 January 1935 in Sydney and had one older sibling, Bill Webster, who passed away in September of this year.

John attended the Bondi Public School, which no doubt accounts for his great love of its beach and his decade's long membership of the North Bondi Surf Lifesaving Club. It also clearly accounts for his almost religious dedication throughout all of his life when living in Sydney, to go to the beach each day in the early morning in both summer and winter to run and have a surf. He was usually accompanied by his Golden Retrievers over the years, Fred, Toby and Lady. In more recent times he has taken his and Ann's corgi, Leo. As a result of this lifetime activity he has always been very fit. There were many of his friends over the years, including myself, who greatly enjoyed this activity with him.

In his High School education he attended the Sydney Grammar School and one of his class mates, David Emanuel, on the first day of class, observed that John was sitting in the front row of the class with his head down and he assumed that he was sleeping! (I do not know if this was correct). In any event, he gave him the nickname 'Sleepy' which caught on at school and has carried on. It is an affectionate nickname for which he is well known.

He was a keen and skilled rower. He rowed for the Grammar Eights in the Head of the River and his friend, David Emanuel tells me that it was won by Grammar in his year. As a member of the Sydney Rowing Club's fours he also won the New South Wales title. As with everything in his life John gave of his best.

He married Jillian Browne in 1956 and there were four children of their marriage, namely, Jeffrey, David, Michael and Tracey. Some of John's children propose to speak of their father at the function to follow later today. They separated in 1971 and were divorced in 1972. Many years later he established a relationship with Belinda Moon and they were married in 1986. Belinda had a child, Amelia, who he treated and loved as his own daughter. There was a child of the marriage of John and Belinda, namely, Elisabeth who has always been known as Lily. As is often the sad case of life being married to a successful barrister John and Belinda parted company in 2003. John has nine grandchildren namely, Josie, Katie, Maddie, Georgia, Mikayla, Max, Ben, Oscar & Billy.

John had had a great love and devotion for all of his children and they for him. He helped them in every way he was could. He absolutely adored his grandchildren and they adored him. Max was particularly devoted to him and John enrolled him as 'a nipper' at North Bondi where he continues to do surf patrol.

In 2004 he first met Ann Bowen who practiced as a solicitor in the Land and Environment Court. In 2005 they developed a close and loving relationship and commenced to reside in a terrace in Glebe Street, Edgecliff.

After John left school he worked in the State Valuer General's Department and Land Tax Office and he designed and set up their computer systems. He studied to become a valuer at night. He went to Canberra in 1967 and worked for various Commonwealth departments doing computer and IT work. He came to provide the computing systems for the Air Force in the maintenance of their Mirage fighter jets. At the same time he studied Commerce and for his LLB at the Australian National University.

In 1967 he was contracted by Westpac to set up their computer systems in their bank and returned to live in Sydney. In 1970 he was admitted to the bar but did not practise until April Fools Day 1972 and shared at Denman and Forbes Chambers.

A good mate Mick Coleman helped him at this time. They cut their teeth on cases in the Police Court, as it was then known, and later Petty Sessions. This was a pathway for many at the bar around this time, including myself. Mick became his closest friend and was the best man at both of his weddings.

His skill and expertise in the area of valuation became to be known by Trevor Morling and Noel Hemmings and he was asked to join Tenth Floor, Wentworth Chambers. He substantially practiced at the criminal bar and also at the common law bar. He also developed a practice in valuation and environmental law. He had a robust approach to his advocacy.

Over the years he developed a stellar legal practice. He was the preeminent

'John James Webster SC'

barrister in the area valuations and land acquisition law in Australia. He practiced in the Supreme Court, New South Wales Court of Appeal and the High Court of Australia. He was also a junior in the *Tatmar Pastoral Case* in the Privy Council. His areas of practice focused on local government, planning, property and pollution law and criminal matters relating to this area of law.

He regularly appeared in the proceedings of a disciplinary nature, the Pecuniary Interest Tribunal, the Administrative Appeals Tribunal, the Real Estate Valuers' Registration Board and the Coal Compensation Review Tribunal on mining lease matters. He was appointed by the minister to the Real Estate Valuers' Registration Board from 1983 to 1997. In 2002 he was appointed senior counsel.

Whilst a senior junior barrister he was in much demand to be a pupil master and had many pupils to whom he devoted his time and shared his expertise. He also ensured that work flowed to them as he did with many other junior barristers on the floors where he practiced. His readers included Alison Stenmark and Ian Hemmings, now senior counsel. Some of the barristers who were his pupils or he mentored at the bar have gone on to take judicial appointments. He was a founding member of the Environmental Law Association, an executive member from 1986 and vice-president of EPLA in 1995.

He was a great friend to his clerks, including the legendary Ken Hall; Trish Hoff and Michele Kearns. Michele was one of John's many secretaries and shared an enduring friendship with him over three decades even getting away with calling him '*Johnny.*' Michele came to become his clerk in 2000.

I am not wanting to suggest that John was an angel in his practice as a barrister. He could be irascible, difficult and sometimes cranky. However, he never held a grudge and he had a big generous heart.

He held retainers for many local councils and also from BHP. He advised BHP on the environmental aspects of their mini smelter that they built at Rooty Hill. This was a particularly financially rewarding brief for John and enabled him to buy a somewhat run down farming property known as Munmurra Park at Cassilis.

He was not a 'Pitt Street farmer' and was totally hands on in his farming. He undertook a three year agricultural course to fit him out for the agricultural tasks ahead. He loved his property and he worked long hours on it as he did in his practice of the law.

I became friends with John in the late 1970s when he was living in Paddington. When I was in my second bachelorhood he advised me that there was a small totally refurbished terrace for sale at 15 Glebe Street, Edgecliff. I purchased the property that backed onto 38 Great Thorne Street which had been the Presbyterian Manse that John had purchased at about the same time. We came to be neighbours for about 10 years. We frequently went together early to Bondi Beach for a run and surf. It was a great way to start the day. The Presbyterian Manse was not a large property but it was in a rundown condition and John embarked on restoring it to its former glory. It became a comfortable place in which to live where he frequently entertained family, friends and colleagues. He loved good food and wine and was a most generous host.

He was a true *bon vivant*. He loved the company of other people and for him the more the merrier. He frequently invited family, friends and colleagues to spend time at Cassilis where he had restored the homestead. I was fortunate enough to receive many such invitations and, indeed, I went to Cassilis with John and Belinda at the time that they first moved into the homestead and I recall sleeping on a swagman's swag. Our families frequently went skiing at Thredbo and overseas and also went canoeing and camping on the Little Macleay River. They were great and enjoyable times. He was a very engaging friend and companion.

As many of you would know John was part of the legal team who were the subject of litigation in the Land and Environment Court that became known as 'the Yates litigation'. It took its toll professionally and personally on John and the whole team. After six years of litigation they were all totally vindicated by a decision of all the six judges who sat on the matter in the High Court of Australia. It was a great win and I was invited to the party that he put on the rooftop of Wentworth Chambers where the French Champagne flowed freely.

In 2000 he decided to make a new start after the Yates case and decided to join Sixth Floor, St James Chambers, Phillip Street where he remained until 2003 when he became a founding member of Martin Place Chambers, which was specialist chambers in the environmental area.

Ultimately, Munmurra Park was sold and in 2004, by which time, it had become a show piece property. He continued his interest in farming and purchased a Macadamia farm at Byron Bay. John saw the latter part of his life as a change of seasons. He took up golf, yoga, cryptic crosswords and together with Ann developed a keen interest in classical music. They travelled on music tours to Bavaria and Portugal, he continued his skiing and in in the ensuing years he toured Europe with Ann and they went to the Galapagos Islands and South America. They went to the World Rugby Cup. However, towards the end of 2013 he was beginning to experience mobility issues and came to require the use of a stick.

'John James Webster SC'

We still remained firm friends and he and Ann came to my wedding to my wife, Helen in 2010. About 18 months ago I received from Ann an email to which there was attached a neurologist's report relating to John's medical condition. It indicated that he had a serious small vestibular disorder and vascular dementia. In the past I had a medical condition that from time to time prevented me for short periods from effectively practicing at the bar. John knew of these difficulties and on an occasion when we were living at Edgecliff he said 'come on Dessie I am going to take you up to Cassilis for the week.'

I went and purchased the biggest T-bone steaks I could find at Edgecliff and provisioned up on the way at Cessnock. It was in the summer and we worked together injecting the cattle and spraying the thistles on the property. I thought my right index finger was going to full off from squeezing so hard. We went for swims in the water hole in the creek and to the Bowling Club for a beer. There was great mirth and amusement from many of the locals who had observed me wearing my pith hat whilst working on the farm. It was a restorative time for me and I never forgot John's kindness and generosity towards me.

When I received Ann's email it seemed to me to be a call for support and I decided to step up to the mark. I was only in partial practice at the time and was able to visit John on a regular basis to give him support and also to give support to Ann.

I was able to observe his slow decline from the walking stick, walker, wheel chair and his admission to Beresford Hall which was a new aged care facility that Ann had organised for John at very short notice. He was exceedingly well looked after by the staff.

As his condition deteriorated in this period he was also regularly visited by friends and colleagues including David Emanuel, Noel Hemmings QC. Dogs were allowed at Beresford Hall and Bernie Gross QC a close colleague and friend often stopped in with his dog on his morning walks. I understand that Murray Tobias also called in from time to time.

Over this time Ann was a loving and devoted partner and carer to him. Whilst he continued to reside at Edgecliff his bodily functions were not as they should be and Ann attended to all of these matters herself.

John had a couple of falls at Bondi Beach and Ann had to get him to the hospital for treatment. The aged care accommodation at Beresford Hall that she organised had an indoor swimming pool that allowed him to undertake rehabilitation and to enjoy his love of the water. Ann also organised regular massages for him in his room and visited him on an almost daily basis.

There were occasions where there was some mirth between us prior to him being admitted to Beresford Hall. I visited him at the War Memorial Hospital at Waverley where he was undertaking rehabilitation. In an animated fashion, I told him about the latest goings on in the courts and the latest gossip and rumour around the bar, which the bar loved to dine on. He was quite amused but said 'you know Des, I won't remember any of this tomorrow' and I said 'don't worry John I will be around again soon and I will take you through it all again'.

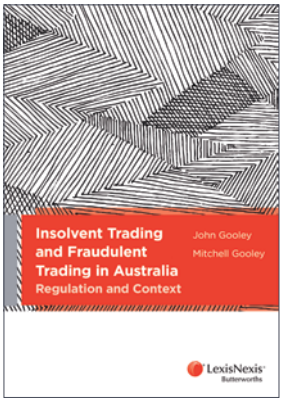
When John was nearing the end Ann had the opportunity to tell him how much she loved and cared for him and that his time had come and in due course she would be searching him out.

John was a gregarious man and the life that he lived would have been the envy of many. He lived life to the full. He was a wonderful father, husband and grandfather. He has been a wonderful partner to Ann. He has been a wonderful friend to all his many friends and colleagues. He was a great barrister and a great man. All that knew him would be saddened by his passing but he will never be forgotten. May he rest in peace.

By Des Kennedy SC

Insolvent Trading and Fraudulent Trading in Australia: Regulation and Context

By John Gooley and Mitchell Gooley | Lexis Nexis Butterworths | 2016



Ever since the House of Lords' decision in *Salomon v A Salomon & Co* [1897] AC 22, the metes and bounds of a separate corporate personality has been the subject of successive legislative and judicial incursions. This is rightly so. The concept of limited liability promoted the entrepreneurialism upon which the material and economic success of the United Kingdom and much of the Western world has been based. It also had the potential to promote fraudulent conduct as was foreseen by Lord Halsbury in *Salomon's* case. Legislators and the judiciary have, since that time, answered with varying degrees of success the vexed question of where to draw the line between enabling corporate risk taking and protecting the public. That is, to what extent should one interfere in the allocation of responsibility and liability between a limited liability entity and its owners, managers and creditors operating in what remains an essentially capitalist system?

The current and historical approach of the law to answering this question occupies much of the focus of the authors of *Insolvent Trading and Fraudulent Trading in Australia: Regulation and Context*. It is this focus which sets this text apart from other practical guides to insolvency, such as the well-known and much used *Keay's Insolvency* and which makes this text a valuable and welcome contribution to the field.

Commonly, guides to insolvent trading legislation helpfully, although rather prosaically, state the relevant legislative provisions and their practical application by illustrative excerpts from the authorities. Messrs Gooley and Gooley take this approach one step further by, in addition, examining the historical context and objectives of such provisions, providing international comparison and discussing future reform. Fraudulent trading provisions, although less favoured, receive a similar treatment and this juxtaposition also gives context to the objectives behind regulating the behaviour of those controlling the trading activities of corporations. In this way, the text admirably fulfils its stated aim which is to explore the historical and current provisions which have regulated and which regulate both fraudulent trading and insolvent trading in Australia'.

The text is divided into three parts. In Part 1, the authors provide an overview of the regulatory context and then examine, in some depth, the concepts of separate legal personality and limited liability. There is then an historical overview of the developments in the law relating to directors' duties. It is not until 126 pages into the text that the authors address insolvent trading regulation. This comprises Part 2.

Having addressed the legal context of insolvent trading regulation in the form of Part 1, Part 2 commences with its historical context. The predictable review of the first enactments and their genesis in bankruptcy legislation is followed by a surprisingly detailed analysis of their application in various decisions. The analysis is a welcome reminder that the authorities, often cited faithfully in present times, are largely a product of distinct and, in some ways, remarkably different legislative regimes.

Chapters 5 to 8, in Part 2, comprise the main analysis of the current insolvent trading provisions as they relate to corporations. Given the emphasis on context, it is not surprising that the analysis commences with a review of the objectives of the current provisions as enunciated in parliamentary debates, the authorities and the Harmer Report, to which the current provisions owe much of their form and content. The discussion of the current provisions is structured to assist legal advisers and, in particular, advocates. The text specifically addresses

…the text admirably fulfils its stated aim which is to explore the historical and current provisions which have regulated and which regulate both fraudulent trading and insolvent trading in Australia.

the onus and standard of proof required, each of the elements of the claim and the defences available to directors. The consequences (whether in terms of damages or penalty) are also addressed. The treatment is detailed, comprehensive and nuanced so as to be of assistance even to the most seasoned and knowledgeable practitioner in the field.

Chapter 9 addresses regulation of insolvent trading of entities other than companies, a topic often neglected in other texts.

Chapter 10 addresses current calls for reform of insolvent trading provisions. Included in the discussion are the potential introduction of a business judgment rule as well as safe harbour options, such as the temporary appointment of registered restructuring advisers without the need for formal

'Insolvent Trading and Fraudulent Trading in Australia: Regulation and Context'

external administration.

Chapter 11 provides an analysis of the regulation of insolvent trading in overseas jurisdictions, in particular, the 'wrongful trading' provisions in the United Kingdom.

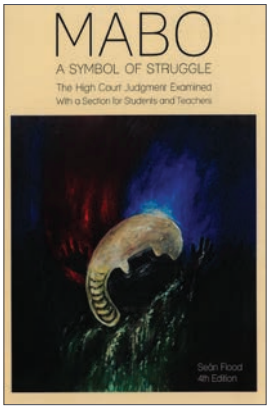
Part 3 is devoted to regulation of fraudulent trading, comprising sections 592(6) and 593(2) *Corporations Act 2001* (Cth). Although the regulation of fraudulent trading of companies has enjoyed a much longer legislative history than the regulation of insolvent trading of companies, there is not the range or depth of judicial analysis. This is no doubt due to the requirement to prove dishonest intent resulting in it being a less attractive avenue of recovery. Consequently, the authors' analysis of this claim is limited.

While fraudulent trading regulation is relevant to the questions posed in the book and at the outset of this review, the real value of this publication is in its contextual analysis of insolvent trading. As such, the text will be a welcome and useful addition to the library of any legal practitioner specialising in the area of insolvency.

Reviewed by Jo Shepard

Mabo

Sean Flood | E Fink | 2017



You would be hard pressed finding a person in Australia who hasn't heard of the High Court decision of *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (*Mabo*). You would have an even harder time trying to find a person who understands what *Mabo* actually means or has actually read it.

In the fourth edition of this book, the author celebrates the landmark decision of *Mabo*, 25 years after it was handed down, by educating its readers about what *Mabo* really means for modern day Australia. When the book was first published Mr Flood felt that it was incredibly important to dispel some of the myths that were being whipped up about the potential impact of *Mabo*. As an Aboriginal lawyer, I hope that this book will continue to be used to educate the community about the true meaning of *Mabo.*

The first half of the book provides an updated discussion on the *Mabo* decision, the *Native Title Act 1993* (Cth) and judicial approaches to native title since 1992. The chapter 'Native title in the courts since Mabo', which was written

This is a new edition to the book, which explores the impact of colonisation, equality, self-determination and constitutional recognition.

with assistance from barrister Lee Corbert, is particularly relevant to those who practise in the area of native title. Other sections will also appeal to those who have an interest in historical jurisprudence and thankfully the book is written in a way which is not overdone with legal jargon.

The second half of this book shifts its focus slightly to look more broadly at the struggle faced by Indigenous Australians today. This is a new edition to the book, which explores the impact of colonisation, equality, self-determination and constitutional recognition. Drawing from his experience working within Aboriginal communities, Mr Flood brings these issues to the surface in a way which will hopefully provoke readers into exploring these issues further.

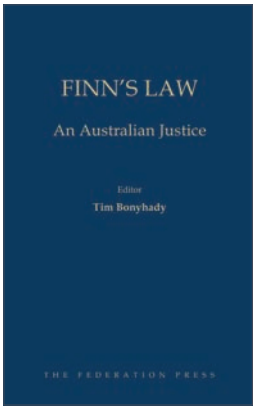
Readers will also be treated to images of artwork which symbolise the position that many Indigenous people find themselves in. For those studying legal studies, studies of religion and history in their HSC, this edition also includes useful discussion questions which will act as great study tool.

This book provides us all with a useful reminder that *Mabo* 'represented neither the beginning nor the end of [the] struggle' faced by Indigenous Australians and that there is a great deal of this struggle yet to unfold. *Mabo: A Symbol of Struggle* is published independently by E Fink at PO Box 4004, Castlecrag NSW 2068.

Reviewed by Damian Beaufils

Fiduciary obligations and Finn's Law

Tim Bonyhady (ed) | The Federation Press | 2016



The following address was delivered by the Hon Keith Mason AC QC at the launch of *Fiduciary Obligations and Finn's Law* on 9 February 2017.

I first met Paul Finn in September 1970 in London. We had both enrolled to do a Masters in Law and chosen Restitution as one of our subjects. Our lecturers included Peter Birks who was then on his very first teaching post, at University College, London. He would later become the Regius Professor at Oxford.

There were five Australians in a small cohort of students, the rest being mainly from England. As a topic was discussed one of the Aussies would occasionally suggest: 'There is an Australian decision on a similar point, if you are interested.' But not Paul Finn, if my memory serves me. He seemed at the time to be strangely reluctant to talk about things Australian.

I thought at the time that this could have been the shy introversion common to Queenslanders from that era. But Paul has never been shy and his reticence in contributing antipodean legal anecdotes seemed to be more broadly sourced. His earlier legal studies appeared to have led him to believe that it was always safer to go back *beyond* the sailing of the First Fleet. Back to the time when judges enunciated moral and political principles more than working mechanically with case law and worrying about judicial hierarchies. Back to the days of Vaughan CJ who in the age of Charles II remarked:

> I wonder to hear of citing of precedents in matter of equity, for if there be equity in a case, that equity is an universal truth, and there can be no precedent in it; so that in any precedent that can be produced, if it be the same with this case, the reason and equity is the same in itself; and if the precedent be not the same case with this it is not to be cited.'

I formed the impression that Paul, the young graduate student, had arrived at the view that some dark cloud had descended over the common law of both England and Australia in the previous two centuries. If a nineteenth or twentieth century case was raised for discussion by Birks, Paul repeatedly challenged him with a variant of the following question: 'But isn't this **really** just what Lord Hardwick was getting at in 1750 in *Earl of Chesterfield v Janssen?*'

This approach was far from mere antiquarianism and it would endure into Finn's early scholarly publications. In his *Finn's Law* chapter about *The Equitable Duty of Loyalty in Public Office,* Justice Gageler writes (p 127):

> The younger and more doctrinal Finn eschewed attempts to find higher truth in legal labels attached to categories of relationship; he espoused instead the importance of identifying the source and content of particular equitable obligations.'

We now learn from these two books that I am privileged to be launching today that, before Paul had even finished undergraduate studies in Brisbane, he had read all of the company and partnership cases in all of the English Reports. This alone would have encouraged the discernment of open-ended, overtly moralistic bases for legal principles.

I have to admit that Paul Finn's youthful seminar references to Lord Hardwick and to principles that were equitable spelt with a lower-case 'e' sounded very strange to both me and the late Bill Caldwell whose legal education had likewise been at Sydney Law School. Yet it is due in significant part to Paul's scholarly influence over the intervening decades that it is now entirely orthodox to see things this way. And likely to continue to be so. If you do not believe me, read both the *AFSL Case* on change of position and the book on *Unjust Enrichment* recently co-authored by our latest High Court justice. Justice Edelman and Professor Bant open with a quotation from Lord Mansfield who observed (in 1774) that:

> ...the law ... would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them fixed certainty.

A decade ago this approach uttered by this dangerous fusionist would have been branded as 'top-down reasoning' in some circles. But few things last forever in the law.

Now when I used the expression 'dangerous fusionist' I was, of course, referring to Lord Mansfield, not Justice Edelman. That said, I for one will not complain if his jurisprudence continues to trend in this direction. Others may do so, but I **never** criticise the work of High Court justices.

Paul Finn's *Fiduciary Obligations* was originally published in 1976. It was the product of a Cambridge PhD embarked upon immediately after the London Masters. The book filled a huge gap because fiduciary obligations had escaped sustained attention by legal commentators, unlike trusts and equitable remedies.

But in a deeper sense, the work was and remains almost unique in working seamlessly across common law and equity boundaries, in crafting coherence from

'Fiduciary obligations and Finn's Law'

Fiduciary Obligations and Finn's Law L to R: The Hon Keith Mason AC QC, The Hon Paul Finn, The Hon James Allsop AO, chief justice of the Federal Court and Professor Stephen Bottomley.

chaotic categories, and in straddling private and public law. It extrapolated and where necessary reconciled common themes across a range of different conceptual boxes such as directors, trustees, executors, public officers, donees of powers, liquidators and receivers. As Paul explains in the Preface to the original edition:

> Insofar as a seemingly amorphous mass of case law has permitted, I have attempted to outline the general principles and rules which inform judicial supervision of fiduciaries. Consequently, I have not concerned myself with presenting a description of the possible fiduciary incidents of particular legal relationships such as principal and agent or trustee and beneficiary. Indeed, in my view, these 'incidents' can only be understood properly after one first divines the purport and nature of Equity's regulation of fiduciaries. And thus one must go back to the general rules and principles.

The public law analogies that were only touched upon in Finn's early writings would become springboards for much of his academic and governmental work after his return to Australia. And the historical, contextual research that this entailed would bring his scholarship away from the ivory towers of Oxbridge into the more realistic dust and dirt of governance in Australia. None the worse for that!

In its ground-breaking approach to legal doctrine, *Fiduciary Obligations* had similarities with Goff & Jones, *Law of Restitution.* The first edition of that work had been published less than five years before Paul embarked on his PhD under the supervision of one of the co-authors, Professor Gareth Jones. Since, however, Paul's *primary* focus in his early writings was upon principles we (from Sydney at least) have been conditioned to think of as inherently equitable with a capital E, Finn (unlike those members of the 'restitution industry' who worked in similar manner but a different field) would not be attacked for trying to appropriate parts of the law marked 'Equity! Intruders Keep Out'.

As we are reminded in *Finn's Law,* Paul's teaching, networking, writing and international influence as a scholar-judge would spill beyond fiduciaries, to fields undreamt of by his beloved Lord Hardwick, areas such as public corruption, fair dealing in contract and native title. Paul's abiding concern for practical fairness and workable yet principled outcomes would help foster a distinctive yet eminently exportable Australian Equity jurisprudence. It would focus on unconscionability and remedial flexibility, particularly in the field of proprietary remedies such as the remedial constructive trust and lien.

These Australian developments, which had themselves been launched, endorsed and promoted in leading High Court decisions penned by Justices Mason, Deane and Gummow, would challenge Peter Birks' hard-edged taxonomies that have gained acceptance in the English Courts. But thanks to Justice Finn's judicial *magnum opus* in *Grimaldi v Chamelion Mining NL,* we have seen in the 2014 *FHR European Ventures* decision of the United Kingdom Supreme Court a major retreat by the English appellate courts when they *dis*-endorsed Peter Birks' pin-up case of *Lister v Stubbs.* I cannot refrain from observing how ironical it is that Paul Finn's academic and judicial scholarship that began by fawning old-English ideas would (as it developed and matured in these hardier climes) become a vehicle for exporting the best of Australian private law back to England and to other parts of the British Commonwealth.

Why *Fiduciary Obligations* did not proceed to later editions is a much-debated mystery. I suppose we must accept Paul's word for it that he had simply 'moved on'. But to give him his due, Paul has also been rather busy between the 1976 and 2016 iterations of *Fiduciary Obligations.* His years at

'Fiduciary obligations and Finn's Law'

the Australian National University were highly productive in every sense of the word, including moulding a generation of disciples some of whom have returned the compliment by contributing to the *festschrift* that is *Finn's Law.* There were also the eight-volume series of '*Finn on*' essays that emerged from the celebrated round of seminars at ANU conducted according to the now internationally recognised 'Finn Rules'.

And, there were the outstanding contributions in the Federal Court that included the *Akiba* native title decision that is reviewed in Justice Michael Barker's chapter in *Finn's Law.* This decision rested upon a wide grasp of case law and legal theory, an understanding of historical context, and (most of all) a willingness to proceed courageously from general principles to fair, workable and authoritative outcomes. We see the spirits of Lord Hardwicke and Lord Mansfield in these and other developments in the Finn jurisprudence.

Finn's writings, mainly judicial, on the topic of fair-dealing in commerce are analysed in the chapter *'Conscience, Fair-dealing and Commerce'* by Chief Justice James Allsop. In the chief justice's words, this contribution reflected Paul Finn's 'recognition of the need to conform rules to principles and to develop principles, and therefore rules, from stable foundations built on practical, honest decency.' (*Finn's Law,* p 92) This chapter also emphasises how ideas from law, equity and statute have been blended in recent years in our High Court jurisprudence. Once again, an aspect of Finn's scholarship.

But I must step back from lauding Paul Finn's *judicial* work because I am under strict instructions from Mark Leeming and the other people from The Federation Press not to encourage subscriptions to any law reports or other publications by LexisNexis or The Law Book Company. The reality is, of course, that you cannot and you should not ever separate the judge and the scholar, or disconnect him or her from an evolving life experience. And in the particular case of Paul Finn, it is hard to think of anyone who has done more to encourage and participate in dialogue between the academy and the bench, and across the jurisdictions. This is not a universal phenomenon, as anyone who has familiarity with the English legal establishment would know.

Fiduciary Obligations has long been the 'go to' work on the topic for teachers, students, scholars and judges. It favours both those prepared to read it a single sitting and those wanting to dip in for detailed analysis. Getting to it has, until now, been impeded by its unavailability. It has the distinction of being the text most often stolen from Cambridge University's law library. When, only months ago, I mentioned casually to Professor Simone Degeling that I owned a copy, she begged to borrow it, and certainly not for the annotations I had added over my years at the Bar and Bench.

I told Simone to save her pennies and buy the new production when it was launched today.

Cambridge undergraduates will no longer risk blighting their careers by a larcenous act that could have given their forebears a free passage to New South Wales. The unavailability of *Fiduciary Obligations* has now been remedied in the productions that I am honoured to be launching today for which The Federation Press deserves genuine praise.

Fiduciary Obligations comes with a modern Introductory Comment by Paul himself, a Preface by Sir Anthony Mason, and the reproduction of two of Paul's many extra-judicial contributions on the topic. These are an article on *The Fiduciary Principle* that first appeared in 1989 and another, called *Fiduciary Reflections,* that was published in 2014. The latter tracks developments in Paul's thinking and scholarship on this topic over the past forty years as well as its reception into law.

Professor Sarah Worthington's chapter in *Finn's Law,* called '*Fiduciaries: Following Finn',* will also enable academics and serious practitioners to survey the reactive academic and judicial scholarship in the intervening years. More importantly, it will assist anyone keen to anticipate the ongoing trajectory of High Court fiduciary jurisprudence over the next decade or so.

Finn's Law: An Australian Justice, edited by Professor Tim Bonyhady, is much more than a *festschrift* provided by a cohort of 'Finn groupies'. I know that such an expression is hardly respectful of five distinguished professors of international repute, and judges from the High Court, the Federal Court of Australia and the High Court of Justice of England and Wales. But I hope you and they will readily understand the point I am making.

In their chapters, Tim Bonyhady and Justice Ross Cranston offer us details of Paul's scholarly life in progress, amply reinforcing my thesis that truly great jurists are those whose beliefs change and

develop during their lifetime, perhaps because they are perceptive enough to realise (with appropriate humility) that their own life experiences and personal networks offer continual stimulation.

The remaining contributors to *Finn's Law* provide critical up to date snapshots of several key doctrines, drawing attention to Australian distinctiveness and Paul's special contribution to this state of affairs.

I would specially mention Associate Professor Pauline Ridge, who discusses participatory liability in its various forms. Pauline charitably describes the High Court decision in *Farah Constructions* as 'unfinished business' and she too dilates upon Paul's multi-faceted encyclopedia in *Grimaldi.* In this context, she identifies three hallmarks of equitable judicial method espoused by our friend, hallmarks also clearly evidenced in such recent decisions of the New South Wales Court of Appeal as *Heperu* and *Fistar.* These Finn hallmarks are:

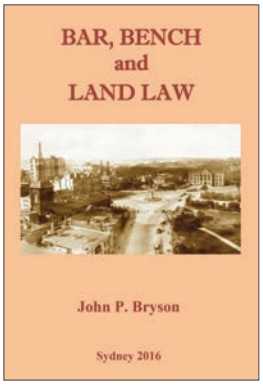
- The exposition of doctrine in terms of its basal principle, organising ideas, and policy underpinnings;
- The discretionary and holistic application of equitable principle and determination of equitable remedy; and
- An openness to principled 'fusion' of common law and equity.

Together, these two books will enable the discerning academic or practitioner to survey large swathes of law. The eminence of the various contributors allows us to be sure that we are shown where the law has come from, where it is going, and where the law in Australia is converging or diverging from that of overseas.

Each book shows what vast strides have been made in the coherent understanding of legal and equitable principles, the magnetic interplay between statutory and judge-made law, and the convergence of public and private law discourse that has taken place in the 46 years since Paul Finn first slipped shyly into postgraduate studies at London University.

Bar, Bench and Land Law

John Bryson | The Svengali Press | 2016



All good books transport readers to a different world. The Hon John P Bryson QC does this in *Bar, Bench and Land Law*. He coaxes the reader into at least two other worlds; that of Old Australia and Plantagenet society. Bryson's aim is to commit to writing some oral history of the bar and an obscure chapter of medieval historical interest. He does both entertainingly in his unique style. It might have been called the Bryson *histories* in the sense of the old English word. It's a personal account and it is *his storie*.

Ostensibly, the book is in two distinct parts. The first part is a true personal memoir of Bryson's experience, as a young boy in suburban Sydney during the Second World War. It moves to the years when Bryson entered the legal world as a clerk and progressed to counsel and beyond.

In the second part, the text morphs into a scholarly exposition on Plantagenet land law – an area in which Bryson has a particular interest. This is a scholarly academic treatment of what forms the basis of the law of real property as we know it today. The style is simple, crisp, elegant.

Bryson takes us back to 1940s Australia. He recalls evacuation practice at his kindergarten near Bowral, and wartime life in his childhood home at Burwood. The lives of all those surrounding him were disturbed as war effort duties punctuated their daily routine. The domestic order of the day was of restriction and deprivation. Bryson recalls Americans were exerting their power, largesse and privilege, as allies deployed in Sydney.

An impressive aspect of the text is Bryson's social commentary of those times. The social order in old Australia was distinct before the war. Bryson charts the tectonic shifts of old-fashioned pre-war social practices, to the new attitudes and the new world order. He describes a long gone world. There was hierarchy of social caste from aristocratic graziers down to ordinary working class toilers. For example, he describes the practice of 'bowing to the Matrons' at race tracks in country towns, once done upon entry to race courses in country NSW, a mystifying practice by young men to assure their social status. But everything changed after the war. There was a future of boundless possibility and prosperity. The world re-calibrated itself accordingly.

Bryson's life in the law infuses the whole text. Bryson describes in a vivid and laconic manner his life, its people and its places. It was a smaller and more intimate profession and bar when Bryson was called in 1966. These pages prove that he is a great observer of his fellow man. The vignettes and Brysonisms are comical as he recalls life at the bar. His descriptions of various people take on a Dickensian feel. Characters of the Supreme Court and the many faces who made up his professional sphere are remembered. The old judges are listed almost *seriatim*. He brings them to life as if they are caricatures in Daumier sketches. There is light and dark shading, a grimace, a stern gaze and much bemusement for onlookers.

Judges and counsel active up to the mid 1970s were a rare breed unto themselves. Bryson remembers for example Kinsella J whose 'gravity was never broken by a smile' and his tipstaff Captain Adams whose manner was one of severe dignity, rivalling that of the judge and befitting his status as a war hero. He recalls Justice 'Jock' McClemens, who is described as 'a warm and industrious human being' and whose face was that which 'Old Masters painted on faces of cherubs'.

There is a memorable chapter 'Chief Justices in Anecdote and Fable'. One of those great personages described is Doc Evatt who was appointed NSW chief justice in 1960. Bryson remains respectful but makes no apology for capturing what Sir Maurice Byers termed 'urbane brutality' as the *modus operandi* of the Supreme Court.

Chapter 12 begins the second part of the book: a summary of antique land law dating from the Plantagenet period of English history. Bryson leads us into yet another world order – that of the demesne lands, feudal Lords, serfs, villeins, manorial courts. One's place in the social order meant everything, as did the church and state and primogeniture. The world was a violent place generally. The elucidation of ancient law and curial procedure is a rare aspect of the text.

For example, benefit of clergy became an exceptional circumstance for members of the laity, allowing an escape from the death penalty for first offenders convicted of serious crimes. The might of the church, even during Plantagenet times, was being progressively eroded. Similarly, the church's privilege of sanctuary began to lose its status as an exemption from pursuit of criminals by sheriffs and constables. It was called upon when criminals or those living in fear of being charged of crimes would take refuge or seek sanctuary in a religious house or church. All one had to do was come within the consecrated ground and touch the ring on a church door. By Stuart times it had lost all significance.

The author's deep learning of English

'Bar, Bench and Land Law'

history, historical literature and ancient lore make this part of the book lighter, livelier and more entertaining. Bryson's turn of phrase is beautiful.

Bryson's book is more than a memoir and a history lesson. The erudition is deep. It reviews two disparate periods of history. It is a private binding in the truest sense. In these pages lie truth and myth intertwined. That lies at the heart of the bar's oral history. Bryson has taken time and effort to record some of that history. It is a valuable book for that alone. It records the wisdom of the ages.

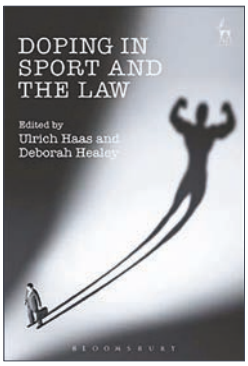
Bryson has indicated that the book was printed as a gift to friends and enthusiasts of legal folklore and history. It purports to be nothing more.

However, those who enjoy its contents are exhorted to make a donation to the Barristers' Benevolent Fund.

Reviewed by Kevin Tang

Doping in Sport and the Law

Haas and Healey (eds) | Hart Publishing | 2016



The World Anti-Doping Code (code) and its related rules were implemented in 2004. Through an amalgam of contract law, legislation and international treaty, they create a legal framework for dealing with doping in sport.

The code was born from the growing disquiet in the sporting world in the mid-1990s that drug cheating was causing irreparable damage to the reputation of major sporting events such as the Olympic Games and the Tour de France and undermining the intrinsic value of sport which, David Howman, the chief executive of WADA recently described as

> …the celebration of the human spirit, body and mind, and is characterised by values such as ethics, honesty, respect for rules, self-respect and respect for others, fair play and healthy competition. If sport is void of these rules (and others) it might be argued that it is no longer sport.

This work was written against the background of the many national and international controversies over the last few years, including those involving Australian cyclist Lance Armstrong, the baseballer Alex Rodrigues, the Australian Football League (AFL) and the National Rugby League (NRL).

It consists of a series of papers by lawyers and academics grouped under the following themes: Part I, the Evolution of the Code; Part II, the Code and the Athletes; Part III, Procedural Questions concerning the Code; Part IV, Obligations and Liability under the Code; and Part V, Governance and Compliance Issues under the Code.

In Part I, Professor Ulrich Haas of the University of Zürich considers the 2015 redraft of the code in detail. He opines that despite extensive consultations with stakeholders paradigmatic change was minor. He addresses the contentious issue of cannabis testing, controversies relating to fault and suspension, the treatment of contaminated products, and the problematic area of disciplining support personnel.

The contributions to Part II of the book includes a chapter written by Dr Tom Hickie, barrister and adjunct lecturer at UNSW, which critically examines the code in the context of recent doping scandals involving professional football in Australia and the Lance Armstrong case, noting that the Draconian nature of the code means that fault does not have to be proven for an infringement to occur. In Chapter 4, Alan Sullivan QC analyses the seminal role that contract law plays in the regulation of doping under the code. He discusses the extent to which the 2015 code operates as a contract and between whom including difficult issues of privity of contract.

It is a must read for lawyers wanting to know more about the code and the complex web of legal and social considerations surrounding its enforcement.

'Doping in Sport and the Law'

In Part III, the contributors address a number of procedural questions concerning the operation of the code, including the gathering and use of non-analytical evidence to establish anti-doping rule violations. Sudarshan Kanagaratnam, barrister, notes that cognisant of the importance of non-analytical evidence, the code places greater emphasis on evidence obtained through investigation and the use of intelligence in the fight against doping.

Part IV includes a chapter written by Professor Joellen and David Weiler of the University of Sydney Law School, in which they discuss the employment law implications of doping regulation, including liability of the employer and liability of employees and others. They note that professional players engaged by football teams are generally regarded as employees, so the doping scandals of recent times raise questions about the respective rights and responsibilities of players as workers who have engaged in, and are victims of, workplace misconduct. This chapter argues that the high level of control the clubs seek to exert over players lives, both on and off the field, warrants a correspondingly rigorous application of the employer's duty of care towards players, which means a high level of diligence by clubs in instituting supervisory practices to manage these risks.

The last part of the book contains a paper by Jason Mazanov, senior lecturer, School of Business, UNSW-Canberra, in which he examines the likelihood of code compliance from a psychological perspective and whether the code will actually deter doping. Reports from WADA suggest the compliance with the code has advanced considerably since its introduction in 2003 and continues to improve. The author argues that while there appears to be breadth in code compliance, actual code compliance lack depth, including anti-doping education.

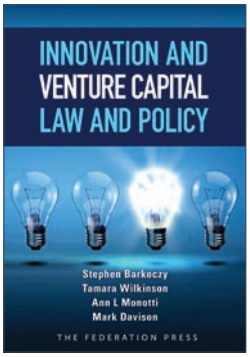
He suggests that evidence from the social sciences indicates that this is because the elegant legal framework that integrates the code, international treaties, domestic laws and contractual arrangements to regulate both international institutions and individual athletes, is inaccessible to athletes and support personnel and, as a result, is perceived as irrelevant to the practice of sport. This creates what the author refers to as a 'Chimera' of compliance, where the headline success of international compliance exists to the failure to achieve compliance with the code where it matters; the daily practice of athletes and support personnel.

The dust jacket to this work describes it as a 'unique international legal and cross-disciplinary edited volume' analysing '… the legal impact of doping regulation by eminent and well known experts in the legal fields of sports doping regulation and diverse legal fields which are intrinsically important areas for consideration in the sports doping landscape.' It well and truly lives up to this description. It is a must read for lawyers wanting to know more about the code and the complex web of legal and social considerations surrounding its enforcement. It is also a significant resource for athletes, officials, coaches and sports administrators.

Reviewed by Anthony Lo Surdo SC

Innovation and venture capital law and policy

S Barkoczy & Ors | Federation Press | 2016



This book appears to be original and seminal in its subject matter and approach.

It is said by the authors to have emanated from a research project funded by an Australian Research Council Discovery Grant awarded in 2012 to a research team in the Faculty of Law at Monash University. The research project was titled 'Designing World-Class Venture Capital Programs to Support the Commercialisation of Australian Research During and Beyond an Economic Crisis'. The project team included three of the authors: Professor Stephen Barkoczy (who devised the project); Professor Ann Monotti and Professor Mark Davison. Grant funding enabled the engagement of the fourth author, Ms Tamara Wilkinson, then a recent Monash law graduate, as a research assistant and project manager. The currency date for the book is February/March 2016.

Professor Barkoczy is the nominated author of most chapters, conjointly with Ms Wilkinson on those which describe venture capital investment and deal with various grant and other support or incentive programmes. The focus of all those chapters is aspects of venture

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capital investment and other aspects of innovation. In his sole authorship Professor Barkoczy gives an overview of the work, describes government programmes that support innovative entities, addresses perspectives on the appropriate role for the Commonwealth Government in supporting venture capital investment, describes Australia's existing capital raising and emerging crowd-sourced equity funding rules and Australian taxation of and vehicles for venture capital investment, and concludes the work with a discussion of policy issues in designing innovation and venture capital programmes.

Professor Monotti has authored two chapters on, first, universities as 'key drivers' of innovation and the role of venture capital in supporting the commercialisation of university research and, secondly, US innovation and venture capital programmes.

Professor Davison has authored a chapter on innovation and venture capital programmes in Israel.

Each of the three lead authors has had extensive experience in innovation, taxation, intellectual property and other relevant legal disciplines in private professional work, the academy and government consulting.

As Professor Barkoczy outlines in the overview chapter, the book describes the genesis and operation of Australian government programmes aimed at supporting start-ups and early stage companies, including the 'often complex and technical' legal and taxation rules governing their operation. An assessment of each programme is offered in terms of its policy objectives, practical operation and 'fit' within Australia's innovation system.

The United States and Israel are seen as worthwhile comparators because of their high (comparatively) percentage of GDP constituted by venture capital and their substantial increase in venture capital investment after the global financial crisis compared with a downturn in other developed economies including Australia.

As Professor Barkoczy and Ms Wilkinson develop in their chapter on the nature of venture capital investment, venture capital is a worthwhile study because of its 'ginger' role in pioneering commercialisation of new ideas, products, technologies and business models. Venture capital provides the test bed with a high degree of flexibility and can be an important engine for job creation.

The methodology is deliberately cross-disciplinary between relevant areas of law, economics and finance, in conjunction with anecdotal information gathered from discussion with participants in the innovation system.

The objective is stated to be, in summary (p 6):

> To use a multi-disciplinary approach to weave a tapestry that pulls together the salient features of a broad range of eclectic government programs from around the world that have been designed to assist start-up and early stage companies raise finance, crystallise their research, develop their products and grow their businesses. Our major objective has been to thoroughly explain the Australian programs and place them into an overarching framework that allows them to be conveniently analysed and evaluated. We have also raised various policy issues that the Australian Government may wish to consider in any future review of its programs.

The work is said to be (p 8) a technical academic text that is addressed at scholars and students studying innovation and venture capital law and policy.

Largely, the work achieves its significant and worthwhile objectives. Of necessity from its objectives, it is primarily descriptive and derivative in its evaluation but in that space it appears to be comprehensive, with extensive footnotes and references at the end of each chapter and a helpful index. The style is clear and easy to comprehend by readers with varying levels of expertise (one can skip parts with which one is familiar).

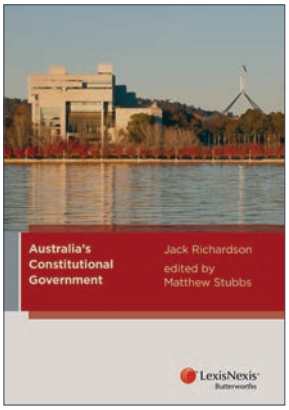
This reviewer would have liked to have seen (for instance, at pp 173 et seq and in the final chapter) more in-depth explanation and evaluation of the role of government as a necessity and a 'good thing' and what degree and type of government support for private initiative for profit crosses the line and ceases to be a 'good thing'. Certainly, there is much source material here for debate on those issues within policy think-tanks and within the processes for formulating government policy by choosing among specific options, and providing that source material appears to have been the primary goal of the work. As the book endorses, working to minimise a culture of aversion to risk-taking is a priority. The ability of government (which does not risk its own money and has deals with political demands in terms of removing regulation) to influence such a cultural change is a matter for debate.

This reviewer also was left wondering whether the discussion essentially in the context of publicly-funded universities in Australia applies, or could with appropriate policy and other encouragement apply, to private tertiary institutions. The rich heritage of innovation involving private tertiary institutions in the United States, which is examined in the work as a good comparator, seems to make this a useful area for further exploration.

Reviewed by
Gregory Burton SC, FCIArb, FCLA

Australia's Constitutional Government

By Professor Jack Richardson AO (ed. Matthew Stubbs)
LexisNexis Butterworths, Australia, 2016



Not long before his 90th birthday, Professor Jack Richardson mentioned to his friend, Robert Ellicott QC, that he'd been working on a manuscript about Australia's Constitution. He'd consulted widely on it, including with friends Professor Leslie Zines, Professor Patrick Keyzer and Professor Dennis Pearce. He was working on it tirelessly; he was aware that physical illness might halt its completion.

He died in 2011, just before he finished it.

At the time of his death, he asked his family to finalise the book, and ready it for publication. Matthew Stubbs, Associate Professor at the Law School at the University of Adelaide 'complet[ed]' it, as editor. Stubbs never actually met Professor Richardson; the author's son, Matthew Richardson, chose him.

Now having read it, Ellicott considers it a seminal work on Australia's constitutional development.

Stubbs has preserved the views of the author, but he updated the manuscript before publication to take account of new case law and new or consolidated legislation. In a few parts of the book where he disagrees with the views of Professor Richardson, he includes reference to alternative viewpoints.

The book is very easy to read. It provides a thorough overview of the important historical events leading up to Federation: Part One of the book is titled 'Colonisation to Federation' and includes seven chapters, including a chapter dedicated to the 1897-98 Convention Debates (which relies heavily on Quick and Garran's 1901 publication, *The Annotated Constitution of the Australian Commonwealth*), and a chapter on the first decade of Federation.

Each chapter is easy to follow, sign-posted with sub-headings. The author gives his opinion unapologetically.

For example, he discusses the backlash against the first governor-general, Earl Hopetoun, after he sent for William Lyne to be the first prime minister: Lyne, then premier of NSW, had been a prominent opponent of federation. Faced by such hostility, the governor-general, Richardson notes, '… appointed Barton, which he should have done in the first place'. As another example, the author notes that the first Commonwealth public administration included four new departments – Prime Minister's, Treasury, Home Affairs and Attorney-General's. In a footnote, he writes,

> The job of organising the elections fell to Robert Garran, who was appointed Secretary to the Attorney-General's Department. Deakin was the Attorney-General. His Commonwealth Franchise Act 1902 (Cth) was a masterpiece.

(As an aside, that legislation was five clauses long.) The book then includes parts focused on the specifics of the Constitution, such as Parts 2, 4 and 6 on 'The Commonwealth Parliament', 'Commonwealth Legislative Powers', and 'Commonwealth Executive Powers' respectively. These are interspersed with civic perspectives on Australia in the Constitutional context, such as Part 3 titled 'The Growth of the Nation'.

Part 3 includes a chapter on Aboriginal and Torres Strait Islander Peoples, and provides a short historical account of the treatment of Aboriginal and Torres Strait Islander Peoples, including governmental policies of assimilation that led to the Stolen Generation and the prime minister's apology in 2008.

The chapter touches on sections of the Constitution specific to Aboriginal and Torres Strait Islander Australians (s 25, s 51(xxvi), and the former s 127), accounts for the division of legislative power between the Commonwealth and the States for the treatment of Aboriginal and Torres Strait Islanders, and refers to the relevant Constitutional amendment to s 51(xxvi) and the deletion of s 127. It also includes a concise review of *Mabo v Queensland (No 2)* (1992) 175 CLR 1, and subsequent important native title cases. It includes short sections on Aboriginal sovereignty, the Northern Territory intervention, and the more recent push for Constitutional 'recognition'. (The book's editor, Matthew Stubbs must have included some information in this last section.)

Part 4 on Commonwealth legislative power includes eight chapters, each dedicated to a separate head of power. The chapters are sub-divided into short, pithy sections, and Richardson covers in concise language the important cases dealing with each head of power. The sections are particularly enjoyable to read because Richardson's prose is consistent and lucid. It is sometimes difficult to discern a purpose to the order of the sub-sections in each chapter, but this does not detract from the quality of the author's analysis, or the enjoyment in reading it.

Part 5 on 'Federalism' includes, amongst others, chapters on Commonwealth-State relations, inconsistency between State and Commonwealth laws, and the s 51(xxxvii) reference power.

Part 6 on the 'Commonwealth Executive

'Australia's Constitutional Government'

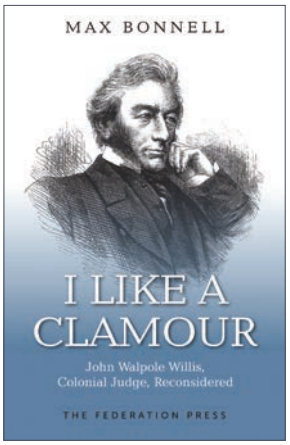
Power' includes a chapter on the powers of the Governor-General with reference to the double dissolution of 1975. It provides an overview of 11 principle criticisms of Sir John Kerr's decision, ranging from whether the governor-general ignored a convention that the Senate not reject appropriation bills essential to ordinary annual services of the government, to whether the governor-general had the reserve power to dismiss the Whitlam Government, and whether it was right for the governor-general to have secretly sought the advice of the chief justice of the High Court, Sir Garfield Barwick, and Justice Sir Anthony Mason (and whether they should have given it). The chapter is fascinating.

This book is not a Constitutional law textbook, but it includes thorough legal analysis on the most important aspects of the Constitution. It also includes fascinating insights into the historical and contemporary workings of Australian federalism. I think it would be a worthwhile book for law students and a very worthy, enjoyable, and provocative read for practitioners.

Review by Charles Gregory

I Like a Clamour: John Walpole Willis, Colonial Judge, Reconsidered

By Max Bonnell | The Federation Press | 2017



On 16 March 2017 Chief Justice TF Bathurst AC was the guest of honour at the offices of King & Wood Mallesons to launch a new biography of Judge John Walpole Willis.*

It is a great pleasure to join you this evening in launching the first comprehensive biography of the colonial judge John Walpole Willis, *I Like a Clamour*, and to give a few short praises to the book and its author, Max Bonnell.

As some of you may or may not know, Max has been moonlighting as a sports writer and historian for some time; he is by no means a new entrant to the literary world. But with the launch of his latest book, he takes the next logical step in his literary career, marking the collision of author, historian and lawyer.

For those who work with Max in commercial litigation and international arbitration, his choice for the subject of this book – an enigmatic colonial judge sitting in early nineteenth century Australia – might come as somewhat of an incongruence. Fittingly, it is paradox and incongruence that come to define the man at the centre of this book.

John Walpole Willis is a figure shrouded in controversy and intrigue. The book follows his life and legal career from his initial posting in Upper Canada, to his time as first *puisne* judge of the Court of Civil and Criminal Justice in British Guiana, and finally his position as a judge of the New South Wales Supreme Court and resident judge of Port Phillip, chronicling his ability to swiftly fall foul of the establishment in each fledgling community he visited. As Max highlights, for each contentious scenario 'there is a charitable explanation, and another that is less flattering to [Willis]'.[2] While historians to date have sought to position themselves on either side of the battlelines, Max seeks to paint a more nuanced picture of mixed motivations. Was Willis a pedant or an activist? A man of principle and conviction or vindictive and self-promoting? Stubborn to a fault or courageously resilient? The answer to each of these questions raised throughout the book is, invariably both.

In one example, Max teases apart the motivations and reasoning underlying Willis' decision in *Bonjon*, a 'careful demolition of the *terra nullius* fallacy … articulated 150 years before the High Court reached very similar conclusions in *Mabo*'.[3] Max warns that this decision was not motivated by a genuinely sympathetic attitude towards the Aboriginal people but rather a conscientious and principled application of the law, coupled with a desire to prove this intellect to his superiors. In framing Willis in this way, Max manages to wrest him from the status of caricature and transform him into a thoroughly humanised, albeit tragically flawed, individual.

The enduring legacy of Willis today survives not in his judgments, as rigorous and learned as they were, but in his role as

a bastion of judicial independence. While there is no doubt that Willis sought self-promotion at every turn, he never shied away from conflict, even when it came at the expense of his personal advancement. This 'noisiness', as the title suggests, goes some way to explaining the enigma that is Willis. Ultimately, what we can admire him for, and the reason why he is an historical figure worthy of reconsideration, is that, in Max's words, 'he chose to act as an independent judge even though he lacked the protections that make true independence possible'.[4]

Willis' story was ripe for the telling, its central protagonist is a character of colour and drama who attracted many a cause célèbre. As one journalist of the time recorded, 'as there was no theatre in town, Judge Willis was reckoned to be "as good as a play"'.[5] Max's book is also peppered with amusing titbits from history, from the unlikely first train accident to Willis' family connection to Queen Elizabeth II. While the facts alone paint a fascinating picture, this book is not just a recital of facts; it is accompanied by regular and incisive analysis, a credit to the author's perceptiveness and ability.

As with all good biographies, the book brings the historical period to life, providing an insight into the early colonies and, in particular, the establishment of the Supreme Court of this state. From this we can see the court room has changed significantly since the time of Willis, for one, moustachioed members of the profession were ejected from the court and chased to the nearest barber shop. If such a practice remained today in the age of the ironic hipster moustache, I'd be quite preoccupied. For another, the chief justice of the time, James Dowling, is recorded as having complained 'neither of my colleagues particularly love me'.[6] I can only hope the office of chief justice garners more affection today.

Late last year, I gave a speech on the judicial career of Sir James Martin who, at various times in the nineteenth century, occupied the roles of chief justice of New South Wales, attorney general and premier. I found his career fascinating, but Max's account of Justice Willis' even more so.

It is evident from this book that Max has spent a great deal of time pouring through primary resources and surviving records, for what is no doubt set to become the authoritative work on Willis, and a valuable contribution to the early history of the legal profession in this state. I congratulate Max for his dedication and hard work in putting together such a well-researched and insightful book and commend it to everyone here tonight.

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Endnotes

* I express thanks to my Research Director, Ms Bronte Lambourne, for her assistance in the preparation of this address.

2 Max Bonnell, *I Like a Clamour: John Walpole Willis, Colonial Judge, Reconsidered* (Federation Press, 2017) 38.

3 Ibid 174.

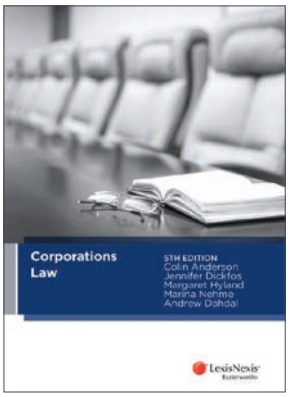
4 Ibid 48.

5 Ibid 209, citing Edmund Finn, *The Chronicles of Early Melbourne 1835-1851* (Heritage Publications, 1888) 67.

6 Ibid 105.

Corporations Law (5th ed)

By Anderson et al | Lexis Nexis | 2016



My school physics teacher was instrumental in the introduction of a new approach to the teaching of physics in the 1960s that encouraged students to learn through practical work rather than by rote. One of the results of this was that textbooks began incorporating pictorial representations of experiments with whacky physicists (an oxymoron or a tautology depending upon your point of view) encouraging students to try for themselves, clutching a handful of magic (maybe radioactive) beans and announcing in large speech bubbles the principle that needed to be remembered (or the take-home message in modern parlance). Incidentally, judged on this approach, the children's classic *Mr Archimedes' Bath* (Pamela Allen, Harper Collins Australia, 1980) could be said to be a classic of the modern physics curriculum!

It struck me when reading *Corporations Law* (Anderson et al, 5th Edn LexisNexis) that there has in recent times been a concerted effort to move the teaching and learning of law in a similar direction; and given the reputation that the law has for being arcane, in both study and practice, maybe a time lag of 50 years behind physics is not bad!

I searched hard, but ultimately in vain, in *Corporations Law* for the whacky and bewigged judge or barrister declaiming *Contra Proferentem, Res Ipsa Loquituor* or *Cuicunque Aliquis Quid Concedit Concedere Videtur Et Id Sine Quo Res Ipsa Esse Non Poluit.*

There were, however, Case Examples dotted throughout the text setting out the facts, issues and decision of notable cases, on a blue background with an image of a paperclip holding them in place; Objectives at the beginning of each chapter, on a blue background hanging as if on post-it notes; Problems at the end of each chapter, on a deeper shade of blue with a Discussion in the form of an Advice following, in blue ink on a white background and held in place by an image of a bulldog clip; and a list of Further Discussion and Further Reading for each chapter, held in place by images of two pins.

Corporations Law does not assume any knowledge of the fundamental principles or the history and development of the regulation of companies.

I remember vividly my law undergraduate tutor giving me advice that rote learning of the key cases and principles would just about scrape me through finals, but some additional critical analysis would achieve a comfortable degree. The rote learning then derived from the textbooks and law reports, while the critical analysis was provided by the *Modern Law Review* and the *Law Quarterly Review* (and the occasional lecture). None of those sources, however, had different font colours or backgrounds, let alone images of post-it notes, paper clips, bulldog clips or pins.

I have previously noted my aversion to considering problems or examples for imaginary clients in text books without being paid for my advice; and I am far from convinced about the inclusion in *Corporations Law* of a crossword of Key Terms in Company Law. As a practitioner, my focus is more upon the principles and relevant authorities cited; but in spite of some initial scepticism, I do have to say that, perhaps with the exception of the crossword, these initiatives make it an easier read.

The authors of this text are five academics, but this stress upon a practical application of the legal principles is effective. In the Preface, the authors of *Corporations Law* set out their intention to 'seek to provide a text that reduces the mass that is corporate law to manageable proportions, where the underlying principles and structure of the law can be clearly understood by the reader'.

The all-encompassing title of the book could be seen as somewhat ambitious; and a more detailed study of a particular area will require recourse to further texts or authorities. Judged by its stated aim, however, this book is a success.

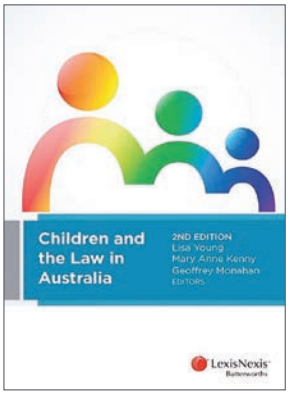
That should not be understood as damning with faint praise, since it goes well beyond a superficial review of the main principles and does include many useful points of detail (with relevant and supporting authorities cited).

Many practitioner texts assume a certain level of knowledge and can become bogged down in a level of detail where the prospect of achieving any overarching narrative is then lost. *Corporations Law* does not assume any knowledge of the fundamental principles or the history and development of the regulation of companies. As such, it is a useful starting point for a practitioner, particularly one with only a limited background or understanding in this area; and, although my undergraduate years are somewhat in the past, I suspect that it is rather a good student text.

Reviewed by Anthony Cheshire SC

Children and the Law in Australia, 2nd Edition

Lisa Young, Marry Anne Kenny and Geoffrey Monahan (eds) | LexisNexis | 2016



This anthology is a collection of articles that identify, discuss and theorise about children's rights and the laws affecting children in Australia. It is a second edition and the book has been updated to take into account recent events and changes in the legal circumstances affecting children in the past decade.

The book commences with a stark reflection on the current situation in Australia and the regression in many areas of the proper recognition of children's rights and the continued marginalisation and paternalism of children by successive Australian governments.

The first few chapters are commentaries on, and academic analysis of, the current state of the legal situation of children in Australia. However, the book moves fairly quickly to a more practical analysis of specific areas of law that affect children.

As a barrister that focuses on Family Law, I found the chapter that has the most immediate concrete application in my practice is Chapter Four titled 'Developmental Science, Child Development and the Law' by Jeannett Lawrence and Agnes Dodds. In my view this chapter provides a fertile platform to effectively challenge the various experts who provide family reports in parenting disputes.

For those new to the field of parenting disputes under *The Family Law Act* 1975 (Cth) the chapter by Lisa Young entitled 'Children and "Family Law"' is a great overview of the legislative framework, the leading cases and the common types of parenting disputes. There are similar chapters on Adoption (by The Honourable Geoffrey Monahan and Jennifer Hyatt) and Surrogacy (by The Honourable Chief Judge John Pascoe).

Likewise Chapter Nine, which looks at the care and protection jurisdictions in Australia and Chapter 18, which looks at medical treatment of children (and issues pertaining to consent of the child, the parents and the jurisdiction of the courts) are both chapters

This edition of Children and the Law in Australia, both because of the calibre of the writing and the breadth of topics covered, makes it a seminal text in the area.

grounded more in practical analysis of these areas rather than theoretical dissertations. Both would be handy to those interested in the areas or for those looking for an overview. Certainly as medical knowledge and accessibility of reproductive technology increases, in the context where children are rights' bearers and that they, as individuals, have certain privileges; legal disputes in these areas will become more prevalent. Chapter Three, which explores the law pertaining to the child in and ex utero, makes as much clear.

It is certainly my view that the legal solicitude for children has increased in the last 50 years and it appears that this trend will continue. This edition of *Children and the Law in Australia,* both because of the calibre of the writing and the breadth of topics covered, makes it a seminal text in the area.

Reviewed by Martha Barnett

Bullfry and the 'mess of puttage'

'Victoria is another country, they do things differently there' – Jack Bullfry QC after LP Hartley and 'The Go-Between'.
The scene: a cold morning before a tough CCA

Furthermore, and finally, there was, your Honours, a complete failure of the 'puttage' – to put it bluntly, there was very serious 'non-puttage'.[1]

The what, Mr Bullfry? Is that a golfing term; or are you channelling Esau?

The *puttage*, your Honours – not pottage – and nothing to do with golfing greens.

I am afraid that 'puttage' is a neologism that I have not come across before in the superior courts of New South Wales, Mr Bullfry – and I, for my own part, would not encourage its use.

If I may quote from a reputable reference your Honour – 'although the expression is colloquial, its useful brevity makes it acceptable in court'. It refers to what your Honours would probably prefer to be called the 'rule in *Browne v Dunn*' – in Victoria the notion of summing up the opposing case to controvert the witness has been described for a very long time as 'the puttage'. In other words, the complaint is that the opposing advocate did not 'put' or 'suggest' various matters to the witness to get his or her denial as a matter of procedural fairness.

But Mr Bullfry, surely Lord Goddard LCJ made it clear long ago that a question in terms of 'puttage' as you (and, as it seems, our Victorian brethren) so inelegantly express it, is inadmissible as to form. In *R v Bacon*[2] he says this about a witness confronted by 'the puttage':

> If the witness were a prudent person, he would say, with the highest degree of politeness: 'What you suggest is no business of mine. I am not here to make suggestions at all. I am here only to answer relevant questions. What the conclusions to be drawn from my answers are is not for me, and as for suggestions, I venture to leave those to others …' *It is right to remember in all such cases that the witness in the box is an amateur and the counsel who is asking the questions is, as a rule, a professional conductor of argument, and it is not right that the wits of one should be pitted against the wits of the other in the field of suggestions and controversy.*

And as Campbell JA has noted, '*Browne v Dunn* is a case more often talked about than actually read'.[3]

Well that may be because it is an extremely difficult case to find – it is in 1893 6 R 67 – a novice might think it is contained in that distinguished series of Scottish Session Cases reported by *Rettie* but as Winston Churchill once famously remarked, when you look at the volume and the date, they do not coincide – *Browne v Dunn* is obscurely reported in a short-lived series called simply, *The Reports*. And indeed Hayne J (a very distinguished Victorian) made the very point in *Axford v The Queen*[4] during argument for special leave that Lord Goddard made in *Bacon*. His Honour said:

> But on the view of the rule in *Browne v Dunn* which you [the applicant] advocate, it leads to prosecutors engaging in that mess of *puttage* which is sometimes seen, 'I put it to you that you intended to kill her', answer, 'No'; 'I put it to you that', et cetera, answer, 'No'; the jury, the accused, nobody is better informed. This accused knew the issue was, did he intend to kill or, as he had it, there was a dreadful accident in which her throat was cut.

And section 42 of the Act specifically permits counsel to put a 'leading question' to a witness in cross-examination. Now, 'leading question' is, perplexingly, defined to include a question 'which assumes the existence of a fact the existence of which is in dispute … and as to the existence of which the witness has not given evidence before the question is asked'.

But Mr Bullfry, is that right? On that basis it would be possible to ask an accused: 'when did you stop beating your wife?'

Well, your Honours, the whole of the law in this area is discussed by Steytler J in *Stack v State of Western Australia*[5] where his Honour concludes that there was always a power to disallow any leading question in cross-examination if as a matter of fairness the presiding judge so decided. And here we submit matters fundamentally went awry because the Crown case was not 'put' specifically to the accused.

But, Mr Bullfry, it was quite clear what the Crown case was. Your client, perhaps improbably, claimed to have misdirected the chainsaw while 'trimming' the garden hedge, at a time when his wife was nearby, hanging out some washing. Why he was using a chainsaw in the first place to attack rose bushes is a matter of speculation about which the jury was entitled to take its own view. And you will recall Sir James Fitzjames Stephen's infamous and cynical dictum that once you know parties are married, you remove any need to prove a motive. Here, in addition, he had told the widow who lived next door that he expected to be able to 'make her an offer she could not refuse' within the next fortnight. Add that to the insurance recently taken out over the deceased's life, and the attempt to claim it was all an unfortunate accident begins to take on a different forensic complexion.

Well, if your Honours are against me on the primary point, I had better move to the sentencing. As to that, we submit that not enough weight, (if any at all) was given to the testimony which referred to his unhappy domestic situation, and the ridicule which his gardening efforts customarily attracted.

I am afraid captious uxorial references to a continuing gardening failure do not justify those actions implicit in the jury's finding, Mr Bullfry. The appeal is dismissed, and the sentence is confirmed.

Endnotes

1. In Victoria, the argument is usually put in terms of non-puttage – see *Buchwald v The Queen* [2011] VSCA 445 per Hansen JA passim.
2. (1925) 18 Criminal Appeal Reports 174, 178 – 179.
3. *Khamis v Regina* [2010] NSWCCA 179 at [2] – [3].
4. [2000] HCA Trans 171 seeking leave to appeal from the decision of the Western Australia Court of Criminal Appeal at [1998] WASCA 100.
5. [2004] WASCA 300 at [76] – [105]. And see per Young J in *GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd (No 3)* (1990) 20 NSWLR 15 at 17 – 18.

Caesuras

By Advocata

It was 27 January and the gun metal of the Wentworth lift had smothered the last of my holiday cheer by level 5. Slack-jawed, I watched the illuminated numbers edge higher as my spirits tipped with each passing floor. A grinning chap in the corner wearing chinos and a polo shirt ignored all my non-verbal cues and beamed a hearty 'Hello'. I didn't know his name but we have smiled and nodded in passing for years and the window for asking it seemed to have long ago ended. 'Hello' I said 'How was your holiday'? 'Brilliant' he replied, turning his goggle tanned face my way. 'Did you go skiing' I obliged. 'We did actually' he said. By rote, I asked 'Great, where did you go'? 'A little town near Salzburg whose name I can't tell you because no other barrister in Australia knows of it' he near-yodelled as he strode out.

As I later workshopped my *l'esprit de l'escalier*, I couldnt help having some empathy with my skier friend. There is something quite dispiriting about taking a very long trip away only to discover that half the bar has the same idea of a dream destination. I shared the January that I spent shunting around the green runs of Colorado with enough floor members to constitute a quorum. Another year, I was tucking my little child into a pretendie jail bed at Alcatraz when I noticed one of my leaders peering through our cell bars with his audio guide headphones on. I once spent the entire drive home from the south coast scrapping with my husband because I let our toddler walk out into the surf rather than lean down in my bikini to pick her up in front of the retired judge I was chatting to. Another time, I was robustly trying to free my child's hand from a lolly jar in an LA aiport lounge when a judge materialised to assist on the (I think still uncorrected) misunderstanding that I was one of the court's staff.

The obligatory January exchange of holiday experiences may be permanently tainted by something between a spot and a lot of boasting but the currency has perhaps recently changed. Desirability of destination seems to have been overtaken, at least amongst the junior bar, by the time spent away. Wagging December to facilitate a three month 'sabbatical' somewhere that is typically experienced by people in their twenties with backpacks may now speak success louder than a cosy couple of weeks in an Aspen condo or a stay-cation at a house in Palm

I was robustly trying to free my child's hand from a lolly jar in an LA aiport lounge when a judge materialised to assist on the (I think still uncorrected) misunderstanding that I was one of the court's staff.

Beach that you happen to, well, own. These sabbaticals are not, of course, to be confused with the kind where you aim to achieve a goal. Those remain monopolised by the serial overachievers and their country cousins, the workaholics.

As much as right-minded people are compelled to mock the ostentatiousness, it seems compassionate to focus upon each other's enjoyment of holidays in late January rather than to fossick around peoples' frames of mind. The prevailing assumption is that any holiday was better than being back in chambers. One of my readers described her holiday as 'a joy' which 'amounted to the suspension of selling my time to strangers so that I could finish breakfast and provide my GP with my banking details for the Medicare rebate'. A colleague said that he had enjoyed the entire Elena Ferrante series while his wife and mother-in-law packed up his late father in law's estate around him. 'The best part of the court vacation' said my friend 'was that I felt less tired when I woke up than when I went to sleep'. Another told me that he spends January replacing his mind's swill of random details about other people's business affairs with bits and bobs about his children. All proof that happiness doesn't write white.

People's routines around returning to chambers are idiosyncratic. For some, freedom dies slowly and never before Australia day. Birkenstocks and half-suiting can linger for weeks. Beards erring a little far towards Kenny Rogers well into mid-February. Children, and the occasional pet, are cheerful companions. Active wear all day is not entirely out of the question. Others resume normal operations, including Silks sandwiches for lunch, by the first day of term.

In the words of my friend explaining his deferred retirement 'I bill therefore I am', and perhaps the true mark of a return to enterprise is time recorded. It's alarming that there appears to be an increasing cohort of barristers who don't take a break of any substance in January. A smaller group claim not to begrudge this. I have heard those who work through the court vacation described as 'the needy and the greedy' but this ignores the nuance. A batch of urgent interlocutory briefs taken before Santa has made it back to Mrs Claus seems to have founded many a new silk's first year of practice at the inner bar. Two weeks on the south coast may not seem as enticing if you got a bit carried away in the spring property auctions. More often than not, though, the holiday was murdered by a hearing that was imprudently set down for the first few weeks of term.

People, as they justify this bungle, can rarely put their finger on exactly how it

happened. A silk, bitter about leaving his extended family behind in the Dolomites, once told me that he was now intending to go to all directions hearings in each of his matters as a prophylactic measure. Putting litigation costs to one side, there may be sense in this. My biggest disaster of this kind occurred when I thought we were before the judge to set a timetable for expert evidence. There had been some defaults. His Honour was demonstrating the phenomenon of being deeply certain about how long was needed to prepare a joint report on the basis of a fleeting familiarity with

It's alarming that there appears to be an increasing cohort of barristers who don't take a break of any substance in January.

the pleadings. People were wanting their money. Suddenly, the focus took a nasty and unpredictable turn towards a hearing date. An early hearing date in the new term. Before I could stop the buzzing in my ears to say something honest like 'But we are going to India' there were three weeks in the diary from 31 January; with submissions by Christmas Eve and replies on Australia day. There was a little joke about work product on Australia day being unpatriotic, so the judge made directions for the 25th.

'Do you think that judges forget the human cost of a big case at the start of term' lamented one of my colleagues after receiving a casual email to confirm that a matter had been set down for many weeks at the start of the next year 'or is it *Schadenfreude*'. 'It's the solicitors' said another 'the senior associates have to work in January anyway and it keeps the billings up'. 'Old silks love it too' he continued 'they only get a couple of cases at a time and at their rates if they work all of January that's sorted September in Tuscany. And it's not like they really need to spend weeks with their kids anymore'. The conversation continued towards developing an algorithm until our wronged friend said 'But how am I going to deal with this?'

His question transported me back to my Sisyphean effort that January and how I still haven't gone to India. As a counterpoint, my silk spent the summer in France and had not returned by Australia Day for the reply submissions. I dutifully emailed my draft to him sometime before this with an apologetic covering email. I told my solicitors that we should allow a day or so and then perhaps try to organise a call - maybe from the airport. Surpisingly, he replied a mere half an hour later. From the first glance the email seemed uncharacteristically long. I read it with a certain nervous foreboding as I rather hoped to spend the next few days camping with my children to rustle up some abridged happy holiday memories.

I can no longer repeat perfectly what my leader wrote but at least the first page of that email was a very fine description of Paris. The restaurant, the dinner, the matching wine. The contagious Frenchy bonhomie. Bridges, mist, moons and the cheese and armagnac trolleys; he captured them all. For a moment, I too was lost in the beautiful city. Finally, my leader left a few lines and wrote:

'So serve what you want'.

This seems now, as it did then, a perfect response to the dilemma.

Bench & Bar v Solicitors Golf Match

By Dennis Flaherty

After the 2016 event and then looking forward to 2017 I asked the question: - 'Is a threepeat possible?' On 23 January 17 at Manly Golf Club that question was answered in the affirmative - by the narrowest of margins or on a technicality (depending on your point of view).

Of the nine games played (slightly down on last year) the Bench & Bar were victors in four and the solicitors four. The 9th game was tied. The final result was: 4½ to 4½. But because the Bench & Bar had won the 2016 event and the solicitors failed to win the 2017 event, the mace of the late Sir Leslie Herron (suitably engraved to record the victory) will remain in the chambers of Justice Robert Hulme for another year. So I call that a win (of sorts).

Congratulations to all members of the Bench and Bar who participated. As usual a wonderful dinner at the clubhouse ensued. Can we retain the mace in a more emphatic manner in January 2018? Come along and be part of the fun (and drama). Meanwhile, happy golfing!