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Cover: By Rocco Fazzari

Technology is coming, but fear not

The Federal Court is rightly proud of its electronic file system. Judges access digital documents. Those who prefer to work on paper have their associates print the material. But the default starting point is that the material is provided, and viewed, on a screen.

Yet in court the default starting point is paper. Practitioners may use digital devices, but all documents that are to be shown witnesses, tendered or otherwise provided to the court are printed.

So it was, and so it remains. For now. Change is coming.

It is starting slowly. Appeal benches are now making directions for authorities and appeal books to be provided electronically. Where there are no witnesses and no fresh evidence, there is no need for paper. It is a matter for the parties if they wish to use a paper copy.

In the next decade, possibly in the next few years, the court will move from paper being the default to digital documents being the default.

Why? Not simply to reflect modern ways (after all we still wear black robes and jabots centuries after they went out of fashion). It will happen because it is cheaper and quicker: two of the three fundamental principles that underpin all proceedings: s 37M of the Federal Court Act.

Having documents accessible electronically saves court time. The Victorian Bushfire Royal Commission estimated it reduced hearing time by 25 per cent. Even the most old-fashioned of registrars (and Warwick Soden is not one of those) will not hesitate to take advantage of the potential for a substantial increase in hearing time without a corresponding increase in judicial costs, staff costs and hearing rooms.

It saves costs in printing, organising and transporting paper. In a recent case a client decided to buy an iPad to show witnesses the tender bundle. The iPad cost half what it would have cost to print another copy of the bundle.

Using digital documents rather than paper is also easier. Not initially, I accept. It takes a little time to learn how to use a tablet or laptop to access documents as easily as one can find them in a folder. But after no great practice it turns out to be much quicker to

locate a document in an electronic file than in a multi-folder brief.

Those who like to scrawl on their briefs, and tag them with post-it notes, will resist. That is, until they find there are programs using tablets that allow all they could do before, plus the added convenience of word searches and hyperlinks between documents.

These issues were discussed at a recent Federal Court Digital Practice Forum, an event covered in this edition in an article written by Joe Edwards.

I shudder to think of the misinformed, misogynistic and other downright offensive comments that might be made on any app that seeks to rate the bar, assuming it could be accessed by anyone, including witnesses, opposing parties and members of the public who read about cases in the press.

The conference identified obvious access to justice concerns when moving away from paper. Technology should not be a barrier to justice. The concern being voiced in that regard was not a concern for aged barristers unable to navigate a world of pdf documents. Rather, those who represent indigent and disabled clients are concerned they would not have the devices necessary to read documents or would have difficulty using them. And the Law Society, representing thousands of suburban solicitors who occasionally but rarely litigate, is concerned that new technology not be introduced that requires those solicitors to invest significant sums in new technology and training.

They are legitimate concerns. They can be readily met. What follows are my views as to how it can be done.

First, it needs to be led by the court. If the judge is viewing the documents electronically two things will happen. First, the court will want the documents sorted and indexed in a way that allows them to be most readily found and used electronically. Second, lawyers appearing in court will naturally tend to mimic the judge – it is after all effective advocacy to see the case from the judge's viewpoint. A judge that is insisting on everything being on paper is one that will, expressly or implicitly, reduce the likelihood of electronic documents being used, or at least being used effectively.

Hence, the starting point ought to be a move to a new default position. Just as the court currently has all its files in electronic form, but can print them, all documents in court should be provided electronically, although can be printed.

To address access to justice issues, the documents that are filed in advance should be able to be viewed in court by those appearing via screens that are part of the court furniture. Parties can bring their own, but no party should be deprived of the capacity to see documents being referred to because they do not have their own device.

Whenever a document is referred to it should be able to be brought up on each screen. This could be done by the associate having the capacity to identify any document that a judge or party wishes to refer to, which would then appear on the common screens.

It requires a protocol to be established for indexing. Again this must be led by the court, although it could be assisted by a practice note governing how files are to be electronically filed.

There is electronic filing now. All documents filed currently go into an electronic

dataset containing indexed digital documents. That particular dataset cannot be made available to all parties, since it will contain material confidential to the judge, and may contain material that is the subject of confidentiality orders. However a separate electronic dataset could be readily created, in the manner of a paper court book, that duplicates so much of the documents as need to be available at hearing.

Creating an electronic court book sounds complicated, but it could be very readily simplified. If not done by the court itself, then each party could be directed to upload documents by type (pleadings, affidavits, exhibits, etc) by logging into a webpage, or in due course, an app. The index would be created automatically. It would be part of a dataset which each party, as well as the associate when in court, could access (and from which the bundle could be downloaded). The documents could be updated during a hearing, by the parties themselves or, in the case of litigants who do not have the capacity, by handing documents to the Associate who could have them scanned into the dataset.

Any changes should be introduced gradually, with a trial period in a particular registry and/or practice area to iron out the wrinkles.

Suburban solicitors with access to the internet would need no additional technology to upload the documents. If they can access the internet and email they have all they need. Once the court book is created they can continue to print them, if that is their preference. The book will print with an index and page numbers that correspond with the electronic version. Or they can take the next step and go to court with a tablet or laptop.

It will require some additional resources and training, but the cost savings and increased productivity will quickly be greater than these costs.

Will it change the bar?

This edition carries an article by Penny Thew summarising aspects of the excellent ABA national conference rise2018 recently held in Sydney. Chief Justice Kiefel AC, the first keynote speaker spoke about *Change in the Legal Profession*. She noted that before kings counsel came to the fore, the lead advocates at the English courts were the serjeants-at-law. Their demise was in part brought about by technology. They specialised in oral pleading, a skill that became unnecessary with the introduction of written pleadings.

Photo by Markus Spiske on Unsplash

While the chief justice echoed a prediction that the next two decades will see more change in the legal profession than has occurred in several hundred years, she nevertheless saw a future for the bar in a world of artificial intelligence. Her Honour identified that it is the human ability to evaluate complex evidence and apply legal reasoning and logic to cases with competing possible outcomes that will ensure that this edition's cover page does not come about.

The second keynote speaker, Chief Justice Bathurst AC, continued the theme. He identified how much has changed already from the time he started practice; when trolleys were only used for shopping, and phones were attached to the wall. He too saw in the near future rapid change to the practise of law with the advent of technology. He noted the Supreme Court was already doing away with the time-consuming and costly directions hearings by moving to the use of a virtual courtroom.

Bathurst CJ also predicted there will soon be a Tripadvisor-like app that rates barristers. *Baradvisor*, as he dubbed it, would allow clients to rate and rank barristers in real time. I can see it now: A Bell SC, 4 stars, 'Whacked the other side. All you expect a barrister to be – Would have given him 5 stars, but we lost'.

This notion, which is said to be inevitable, is amusing but frankly horrifying. It brings to mind comments made by Julia Baird on the first morning of the rise2018 Conference: she spoke of her experiences as a prominent woman using social media – how the anonymity of the online world gives rise to the most appalling communications. I shudder to think of the misinformed, misogynistic and other downright offensive comments that might be made on any app that seeks to rate the bar, assuming it could be accessed by anyone, including witnesses, opposing parties and members of the public who read about cases in the press.

Technology continues as a major theme in this edition. Farid Assaf SC has written an excellent article providing an overview of artificial intelligence and its increasing use in the legal profession. He introduces us to IBM's Watson, a proto-type question-answering computer that foretells a not-so-distant future when computers can understand a legal question, conduct research and provide an answer.

Emma Beechey gives us a ~~Dummies~~Bar-

rister-guide to cryptocurrency and blockchain. Something you can digest and then perhaps speak confidently about with your younger relatives over the summer holidays.

We have two excellent pieces from our regular opinion writers. Geoffrey Watson makes out the case for a federal ICAC. Can it seriously be suggested that our federal politicians and public servants are immune from the temptations that have beset their contemporaries at the state level? One can well understand the nervousness of politicians to create a body that has the potential to ruin a career – but surely the benefit of exposing corruption outweighs the costs.

Anthony Cheshire examines the merits of the current standard path to the bar: i.e., first spending some years as a solicitor. He ponders whether it would be better, for some at least, to be told to come straight to the bar after graduating, rather than first spend years practising as a solicitor. He asks, provocatively: is the fact that lawyers come to the bar later in Sydney than in London a reason why our bar has a much lower percentage of women? Should the bar be encouraging all those with an interest to come earlier? And what can be done to assist them when they get here? He notes the practice adopted by the UK of the chambers providing an income to readers.

Richard Scruby and Brenda Tronson provide a very important analysis of the extent to which women at the NSW Bar appear in hearings in superior courts. Summarising the output of huge amounts of work done by the Bar Association's Equity and Diversity Committee, they confirm by charts and text that appearances by women are statistically fewer than the percentage of women at the bar in all superior courts other than in the NSW Court of Criminal Appeal and the Family Court. That is particularly the case in respect of private (non-government) work, which of course is more highly remunerative. This fact correlates with earlier published analysis showing a significant remuneration gap between women and men at the bar. The analysis tends to support the importance of promoting equitable briefing policies. Such policies are applied by government, while their take up in respect of private work is patchy.

A must-read for senior juniors considering taking the next step is the conversation between Gail Furness and five recently appointed senior counsel. They speak about the process of applying, the day of the announcement, and, one year on, how it has affected their practice.

Belinda Baker has written a fascinating piece on the use of foreign judgments, called 'Dangerous Dicta'. She examines when it is useful to cite the decisions of foreign courts, and how to research foreign law.

As usual our recent developments team, now Victoria Bridgen, Daniel Klineberg and Belinda Baker, have collated a series of short pieces summarising recent decisions of note. Of particular interest is the decision of the Supreme Court of Nauru to permanently stay the prosecution of the 'Nauru 19', accompanied by some photos, including one of the team from the NSW Bar who represented them pro bono. There is also a summary of the Supreme Court of India's decision declaring constitutionally invalid the crime of consensual homosexual sex. It is accompanied by another fantastic illustration by Rocco Fazzari: see if you can name his pen portraits, being four of those quoted in the almost 500-page judgment.

On the subject of illustrators, we welcome a new contributor, Jerome Entwhistle, who recently joined the bar and Banco Chambers, who has penned two great cartoons in this edition. We welcome any other cartoonists, illustrators or writers who wish to volunteer contributions for future editions.

This being the Summer edition, there are a number of articles about things to enjoy during the holidays. In addition to reviews of books, there are also reviews of podcasts and even a film. Belinda Baker's review of series 3 of the podcast Serial is well worth reading. We may shake our heads at the US criminal system, but there are analogies to our own justice system which give pause for thought. We may not have judges that threaten to revoke bail if an offender has a child out of wedlock, but does our system also have a tendency to treat 'the usual suspects' differently and to their disadvantage?

Can I finish by thanking all those who contribute selflessly to *Bar News*. *Bar News* seeks to reflect the bar, written by the bar. It is truly a team effort. In addition to the authors, there is so much great work done by the *Bar News* committee and Bar Association staff, in particular Chris Winslow. Happy holidays!

CORRECTION

Regional Practice in 2018 [2018] (Spring) Bar News

By Alexander H Edwards and Ting Lim (Bar Association)

Following the publication of the article 'Regional Practice in 2018' in the 2018 Spring edition of *Bar News*, correspondence was received from members of Orange Chambers and Sir Owen Dixon Chambers noting that they had not been included in the data presented in the article.

The article provided information drawn from records held by the Bar Association as to the numbers and location of barristers practising outside of Sydney. The article should have noted that the dataset on which it was based, relied on data each barrister nominated to the Association as their principal place of practice, and was valid as at November 2017. Members who listed their principal place of practice as a Sydney-based chambers but who also hold a door tenancy in a Chambers outside Sydney were unable to be included in the statistics published in the article as the association does not currently collect that data.

Sir Owen Dixon Chambers - Newcastle was established in April 2016 and currently comprises 11 members.

We are told by members of Orange Chambers that it was established in 2016 and comprises six members.

Advocacy, independence and the future of the independent bar

By Tim Game SC

It is a privilege to be elected to serve as president of the oldest independent bar in Australia.

One of the immediate demands that come with the office is to be greeted with an invitation to pen a column for the Summer edition of *Bar News*. Readers of recent editions of this journal will have seen the thoughtful contributions made by my predecessor, Arthur Moses SC. I wish to thank him for his service, dedication and the tenacity he brought to the presidency. Through his advocacy, the Bar Association has informed policy debate and law reform on a wide range of issues, along with issues of specific concern to barristers and their practice. I wish Arthur every success in his next role as president of the Law Council of Australia and very much look forward to working with him and the Law Council in 2019. Thank you Arthur.

In my first week as president, the New South Wales Bar Association had the honour of co-hosting the national conference in Sydney with the Australian Bar Association. This was an opportunity to welcome colleagues from around the country and overseas. We were also honoured to hear addresses from chief justices of the High Court, Federal Court and the Supreme Court of NSW, and the attorney-general of Australia, along with many other eminent speakers. I'd like to say a little about a consistent theme that emerged from these papers.

Chief justice of the High Court, the Hon Susan Kiefel AC, began with a speech that traced the origins of an independent bar from the emergence of the Common Law courts from the 12th and 13th centuries. From that point, barristers have performed a critical role in the relationship involving bringing about the resolution of legal disputes by the Common Law courts. Despite all the trials and tribulations, the bar has long thrived as the independent interlocutor between citizen and the judicial arm of government.

Chief justice of the Supreme Court of NSW, the Hon Tom Bathurst, developed a very similar theme but in the context of the future, and with specific reference to the commercial bar. His Honour's essential point was that whatever change is wrought

If the independent bar is to survive in Australia it has to be as a unified, national profession.

by technology, including artificial intelligence, the activity of advocacy, and for that matter judging, is essentially a human one to be done by independent, trained advocates on the one hand, and independent deciders of cases, namely judges, on the other.

Chief justice of the Federal Court, the Hon James Allsop AO, drew out the essentially fiduciary nature of the relationship between the barrister and the client, and a parallel obligation to the court. His Honour also made the explicit point that if the independent bar is to survive in Australia it has to be as a unified, national profession.

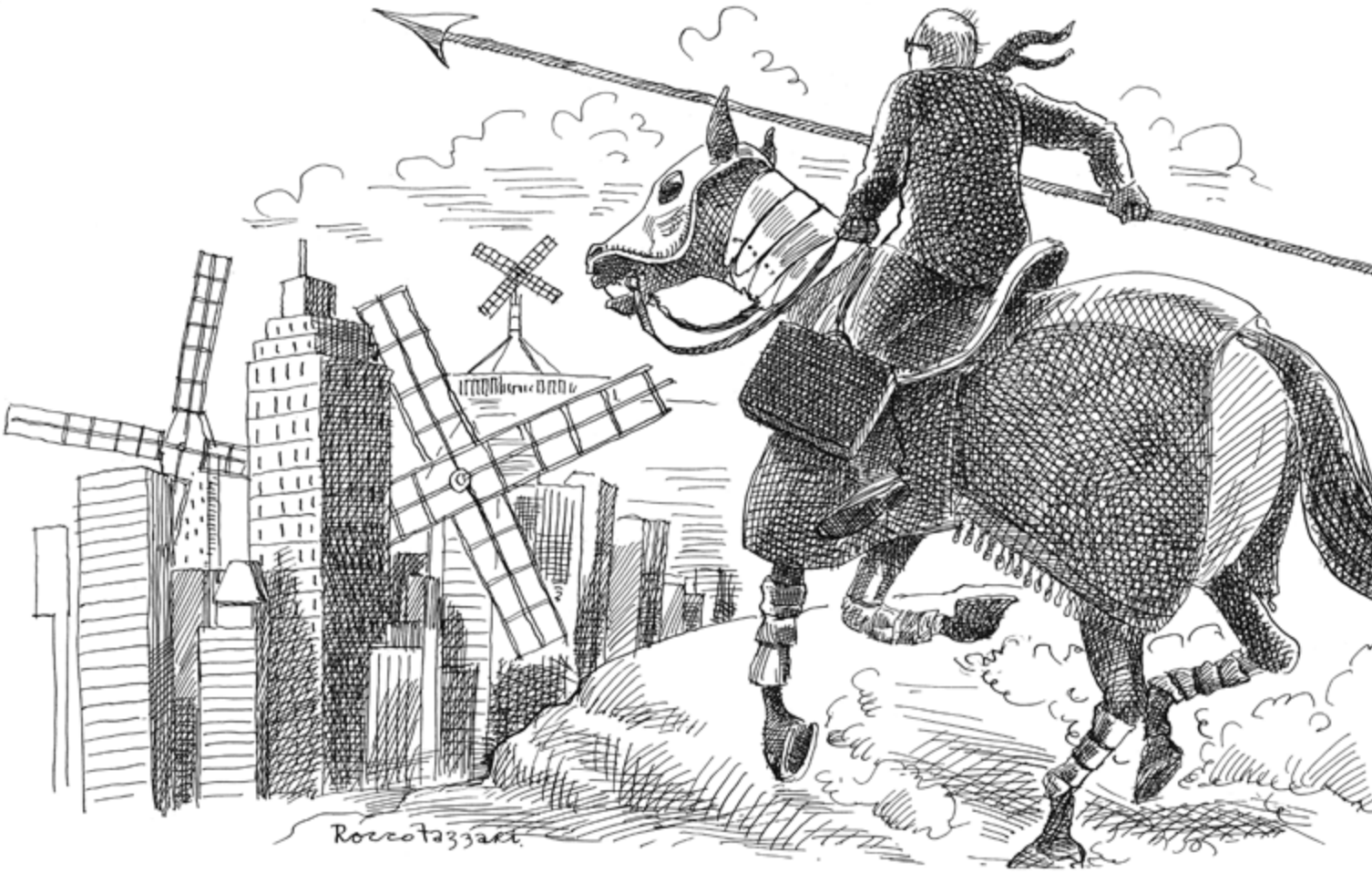
The federal attorney-general, the Hon Christian Porter MP, among other things also addressed the challenges to the profession of the development of artificial intelligence, both good and bad.

Apart from these keynote speeches, there was a refreshingly intense level of presentation and engagement in each of the separate streams that took place over the two days of the conference. This included a presentation from the Hon Justice Virginia Bell AC in the criminal stream on the emergence of the criminal jurisdiction of the High Court, with particular reference to the critical role in that regard of the NSW public defenders over a long period of time. Former chief justice the Hon Robert French AC delivered a speech in which he spoke about the abandonment of exceptionalism in statutory interpretation of tax legislation. He also demonstrated something that I had not fully appreciated, which was that much of our law concerning the construction of privative clauses comes from the taxation context.

If one wanted to summarise the overriding theme of the conference, it could be put in the words of Chief Justice Allsop: 'Without independent representation informed by the fiduciary principle and the duty to the court the protective judicial power is stunted. So, the profession, and so the independent bar, forms an integral part of the judicial process and so judicial power.' It was a privilege to be involved in such an intensely engaging activity (particularly since all the hard work and preparation for the conference had already been done by others!). I wish to particularly thank the former president of the ABA, Noel Hutley SC, and Arthur Moses SC for chairing the conference steering committee and recognise the tireless efforts of the CEO of the ABA, Cindy Penrose, and the executive director of the New South Wales Bar Association, Greg Tolhurst, and staff of both associations in planning and executing the conference.

May I take this opportunity to wish you and your family a restful summer break and a Happy New Year. I look forward to seeing you in 2019.

NEW SOUTH WALES
BAR ASSOCIATION



Why we need a Commonwealth commission against corruption

By Geoffrey Watson SC

The Hon T F Bathurst AC and N A Wootton recently presented an important paper at a symposium on Australia's public integrity institutions. The Bathurst and Wootton paper traced the purposes, activities, powers, and challenges facing integrity commissions around Australia, with a view to identifying particular issues which might confront the creation of a national anti-corruption agency. None of the problems are insurmountable. The real issue is not whether we can have a federal agency, it is whether we should have such an agency.

I say the case for the creation of a federal integrity commission is compelling.

Public sector corruption is the most serious crime on the planet. It dwarfs the international drug trade – which, incidentally, could not continue without corruption in the public sector. In 2014 the World Economic Forum

estimated that the international cost of corruption was more than $3 trillion annually – that is more than five per cent of the global GDP and twice the size of the Australian GDP. The World Economic Forum has estimated that corruption increases the cost of doing business by up to 10 per cent.

It is not just a matter of money; we are talking about lives. Twenty thousand human beings die each day from starvation and preventable diseases. In 2005 the World Bank estimated that between 20 per cent and 40 per cent of all official development assistance was simply stolen. Researchers have conservatively estimated that if corruption could be reduced 5,000 human lives could be saved each day.

'*So what*' – you say – '*that is the third world*'. Well, I accept that corruption in Australia is less than it is in the third world, but it is still a serious problem here, and it is becoming more serious. A well-respected annual study by Transparency International rates nations in terms of their public sector corruption. The recent studies show that Australia's rating has fallen year after year (incidentally – yet another area where we badly trail New Zealand). This is an independent study by a highly respected body and it shows that corruption in Australia is worsening. This accords with public opinion

– recent polls show that only 15 per cent of Australians trust our federal politicians, and 85 per cent believe there is corruption at a federal level.

Perceptions are important, but even more so when the problem is real. The problem is real. In a 2016 census 3,000 federal public servants reported witnessing conduct of fellow public servants which was inappropriate or illegal. The conduct included nepotism, blackmail, bribery, fraud, and collusion with criminals. That was in only one year. And that is a startling figure given the secret nature of corruption – if that is the corruption being observed, then the actual rate of corruption would be orders of magnitude higher.

We need a federal anti-corruption agency for two principal reasons. The first is noble – it is to help restore public confidence in the federal public sector. The second is more visceral – it is to actually catch and punish the criminals profiting from corruption.

I might add that there is also a practical need for such a federal agency. Think about the current inquiry initiated by the South Australian government into the rorting of allocation of water in the Murray-Darling scheme. The work of the commissioner, Bret Walker SC, has been stymied by the reluctance of other governments, federal and state, to cooperate with his inquiry. It seems that only an overarching federal agency will be able to solve this problem.

Why don't we already have a federal anti-corruption agency?

I might be naïve, but it surprises me is that there is any opposition to the creation of a federal anti-corruption agency. Why would you oppose measures to fight crime? Why would you oppose fighting public sector corruption? The fact of the existence of any opposition is disturbing. It is even more disturbing when you look at the identity of some of the opponents.

Two of the strongest opponents to the creation of a federal anti-corruption have been the Australian Public Services Commission and the free-enterprise think tank, the Institute of Public Affairs. There are connections between them.

In 2017 the Australian public services commissioner, John Lloyd, made a submission to a Senate Select Committee denouncing the call for a federal anti-corruption agency (his statistical basis for doing so was deeply puzzling – as I explain below). In 2018 Mr Lloyd resigned from his position following controversy over his relationship with – you guessed it – the Institute of Public Affairs.

Meanwhile the Institute of Public Affairs will not reveal the identity of those persons funding its relentless campaign to forestall a federal anti-corruption agency. It really makes you wonder.

And the reasons proffered as to why there is no need for such a commission are puzzling. Three are given: that there is no corruption at a federal level; that such an agency would be too expensive; and that there is no need for such an agency as there are organisations already attending to the task.

Each of these arguments is obviously wrong.

No corruption at the federal level

It is foolish to contend that while there is corruption elsewhere, somehow, federal government remains pristine. In 2014 the then prime minister, Tony Abbott, dismissed the need for a federal anti-corruption agency out of hand – he said that was because, to his mind, Canberra was a '*pretty clean polity*'. That sounds more like a creed, rather than a considered statement of policy.

In accordance with the Abbott creed, it has repeatedly been said that there is no data supporting corruption at a federal level. This argument is not only absurd, it is circular. We have no data because we have no agency collecting the data. Without a federal agency armed with the appropriate investigative tools, corruption remains undetected. On the Abbott argument the longer we postpone creating an agency with the ability to find any public sector corruption, the less corruption there will be.

An even stranger view was advanced by the gentleman I mentioned before – John Lloyd, the Australian Public Service Commissioner. In his submission to a Senate Select Committee Mr Lloyd explained that a national integrity commission was unnecessary because the incidence of corruption in the federal public service was inconsequential – as he put it, in 2016 'only 4 per cent of Australian public service employees reported having witnessed another employee in engaging in behaviour they regarded as corrupt'. What? What do you mean – '*only*' 4 per cent? In 2016 there were over 155,000 federal public servants. Using Mr Lloyd's figure, something like 6,200 had witnessed corrupt conduct. That level of corruption is serious – it warrants urgent action.

We have seen this same argument play out in the real world in recent times. For many years a succession of Labor and Coalition governments in Victoria claimed there was no need for an anti-corruption body because there was no corruption. Despite the confidence of those assertions, since its inception in 2012 Victoria's IBAC has proceeded to reveal rampant corruption in several government departments.

The state-based anti-corruption bodies have demonstrated widespread and deep-rooted corruption in the public sector. It is block-headed to think that corruption is occurring in Brisbane, Sydney, Melbourne and Perth, while Canberra remains immune to the illness. I will stop this now – it is frankly ridiculous to assert that there is no corruption in the federal public service.

Too expensive

This argument is not only implausible, it is bad economics.

The leading economist Richard Denniss sees an effective national integrity commission as an essential component in encouraging and maintaining foreign investment. International studies demonstrate that any kind of corruption will act as a deterrent for foreign investment; foreign and institutional investors want certainty and protection. A common question relates to anti-corruption controls and regulations. Other countries competing for the money point to their own independent agencies as a lure to investors. We do not have one. According to Dr Denniss a federal integrity agency would quickly pay for itself.

And if it really is truly a question of preserving public money, then possibly some or all of the funds currently allocated to the National Windfarm Commission could be diverted toward a National Integrity Commission. Another means might be to cut back the current spending on the federal body known as the Independent Scientific Committee on Wind Turbines. I sense that actually fighting corruption is more important than tilting at windmills.

The need is pressing. Surely the money can be found.

No need for a central agency

This is a more complicated issue. We already have several federal agencies which can examine aspects of corruption – described as a '*multi-faceted approach*'. That may be true, but multi-faceted does not mean effective. One facet is our powerful anti-international bribery legislation, which, after 18 years in operation, has only secured two convictions. Meanwhile, international bribery flourishes.

Several highly qualified commentators have pointed out that the current federal scheme is too diffuse, unfocussed and ineffective. Professor A J Brown has described the current regime as '*under-inclusive and unwieldy*'. Professor George Williams describes it as '*resulting in under reporting and confusing*'. In particular, as Professor Brown says, the current scheme means that federal politicians are not subject to legally enforceable accountability mechanisms. The controls at the federal level are so inadequate that, according to Professor Anne Twomey, '*at a federal level you can get away with almost anything*'.

Think about a recent instance where a federal minister, Stuart Robert, had to repay tens of thousands of dollars previously successfully claimed by him from the public purse. The repayment only occurred after the matter had been exposed by investigative journalists. It appears there will be no investigation or even basic inquiry as to how this occurred. It is so much worse because Mr Robert – a politician with a history of unusual financial activities – is the assistant treasurer and charged with

protecting our public purse.

The principle in Mr Robert's case might be important, but the sums are trivial. But some of the matters of concern involve very large sums. Two recent examples. Earlier this year the federal government allocated $443 million to a shadowy, inexperienced body to protect the Great Barrier Reef, one of our greatest assets. The money was given to an inexperienced body outside government guidelines. Why? More recently the government suppressed an auditor-general's finding that hundreds of millions of dollars could have been saved had negotiations with defence contractors been conducted differently. Why? In both instances, the information only came to light through the work of investigative journalists. Maybe there is nothing wrong with either deal, but without the ability to investigate how would we know?

The extraordinary powers of investigation

The Bathurst and Wootton paper addresses one vexing issue surrounding the creation of a federal anti-corruption agency: whether or not it should be given '*extraordinary powers*'. The extraordinary powers are the ability to pierce legal professional privilege and to override, for limited purposes, the privilege against self-incrimination. The Bathurst and Wootton paper examines how these powers have been provided to similar investigative bodies and how protective devices are put in place in the event the matter enters the criminal justice system.

If a national integrity commission is to be effective it needs the extraordinary powers of investigation. Public sector corruption is an extraordinary crime and it is almost impossible to detect or expose using ordinary investigative powers.

There are several reasons why this is so. Perhaps the most fundamental is that corruption has many of the characteristics of a '*victimless crime*'. If, for example, private contractors are skimming money from a major public contract, it is difficult to notice that this has occurred. Often it requires a very careful analysis of the detail of the contracts. More often than not the corruption will go undetected.

Another special difficulty is that corruption is one of those crimes which is organised by persons who are usually the most knowledgeable about the processes and, hence, most likely to be aware of the loopholes. Think about it. Starting with the minister and working your way down. Who would be best armed to know the intricacies of the manner in which a mining licence could be granted? Experience has also shown that those involved are careful to lay down potential excuses in preparation for the ultimate decision. Go back to the recent conviction of the former NSW mining minister, Ian Macdonald, who had granted a coal mine licence improperly, but laid the groundwork so that it was said that the grant of the licence was for the creation of a training mine. He claimed that a training mine was designed to train and protect the mine workers from injury. A noble purpose: if it was true. A jury found that it was not true. But you can see how it may have carried force.

And cutting through legal professional privilege is essential when investigating corruption. Corruption is a money crime. Often it involves a lot of money. Often it involves moving currencies between jurisdictions. Experience has shown that the larger the scale of the corruption the more likely it is that lawyers will be involved. It is a further complication that the co-conspirators do not fully trust each other and often each will need a lawyer to intervene to divide the spoils.

So it is that an investigative agency is able to acquire the critical information from lawyers who had been retained on conveyancing and contractual matters relevant to the corrupt transaction. The actual lawyer may (commonly) suffer a full memory failure, but by habit they are usually careful note takers.

The power to compel testimony is just as important. Bear in mind that the process is an *investigation*, not a *prosecution*. And it is an investigation which is designed to get to the truth. Where you have a corrupt conspiracy, unless one of the conspirators breaks ranks, the only way to get to the truth is to compel those involved to give evidence.

It is true that, on their face, the application of such powers may seem to interfere with ordinary protections provided in the criminal justice system, that is, your civil liberties. But there are adjustments in place to protect against any damage to the individual. When the extraordinary powers are exercised it is pursuant to a qualification so that, in the event any criminal proceedings are pursued, the privileges are restored. In this respect I think it is salutary to note that Civil Liberties Australia and the NSW Council for Civil Liberties both addressed a recent Senate select committee and supported the creation of a federal anti-corruption agency armed with extraordinary powers.

Public hearings

The Bathurst and Wootton paper also addresses another difficult issue: the benefits and detriments from an anti-corruption agency conducting part of its process through a public hearing.

The ability to call a public hearing is a critical power for any anti-corruption agency. Unless there is the power to hold public hearings any new federal agency will not gain public trust.

Just imagine for one moment that the work of the Royal Commission into Institutional Responses to Child Abuse had been conducted privately, not publicly. No-one would have trusted the processes and the fine work done by that royal commission would have been lost to us. It would have been a pointless exercise. Worse, it would have been perceived to have perpetuated the secrecy which has surrounded those terrible crimes.

Ordinary people engage with a public inquiry. The public hearing creates a general sense that something can be done, that something is being done and that wrongs can be righted. I add that public engagement has a powerful positive influence on the investigation. When matters become open it is my experience that members of the public come forward with important information. Some, who previously thought there was no point in doing so, finally get their opportunity to speak out. Others, who were previously scared to do so, are emboldened into action.

Again, an anti-corruption inquiry is an *investigation*, not a *prosecution*. You should never underestimate the positive impact that the publicity surrounding a public hearing can create in terms of the production of further evidence.

The ability to hold public hearings is essential. Corruption is a crime which occurs in the dark. The public hearing is the chance to shine light into the darkest corners.

What is happening?

A federal anti-corruption agency is on its way. Polling has demonstrated, time after time, that a large majority of Australians favour the creation of a national integrity commission. It is a vote-winner. Maybe that is why it now seems that a majority of parliamentarians also support the creation of such an agency.

True, some politicians have held the creation of a federal anti-corruption body as policy for some long time, notably the Greens, the Nick Xenophon Party and some influential independents such as Andrew Wilkie, Cathy McGowan and Derryn Hinch. It appears Kerryn Phelps will also support the proposal.

More recently the Australian Labor Party has announced that it is going to the next federal election on a promise of creating a powerful and independent national integrity commission. The position of the Coalition remains unresolved. It would be so much better if this could be a bi-partisan move.

In conclusion

I am confident that we will soon get a national integrity commission. Australia needs it and the public wants it.

The real battle will be around assuring that such a federal agency is given the appropriate jurisdiction, sufficient funding to ensure its independence and its efficacy, and the necessary powers to do its job. We cannot afford anything less.

The courts and integrity bodies: constitutional conundrums

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Introduction

There have been various challenges in the courts to the activities and reports of state based integrity bodies, which have thrown up difficult legal questions. This is partly because these bodies, whose prolific existence is a relatively recent phenomenon, do not neatly fit into traditional tripartite *constitution*al structures.

This paper deals with some of the cases the New South Wales Supreme Court has dealt with and considers how these issues might arise in the federal context in relation to a national integrity body.

The New South Wales integrity system

New South Wales has a plethora of bodies which fulfil integrity functions,[1] including the Ombudsman,[2] Information and Privacy Commission,[3] the Auditor-General,[4] the Law Enforcement Conduct Commission[5] and, of course, the Independent Commission against Corruption, or ICAC.[6]

In relation to ICAC, it functions are broadly to investigate and expose corrupt conduct in the New South Wales public sector, prevent corruption through advice and assistance and educate about corruption and its effects.[7] Corrupt conduct is defined very broadly in the *ICAC Act*, incorporating 'any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official'.[8] This definition is limited by a subsequent section which states that conduct that would fall within that definition only amounts to corrupt conduct if it could constitute or involve a criminal offence, a disciplinary offence, reasonable grounds for termination of employment of a public official, or a 'substantial' breach of a code of conduct by a Minister or MP.[9]

It has extraordinary powers of investigation, including the ability to obtain information from public authorities,[10] enter public premises and take copies of documents,[11]

conduct compulsory examinations,[12] summons witnesses to attend and give evidence or produce documents,[13] issue warrants for the arrest of witnesses who fail to attend in answer to a summons,[14] issue search warrants[15] and prepare reports on its investigations.[16] It is also able to undertake covert activities such as obtaining telecommunications interception warrants and warrants to use listening, tracking, and data surveillance devices.[17]

The Commission can conduct a public inquiry if it is satisfied that it is in the public interest to do so, taking into account the benefit of exposing the corruption to the public, the seriousness of the complaint and any risk of undue prejudice to reputation.[18] Although the commission has broad powers to obtain information and documents and to summon people to give evidence, that evidence given is not admissible in any civil or criminal proceedings.[19]

The New South Wales Ombudsman, which has jurisdiction to investigate complaints about New South Wales public authorities,[20] similarly has the power to force witnesses to give evidence,[21] even where to do so might incriminate them[22] – but again, such statements are inadmissible in later proceedings against them.[23]

The courts and integrity bodies

Before considering some of the issues arising from the interaction of integrity bodies with the courts, it is important to note that there is debate in the legal community about where these bodies fit into our existing tripartite *constitution*al structure, and whether there needs to a revision of the existing model of the separation of powers to accommodate integrity bodies as a fourth branch of government.[24]

This paper does not deal with this debate, as it is likely to remain somewhat academic in circumstances where the separation of powers is strictly entrenched at the federal level by a written *constitution* which can only be amended by referendum. The balance of this paper is therefore based on the assumption that any such integrity body will remain within the executive branch of government, be subject to the scrutiny of parliament and the laws passed by parliament, and its compliance or otherwise with those laws will be enforced by the courts.[25]

Judicial power

The separation of powers is one of the most significant *constitution*al limitations on the design of a federal integrity agency. At the federal level, only courts referred to in s 71 of the *Constitution* can exercise judicial power.[26] This separation exists in a diluted form at the state level.[27] There is no 'exclusive and exhaustive'[28] definition of the concept of judicial power, but its core characteristic is the conclusive settlement of a dispute between parties as to their existing rights,[29] as opposed to the creation of new rights.[30] The process of making an enforceable decision by applying principles of law to facts is exclusively judicial. This always includes the adjudgment and punishment of criminal guilt, a function which a federal executive body could never exercise.[31]

While investigatory bodies such as royal commissions have always been understood to be exercising executive and not judicial power, the waters can start to muddy when considering commissions that investigate offences and misconduct.[32] This was the case, for example, in the case of *Brandy v Human Rights and Equal Opportunity Commission*, in which decisions of the commission were registrable in the Federal Court, and thereby

became enforceable as if an order of that court.[33] The binding and conclusive effect of registration meant the commission was impermissibly exercising judicial power, and the legislation found *constitution*ally invalid.[34]

An analogous issue arose in relation to ICAC, in the case of *Balog v ICAC*.[35] Mr Balog, who was the subject of an ICAC investigation, sought a declaration that the commission was not entitled to make a finding that an individual was guilty of a criminal offence. The court held, as a matter of statutory construction, that this was not permitted by the *ICAC Act* at the time, and commented on how 'inappropriate it would be' for a 'Commission intended to be primarily an investigative body' to 'report a finding of guilt or innocence'.[36] As a result the *ICAC Act* was amended,[37] and now explicitly provides that the commission is not authorised to include an opinion that a person has committed a criminal offence, but that an opinion or finding that a person has engaged in corrupt conduct is not a finding of such a nature.[38] Notwithstanding, the definition of corrupt conduct, to the extent it extends beyond public officials, requires a finding of conduct of a nature which could involve certain types of criminal offences.[39]

However, it does not appear to be *constitution*ally impermissible for an executive body to make findings that corrupt conduct has occurred, provided the legislation does not take that extra step of binding enforceability in *Brandy*.[40] This much was confirmed in the case of *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd*,[41] where the High Court held that it was not un*constitution*al for ACMA to make a finding that a provider of commercial radio broadcasting services had used the service in the commission of an offence, as a pre-condition to ACMA taking enforcement action which could include the suspension or cancellation of the provider's licence.[42] The court held that 'none of the features of the power conferred on the Authority … support the conclusion that it is engaged in the exercise of judicial power'.[43]

What this probably means for any integrity body at the federal level is that it may be capable of making a finding that a person has engaged in corrupt conduct. The lesson from *Balog v ICAC*,[44] and one which repeats itself throughout the integrity body cases, is that legislative design is key, and attention should be focused on exactly what kind of findings the body is authorised to make. However, it should be noted that *Balog v ICAC* turned on construction of the statute, and no issue of the *constitution*ality of such a provision arose in the case.[45]

It will also be important to consider how, to the extent that federal judicial officers are subject to investigation, this does not infringe on the separation of powers by impermissibly interfering with the exercise of federal judicial power. On that point, it should be noted that there has never been a suggestion that the *Judicial Officers Act 1986* (NSW), which provides for the Conduct Division of the New South Wales Judicial Commission to investigate complaints about judicial officers, impermissibly interferes with the separation of powers at the state level. If the Conduct Division decides that a complaint is wholly or partly substantiated and forms an opinion that the matter could justify parliamentary consideration of the removal of the judicial officer from office, it must present to the Governor a report setting out its findings of fact and that opinion.[46] In New South Wales, a judicial officer cannot be removed from office in the absence of such a report being made by the Division.[47] It also has the power to refer complaints to any other body, if the Division considers it appropriate in the circumstances.[48] In the case of *Bruce v Cole*[49] involving a judge of the New South Wales Supreme Court, the court noted that while the reasoning in *Kable v Director of Public Prosecutions*[50] indicates that 'the legislative power of the State may not be used to alter fundamentally the independence of a Supreme Court judge, or the integrity of the State judicial system', 'no submission has been made that any part of the *Judicial Officers Act 1986* or the *Constitution* Act 1902 … has any such effect'.[51]

One other matter which may be of significance is that the 'public officials' to whom the *ICAC Act* applies includes judges, whether exercising judicial, ministerial or other functions.[52] The New South Wales Judicial Commission is a body which falls within the definition of a 'public authority' in the *ICAC Act*.[53] The principal officer of a public authority is obliged by s 11(2) of the *ICAC Act* to report to ICAC any matter the person suspects on reasonable grounds concerns, or may concern, corrupt conduct. The validity of the inclusion of judges as public officials and the obligation on the Judicial Commission to report such conduct has never been tested. Such provisions may well be challenged if introduced into the federal sphere, where there is a stricter separation of powers.

The obligation to afford procedural fairness

A common issue that may result in an integrity body finding itself before a court relates to its obligation to afford procedural fairness. There are two questions that arise: first, to what extent must an integrity body give a fair hearing to someone who might be subject to an adverse finding, and second, what does a 'fair' hearing look like in this context?

These questions arose in relation to ICAC in the matter of *Glynn v ICAC*.[54] ICAC was investigating whether corrupt conduct had occurred in relation to the use and development of land in the Northern Rivers Regions of New South Wales. The directors and representatives of certain companies claimed that the Assistant Commissioner had denied them procedural fairness. The court held that 'there can be no doubt that the commissioner was bound to observe the rules of natural justice, the content of which is variable according to the requirements of each case, but hinges on the notion of fairness'.[55] The allegations were varied but included that the Commissioner gave insufficient notice of the areas in which adverse findings might be made. The court held that in this context procedural fairness did not require ICAC to formulate precise but tentative conclusions at the commencement of the inquiry.[56] The court noted that the *ICAC Act* suggested that the legislature did not intend that its inquiries should be 'shackled by all the formal rules that attend adversary proceedings in a court of law,'[57] but the parties were entitled to a fair and unbiased hearing and to be sufficiently informed of the matters they should expect to meet if they were to be subject to adverse findings.[58]

There are a few points that arise when considering the implications for a federal integrity body. First, it is clear that the common law will imply a condition that the powers conferred on such a body be exercised with fairness to those whose interests might be affected.[59] One relevant 'interest' is a person's reputation. This was established in *Ainsworth v Criminal Justice Commission*, where a report prepared by the CJC was tabled in the Queensland Parliament containing adverse recommendations about certain persons involved in the poker machine industry, without any notice having been given to those mentioned in the report of its existence or contents.[60] The plurality stated that 'reputation is an interest attracting the protection of the rules of natural justice',[61] including one's 'business or commercial reputation'.[62]

Secondly, however, it is also well-settled that in this context the legislature can exclude the requirements of procedural fairness 'by plain words of necessary intendment'.[63] To the extent that policy-makers think it is desirable that there should be limitations on the obligation of a federal integrity body to afford procedural fairness, it is necessary that it be clearly manifested in the relevant statute, using language, as described by the High Court, of 'irresistible clearness'.[64]

Finally, it should be noted there has in recent times been criticism of the manner in which ICAC has conducted its inquiries. Three separate claims, all relating to the granting of certain mining tenements, have been brought in the Supreme Court. The first was on the ground of apprehended bias,[65] the second for want of procedural

fairness[66] and the third claimed that ICAC officers committed the tort of misconduct in public office during the course of their investigation.[67] These claims were all dismissed by the court. Notwithstanding this, there has been concern by some sections of the media as to whether the ICAC process is fair, and suggestions that the power of the commission to order a public hearing be limited and the courts provide merits review of findings of corrupt conduct. It is inappropriate for this paper to comment on the first matter. As to the second, there are at least two problems. At a functional level, it would impose extensive burdens on the court. Second, it may be argued that reviewing the question of whether a person has engaged in 'corrupt conduct', including of whether he or she may have been guilty of a criminal offence, may not be a judicial function.[68] This may be of *constitution*al concern at the state level,[69] and this is even more likely at the federal level.

The privilege against self-incrimination

Similar issues again arise in relation to legislative decisions to abrogate the privilege against self-incrimination, being a common law rule that a person cannot be obliged to answer any question or produce any document if this would tend to incriminate them.[70] It is related to the principle that the prosecution is to prove the guilt of an accused person.[71] The New South Wales Supreme Court has been asked to deal with cases where someone has been compelled by an integrity body to answer questions which tend to incriminate them, and have subsequently been charged with a criminal offence, with the DPP having access to the evidence they were compelled to give.[72] Other cases have arisen where someone has been charged but not yet tried, and a crime commission has used its powers to examine them with respect to those offences.[73] The court is asked either to grant a permanent stay on those criminal proceedings, or after the fact to find that a miscarriage of justice has occurred and overturn the conviction.

The Court of Criminal Appeal heard a case in 2016 involving ICAC and former state Minister Ian Macdonald. Mr Macdonald and his associate, John Maitland were examined by ICAC and gave evidence subject to objection taken under s 37 of the *ICAC Act*, the result being it was inadmissible in evidence against them in any later proceedings.[74] Transcripts of the examination were uploaded to the ICAC website, and the barrister and DPP solicitor involved in providing advice as to whether they should be charged both downloaded that transcript and read portions of that evidence. In the Court of Criminal Appeal, Messrs Macdonald and Maitland sought a temporary stay to the criminal charges which were eventually brought, until persons who had access to the evidence were no longer involved in the prosecution. The court ultimately dismissed the appeal, finding that as a matter of construction, the *ICAC Act* necessarily abrogated the accusatorial principle, so that the protections were limited to what the legislature has provided for in ss 18 and 112 of the Act.[75] Those sections provide that ICAC can make a direction that the evidence should not be published and conduct inquiries in private to the extent necessary to ensure a fair trial. Earlier in 2016, the High Court had rejected a similar argument in relation to the Victorian Independent Broad-based Anti-corruption Commission.[76]

In the matter of *X7 v Australian Crime Commission*, the High Court was faced with a situation where an individual had been charged with three drug trafficking offences.[77] While in custody before trial, the Crime Commission sought to examine him on matters related to the charges. The court found that the *Australian Crime Commission Act 2002* (Cth) did not permit a person who had been charged to be compulsorily examined on the subject matter of the offence.[78] In a later case in the High Court of *Lee v The Queen*,[79] convictions were quashed where transcripts of a compulsorily examination were provided to the DPP, because the New South Wales Crime Commission's legislation (at the time) stated the commission had to make a declaration prohibiting publication of material which might prejudice the fair trial of a person.[80]

There are two matters which emerge from these cases. The first is that although the privilege and the accusatorial rule it relates to have been described as 'fundamental', courts have maintained that they can be overridden by legislation, provided that legislation is sufficiently clear in its intent to do so.[81]

However, a case in the New South Wales Court of Appeal last year shows there is a limit to the *constitution*ality of provisions affecting the privilege. While there is little doubt that examinations prior to charge are *constitution*al, there may be a problem where such examinations occur after criminal charges have been laid. This arose for consideration by the New South Wales Court of Appeal in *Commissioner of Australian Federal Police v Elzein*, where it was argued that provisions of the *Proceeds of Crime Act 2002* (Cth)[82] permitting a compulsory examination where criminal proceedings were on foot were un*constitution*al.[83] There was a suggestion of this kind from Justice Kiefel, as her Honour then was, in *X7*,[84] where her Honour stated that 'the concept of an accusatorial trial where the prosecution seeks to prove its case to the jury has a *constitution*al dimension'.[85]

The individuals concerned were charged with offences under the *Customs Act 1901* (Cth) and subsequently issued with examination notices under the *Proceeds of Crime Act*. The court stated that a procedural scheme which constituted a 'substantial interference with the fairness of a criminal trial would not be *constitution*ally valid'.[86] This was based on Chapter III of the *Constitution*, and particularly a comment made in the case of *Condon v Pompano Pty Ltd*,[87] that a court in Australia cannot *constitution*ally be required to adopt an unfair procedure, as procedural fairness is an 'immutable characteristic of a court'.[88] However, in that case, the Act did not fall into such a category, as the court retained the ultimate power to take steps to protect the integrity of the criminal process, such as prohibiting disclosure of the information.[89] What this suggests for any federal body is that while the privilege against self-incrimination can be abrogated, there is a *constitution*al limit at the point that this abrogation forces a court to eventually conduct a trial that is unfair.

Parliamentary privilege and 'exclusive cognisance'

Disputes have also arisen in relation to the execution of search warrants by ICAC on the offices or homes of members of parliaments. This is not an issue confined to integrity bodies – the AFP, for example, in investigating Commonwealth parliamentarians' conduct has had to manage claims of privilege.

For example, in the matter of *Crane v Gething*, Commonwealth Senator Winston Crane brought a case before the Federal Court after police executed search warrants at his home address, electorate office and parliamentary office.[90] Justice French, as his Honour then was, noted the *constitution*al basis for the privilege in s 49 of the *Constitution*, from which the Senate and House of Representatives derive the full powers, privileges and immunities of the House of Commons at the time of Federation, until Parliament otherwise declares.[91] Parliament did so in 1987, with the *Parliamentary Privileges Act 1987* (Cth), but this Act expressly does not narrow the scope of the power.[92] Justice French held that the issue of the search warrant was an executive, not judicial act.[93] Whether the privilege was to be asserted by the Senate therefore had to be resolved between police and the Parliament, not in the courts.[94] This is because of the fundamental principle, that while 'it is for the courts to judge of the existence in either House of Parliament of a privilege … it is for the House to judge of the occasion and of the manner of its exercise'.[95]

The practical operation of this principle was seen in the matter of the Honourable Peter Breen MLC, following ICAC's execution of a search warrant on his Parliament House office in 2003. The Standing Committee on Parliamentary Privilege and Ethics reported on the matter.[96] It was an issue before the Committee as to whether

the mere seizure of the documents by ICAC amounted to a breach of parliamentary privilege.[97] ICAC's position was that the seizing of material under a warrant did not amount to an 'impeaching or questioning'[98] of parliamentary proceedings – thus ICAC could seize documents but just not use them later in Court. The Committee concluded, contrary to that submission, that an ICAC investigation is a 'place out of Parliament' within the meaning of Article 9, and the seizure of the documents involved a breach.[99] That this fell to be resolved by Parliament and not a court flows from the judgment of French J in *Crane v Gething*[100] – the question of the application of the privilege in particular cases is one that only the Parliament can resolve.[101]

This leads into the second class of cases, which have involved members charged with criminal offences claiming that matters of misconduct are within the 'exclusive cognisance' or jurisdiction of Parliament, flowing from Parliament's power to punish for contempt.[102] This was raised twice before the New South Wales Court of Criminal Appeal on behalf of Mr Edward Obeid, first in his application for his indictment on the count of misconduct in public office to be quashed or stayed,[103] and then in his appeal against conviction.[104] In that matter, both times, the court made clear that the House of Commons, and thus the New South Wales Parliament, does not have an exclusive jurisdiction to deal with criminal conduct, even where this relates to the internal proceedings of the House.[105]

A related issue is whether proceedings should be stayed if a party would be precluded from raising a defence because of parliamentary privilege. As was said in *Prebble v Television New Zealand Ltd*, 'there may be cases in which the exclusion of material on the grounds of parliamentary privilege makes it quite impossible fairly to determine the issue between the parties'.[106] In this context it is important to remember that the privilege belongs to the relevant House, it is not that of any individual member – so unlike legal professional privilege for example, it cannot be 'waived' by the member concerned.[107] Mr Obeid also raised this argument, namely that he would be unable to properly defend himself because of the operation of parliamentary privilege. It was rejected by the court, as the relevant communication which amounted to misconduct had no connection with parliamentary proceedings.[108]

However, much like the question of self-incrimination, there is significant *constitutional* leeway. Section 49 of the *Constitution* expressly preserves the question of the extent of the privilege to Parliament. The question is very much one of design, and it is preferable that these questions be worked out in the design stage, rather than later resolved in time consuming and costly litigation or parliamentary inquiries.

Privative clauses

The interaction between courts and integrity bodies comes into sharp focus when considering privative clauses and the question of judicial review. An important feature of the *Ombudsman Act 1974* (Cth) is that it contains a privative clause, being a clause that restricts access to the courts for review of the actions of the Ombudsman.[109] Section 35A provides that the Ombudsman is not liable on any ground to civil or criminal proceedings, 'in respect of any act, matter or thing done or omitted to be done for the purpose of executing this or any other Act', unless the act was done, or not done, in bad faith.[110] Section 35B, however, provides that an application can be made for the Supreme Court to decide whether the Ombudsman has the jurisdiction to conduct an investigation or proposed investigation, notwithstanding s 35A.[111]

Privative clauses such as this one raise issues about the lawful conduct of integrity bodies and the extent to which their conduct can be challenged in a court. This in turn reflects the looming question of who, if not the courts, is responsible for holding integrity bodies to account – who guards the guardians?[112] An anterior question is perhaps whether such oversight is necessary, and given the existence of privative clauses, it is evidently the view of parliament that, at least in some cases, it is not. In one case involving the Ombudsman, *Kaldas v Barbour*, it was submitted on behalf of the Ombudsman that litigation would undermine the efficiency and effectiveness of the statutory scheme.[113] It has also been argued that judicial review will expose these bodies to harassment and interfere with their functions through 'unmeritorious claims designed to frustrate or stifle a legitimate inquiry'.[114]

There are countervailing considerations that, in the authors' opinion, outweigh these concerns by some measure. First, is that the powers exercised by integrity bodies are 'coercive and intrusive' in a manner open to abuse.[115] Secondly, these bodies are not free from controversy – the decision of ICAC to investigate Crown Prosecutor Margaret Cunneen being one prime example – and whether or not criticisms are well-founded, independent judicial review of their actions maintains public confidence in them.[116] Finally, even though reports may merely 'express an opinion' to be considered in other processes, and thus do not directly affect legal rights, they certainly affect a person's interest in their reputation and commonly act as a precursor to further acts such as criminal prosecution, which will affect such rights.[117]

At the federal level, section 75(v) of the *Constitution* vests in the High Court original jurisdiction in all matters 'in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'. This provision means that the jurisdiction of the High Court to grant relief for jurisdictional error by an officer of the Commonwealth cannot be removed by the Parliament.[118] This is also entrenched at the state level, as the High Court has held that a State Supreme Court cannot be deprived of its 'supervisory jurisdiction' to enforce the limits on the exercise of State executive and judicial power, as to do so 'would be to create islands of power immune from supervision and restraint'.[119]

In the matter of *Kaldas v Barbour*, however, the New South Wales Court of Appeal found that the privative clause in the *Ombudsman Act* did validly preclude review of the Ombudsman's conduct.[120] This was largely because of the nature of a remedy that a court can give in relation to a report. As reports have no legal consequences of themselves, they cannot be quashed.[121] If the affected person gets to court before a report is released, the Court might be able to issue an injunction or prohibition stopping the publication of the report – but in a case where procedural fairness has been denied, the person affected may not know until such a time as the report is published.[122] What this generally leaves is a declaration – which the court has done in a number of cases involving ICAC. In the Cunneen matter, for example, the court made a declaration that ICAC had 'no power to investigate the allegation'.[123] However, the entrenched supervisory jurisdiction of State Supreme Courts seems to have been determined by the High Court as that which existed at the time of federation, and at the time of federation the court did not issue declarations as a public law remedy in the absence of an effect on legal rights.[124] The Court of Appeal held the privative clause in the *Ombudsman Act* was not invalid to the extent it meant Mr Kaldas was not entitled to a declaration, even though this meant that he was left without a remedy.[125]

This raises interesting questions for the judicial review of a federal integrity agency, if Parliament sought to limit the ability for aggrieved persons to bring proceedings against such a body. At the federal level it has generally been assumed that such a provision would be invalid because of s 75(v) of the *Constitution*.[126] However, that section does not include the remedy of a declaration.[127] In circumstances where the only remedy available might be a declaration, would the court have the power, regardless of any privative clause, to grant relief? The answer may lie in the High Court's decision in *Plaintiff S157*,[128] where it noted that Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction, because this would be

an exercise of judicial power.[129] As explained above, judicial power can only be conferred on courts pursuant to Ch III of the *Constitution*.

Judicial review and access to information

It is clear from the foregoing that there is a minimum provision for judicial review, in both state and federal jurisdiction. The final question which arises is whether there is a minimum *content* of judicial review. This was an issue that arose before the New South Wales Court of Appeal in *A v ICAC*.[130] The Commission had summoned a company employing a journalist to attend a compulsory examination and produce its journalist's e-calendar and everything within his or her email accounts. The Act obliged ICAC to disclosure the nature of the allegation or complaint being investigated, but it did not have to do so until the commencement of the hearing. This meant that the company had no way of seeking judicial review of the summons before the hearing, because it could not make out a challenge on the ground of relevance without knowing what ICAC was investigating.

The company argued that s 111 – which provided that officers of ICAC were not required to produce documents or divulge information relating to the exercise of their functions in court – deprived the court of an important aspect of its *constitution*ally entrenched jurisdiction. The court found that s 111 did not meet the required threshold, as while it may create evidentiary difficulties for a party, it did not wholly deprive the court of its jurisdiction.[131]

The situation may be different for integrity bodies operating at the Commonwealth level due to the High Court's entrenched jurisdiction under s 75(v). In the decision last year of *Graham v Minister for Immigration*,[132] a majority of the court held that the question of whether a law transgressed *constitution*al limitations required examination of both its legal and practical operation.[133] Section 503A(2)(c) of the Migration Act 1958 (Cth) provided that the Minister could not 'be required to divulge information which was relevant to the exercise of his power … to any person or to a court if that information was communicated by a gazetted agency on condition that it be treated as confidential'.[134] The High Court held that this provision prevented it from obtaining access to information which was relevant to the exercise of power by the Minister, operating to shield the 'exercise of power from judicial scrutiny'[135] and striking 'at the very heart of the review for which s 75(v) provides'.[136] The provision was held invalid to the extent it did so.[137]

The decision has important implications for the design of a federal integrity body. Many of the statutes governing integrity bodies contain secrecy provisions which prevent disclosure of operational information, including to courts. There are good reasons for confidentiality, particularly in anticorruption investigations, but it is a fine balance to strike which weighs the effectiveness of an investigation against the transparency of the body itself.[138] It may be even finer when questions of *constitution*ality come into play.

The head of power

At the outset of this paper it was stated that one of the most significant limitations on the design of a federal integrity body is the separation of powers. However, it should also be noted that the most significant limitation is the legislative power of the Commonwealth. The federal government only has the power to legislate on the areas given to it by the *Constitution*. The Commonwealth Parliament cannot give a federal executive body coercive powers with respect to matters about which it cannot legislate.[139] It could not seriously be questioned that the Commonwealth Parliament has the power to legislate with respect to the Commonwealth public service – it is given the exclusive power to do so under s 52(ii) of the *Constitution*. It may be that the question with respect to both parliamentarians and judicial officers is found in Parliament's incidental power in s 51(xxxix), but this is an issue that deserves future critical attention.[140]

Conclusion

This paper has sought to raise potential problems which may well arise if integrity bodies such as ICAC or perhaps the New South Wales Judicial Commission are introduced into the federal sphere. However, it must be remembered that there are many existing integrity bodies in the Commonwealth sphere, including the Commonwealth Ombudsman, Australian Commission for Law Enforcement Integrity, Australian National Audit Office and the Australian Public Service Commission, to name just a few.[141]

Those bodies seem to be operating effectively, and without challenge to their *constitution*ality or to their area of operation. To the extent that bodies such as ICAC raise different issues, these will be dealt with by federal courts. Notwithstanding it is not appropriate for this paper to express a definitive view on any of the issues. It merely seeks to emphasise that solutions to problems in the state sphere will not necessarily translate into the federal arena. What it is important is that those responsible for considering the establishment and scope of a federal integrity body such as ICAC consider these issues at the outset, and how they can be accommodated in the federal sphere within the bounds of the Australian *Constitution*.

END NOTES

1 Defined as 'investigating impropriety, corruption and maladministration in governmental functions and … handling citizen's complaints about administrative decision-making': see TF Bathurst, 'New Tricks for Old Dogs: The Limits of Judicial Review of Integrity Bodies' in Neil Williams (ed), *Key Issues in Public Law* (Federation Press, 2017) 40, 41.

2 See *Ombudsman Act 1974* (NSW).

3 *Government Information (Information Commissioner) Act 2009* (NSW); *Privacy and Personal Information Act 1998* (NSW).

4 *Public Finance and Audit Act 1983* (NSW).

5 The Law Enforcement Conduct Commission (LECC) replaced the Police Integrity Commission (PIC) and the Police Compliance Branch of the NSW Ombudsman in 2017. See *Law Enforcement Conduct Commission Act 2016* (NSW).

6 *Independent Commission against Corruption Act 1988* (NSW) ('*ICAC Act*'). Note also the NSW Crime Commission, though not strictly an accountability watchdog does tend to play a role in anti-corruption work due to the links between official corruption and organised crime: see AJ Brown and B Head, 'Ombudsman, Corruption Commission or Police Integrity Authority? Choices for Institutional Capacity in Australia's Integrity Systems' (Paper Presented at the Australasian Political Studies Association Conference, University of Adelaide, 29 September-1 October 2004) 4.

7 This being the NSW ICAC's summary of its own functions as provided for by the *ICAC Act* s 13(1): NSW ICAC, 'Functions of the ICAC' <https://www.icac.nsw.gov.au/about-the-icac/overview/functions-of-the-icac>.

8 *ICAC Act* s 8.

9 Ibid s 9(1).

10 Ibid s 21.

11 Ibid s 23.

12 Ibid s 30.

13 Ibid s 35.

14 Ibid s 36.

15 Ibid s 40(4).

16 Ibid s 74.

17 Ibid s 19.

18 Ibid s 31.

19 Ibid s 37, or in disciplinary proceedings, except as provided for by the *ICAC Act*: see s 114A.

20 *Ombudsman Act 1974* (NSW) s 26, with certain exceptions: see sch 1.

21 Ibid s 18. See also *Royal Commissions Act 1923* (NSW) s 11 as applied by *Ombudsman Act 1974* (NSW) s 19(2).

22 Ibid s 36.

23 Ibid.

24 The concept of a fourth integrity branch was most famously described in Bruce Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633. In Australia, it is most commonly attributed to James Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724. Chief Justice Wayne Martin has noted that 'I am not so sure that the Chief Justice was advocating the notion of an additional branch of government, but rather was drawing attention to the integrity functions performed by various agencies of government, including the recognised branches of government constituted by Parliament and the courts': Wayne Martin, 'Forewarned and four-armed: Administrative law values and the fourth arm of government' (2014) 88 *Australian Law Journal* 106, 111. See also WMC Gummow, 'A Fourth Branch of Government' (Speech delivered to the National Administrative Law Conference, Adelaide, 19 July 2010) and recent consideration by AJ Brown, 'The Fourth, Integrity Branch of Government: Resolving a Contested Idea' (Australasian Political Studies Association 2018 Presidential Address, Brisbane, July 2018).

25 Martin, above n 24, 124.

26 *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434.

27 *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51.

28 *R v Davison* (1954) 90 CLR 353, 366.

29 James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 221. See *Huddart, Parker & Co Pty ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).

30 Stellios, above n 29, 222.

31 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27.
32 Bathurst, above n 1, 42.
33 (1995) 183 CLR 245 ('*Brandy*').
34 Ibid 269 (Deane, Dawson, Gaudron and McHugh JJ).
35 (1990) 169 CLR 625.
36 Ibid [17] (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).
37 *Independent Commission Against Corruption (Amendment) Act 1990* (NSW).
38 See *ICAC Act* ss 13, 74A, 74B.
39 Ibid s 8(1)(a).
40 (1995) 183 CLR 245: 'However, if it were not for the provisions providing for the registration and enforcement of the Commission's determinations, it would be plain that the Commission does not exercise judicial power. This is because, under s 25Z(2), its determination would not be binding or conclusive between any of the parties and would be unenforceable. That situation is, we think, reversed by the registration provisions': at 269 (Deane, Dawson, Gaudron and McHugh JJ). See also Lockwood v The Commonwealth (1954) 90 CLR 177, where Fullagar J stated: 'It was said, in the first place, that the legislation under which the commission was appointed conferred judicial power otherwise than in accordance with the provisions of c. III of the *Constitution*. I consider this argument untenable. The duties of the commission are to inquire and report. It has, in order that it may effectively perform the duty of inquiry, certain powers which normally belong to judicial tribunals. But the function which is primarily distinctive of judicial power — the power to decide or determine — is absent. The commission can neither decide nor determine anything and nothing that it does can in any way affect the legal position of any person. Its powers and functions are not judicial': at 180-181.
41 (2015) 255 CLR 352.
42 *Broadcasting Services Act 1992* (Cth) s 143.
43 *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352, [59] (French CJ, Hayne, Kiefel, Bell and Keane JJ).
44 (1990) 169 CLR 625.
45 Ibid.
46 *Judicial Officers Act 1986* (NSW) s 29.
47 Ibid s 41.
48 Ibid s 35(1).
49 (1998) 45 NSWLR 163, 167.
50 (1996) 189 CLR 51.
51 *Bruce v Cole* (1998) 45 NSWLR 163, 167 (Spigelman CJ, Mason P, Priestley, Sheller and Powell JJA agreeing).
52 *ICAC Act* s 4.
53 See ibid.
54 (1990) 20 ALD 214.
55 Ibid 215.
56 Ibid 218. The requirements of procedural fairness are not fixed, but 'must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth': *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, 504 (Kitto J) citing *Russell v Duke of Norfolk* [1949] 1 All ER 109 (Tucker LJ).
57 Ibid.
58 Ibid 215.
59 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, [97] (Gummow, Hayne, Crennan and Bell JJ).
60 (1992) 175 CLR 564.
61 Ibid 578 (Mason CJ, Dawson, Toohey and Gaudron JJ).
62 Ibid.
63 *Plaintiff M61/2010 v Commonwealth* (2012) 243 CLR 319, [74] citing *Annetts v McCann* (1990) 170 CLR 596, 598.
64 *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J) cited in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). The necessity of clear language is evident in the long line of migration cases in which the legislature has attempted to exclude procedural fairness, or provide an exhaustive code for its exercise. For example, *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 involved legislation with 'extensive procedures governing refugee decision making': see Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook Co, 6th ed, 2017) 465-6. The Explanatory Memorandum described it as a 'procedural code' that was intended to 'replace the uncodified principles of natural justice with clear and fixed procedures'. The High Court held that Parliament had not manifested an intention to exclude procedural fairness, with McHugh J stating that 'the use of the term 'code' was too weak a reason to conclude that Parliament intended to limit the requirements of natural justice': at [131].
65 *Duncan v Ipp* [2013] NSWCA 189.
66 *Duncan v ICAC* [2016] NSWCA 143.
67 *Obeid v Lockley* [2018] NSWCA 71.
68 See Murray Gleeson and Bruce McClintock, 'Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption' (Report to the Department of Premier and Cabinet, 30 July 2015) x.
69 Under the principles articulated in *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51, 'neither the Parliament of New South Wales nor the Parliament of the Commonwealth can invest functions in the Supreme Court of New South Wales that are incompatible with the exercise of federal judicial power': at 116 (McHugh J). See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.
70 See *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 335.
71 *Lee v The Queen* (2014) 253 CLR 455, [32]. See also *Woolmington v The Director of Public Prosecutions* [1935] AC 462; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.
72 See, eg, *Macdonald v R; Maitland v R* (2016) 93 NSWLR 736. See also *A v Maughan* (2016) 50 WAR 263.
73 See, eg, *XY v Australian Crime Commission* (2013) 248 CLR 92.
74 *Macdonald v R; Maitland v R* (2016) 93 NSWLR 736.
75 Ibid [107] (Bathurst CJ, R A Hulme and Bellew JJ agreeing).
76 See *R v Independent Broad-Based Anti-Corruption Commission* (2016) 256 CLR 459. In that case two police officers were summonsed by IBAC to be examined concerning an alleged assault. After being summonsed the police officers were suspended from duty on the basis that they were reasonably believed to have been involved in the assault. However, they had not been charged. The plurality concluded that neither the 'fundamental principle' (namely, that the onus of proof of a criminal charge rests upon the prosecution) or the 'companion principle' (namely, that the prosecution cannot compel an accused to assist in the discharge of its onus of proof) had application in such a case: at [41]-[51]. The effect of the case is that, in circumstances where both an examination and the provision of its contents to a prosecuting authority occur prior to the examinee being charged, neither the accusatorial principle nor the companion principle is engaged: *Macdonald v R; Maitland v R* (2016) 93 NSWLR 736, [85] (Bathurst CJ, R A Hulme and Bellew JJ agreeing).
77 (2013) 248 CLR 92.
78 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [69]-[70], [87] (Hayne and Bell JJ), [157] (Kiefel J).
79 (2014) 253 CLR 455.
80 See ibid [3]. The law at the time, the *New South Wales Crime Commission Act 1985* (NSW) has since been replaced by the *Crime Commission Act 2012* (NSW), although section 45 of that Act is in similar terms to the relevant provision under the 1985 Act. Note that the NSW Parliament amended the Act in response to the decisions in *X7* and *Lee* by the passage of the *Crime Commission Legislation Amendment Act 2014* (NSW) which, *inter alia*, inserted new ss 45A-C.
81 See, eg, *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 where Crennan J, for example, stated it was 'undoubtedly within the power of the legislature of New South Wales to alter the common law in relation to answering incriminating questions': at [125] citing *Sorby v The Commonwealth* (1983) 152 CLR 281, 299, 308-309; *Hamilton v Oades* (1989) 166 CLR 486, 494; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 503, 533; *Azzopardi v The Queen* (2001) 205 CLR 50, [7].
82 Sections 180, 39(1).
83 (2017) 94 NSWLR 700.
84 *X7 v Australian Crime Commission* (2013) 248 CLR 92.
85 Ibid [160]. Her Honour cited R v Snow (1915) 20 CLR 315, 323, where Griffith CJ stated in relation to s 80 of the *Constitution*, which provides for trial by jury in relation to indictable Commonwealth offences, that 'this provision ought prima facie to be construed as an adoption of the institution of 'trial by jury' with all that was connoted by that phrase in *constitution*al law and in the common law of England'. It is difficult to reconcile this with cases such as *Nicholas v The Queen* (1998) 193 CLR 173 which give Parliament significant leeway to regulate rules of evidence to be applied in the exercise of judicial power. In that case, Brennan CJ stated that it was open to parliament to alter the burden of proof in a criminal case: at 190. This was noted by French CJ and Crennan J in their judgment in *X7 v Australian Crime Commission*: 'As has been stated in the context of abrogation of the privilege, the plaintiff's argument that an accused's rights to due process (including the right to refrain from giving evidence at trial) are entrenched by Ch III was too broadly stated. For example, the choice of the standard or burden of proof, at least in relation to specific issues, can be regulated by Parliament, and the rules of evidence may be regulated, provided, as Hayne J remarked in *Nicholas v The Queen*, that any law effecting such a change does not 'deal directly with ultimate issues of guilt or innocence'. This court has also rejected arguments that an alteration by Parliament of a substantive right usurps the judicial power of the Commonwealth. Furthermore, legislatures commonly require pre-trial disclosure from an accused person, as exemplified by provisions in the *Criminal Procedure Act 1986* (NSW) requiring the giving of an alibi notice, the disclosure of expert reports relied on to support a defence of 'substantial mental impairment' and other disclosures relating to the case management of a criminal trial.': at [48].
86 *Commissioner of Australian Federal Police v Elzein* (2017) 94 NSWLR 700, [128] (Basten JA, Beazley P and Simpson JA agreeing).
87 (2013) 252 CLR 38.
88 Ibid [194] (Gageler J). See also *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 459 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
89 *Commissioner of Australian Federal Police v Elzein* (2017) 94 NSWLR 700, [128]-[134] (Basten JA, Beazley P and Simpson JA agreeing).
90 *Crane v Gething* (2000) 97 FCR 9, [3].
91 Ibid [39].
92 *Parliamentary Privileges Act 1987* (Cth) s 5.
93 *Crane v Gething* (2000) 97 FCR 9, [45].
94 Ibid [45].
95 *R v Richards*; ex pare Fitzpatrick and Browne (1955) 92 CLR 157, 162.
96 Legislative Council Standing Committee on Parliamentary Privilege and Ethics, Parliament of New South Wales, *Parliamentary privilege and seizure of documents by ICAC Report No 25* (2003).
97 Note that in NSW, Article 9 of the *Bill of Rights 1689* (1 Will & Mar sess 2 c 2) applies by virtue of s 6 and sch 2 of the *Imperial Acts Applications Act 1969* (NSW): see *Egan v Willis* (1998) 195 CLR 424, [129]. Article 9 provides 'That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament'.
98 Legislative Council Standing Committee on Parliamentary Privilege and Ethics, *Parliament of New South Wales, Parliamentary privilege and seizure of documents by ICAC Report No 25* (2003) 26-7.
99 Ibid 37.
100 (2000) 97 FCR 9,
101 It should be noted that there is a memorandum of understanding and AFP guidelines governing the execution of search warrants in the premises of Commonwealth senators and members, which provide that 'any executions of search warrants in the premises of senators and members are to be carried out in such a way as to allow claims to be made that documents are immune from seizure by virtue of parliamentary privilege and to allow such claims to be determined by the House concerned': see Harry Evans, *Odgers' Australian Senate Practice* (14th ed, 2016) 63.
102 See *Parliamentary Privileges Act 1987* (Cth) s 4.
103 *Obeid v R* [2015] NSWCCA 309.
104 *Obeid v R* [2017] NSWCCA 221.
105 *Obeid v R* [2015] NSWCCA 309, [35]-[55] citing R v Chaytor [2010] UKSC 52; [2011] 1 AC 684. The leading judgments were those of Lord Phillips PSC and Lord Rodger JSC. Both dealt in terms with the overlapping criminal jurisdiction of the courts and the House of Commons. Lord Phillips stated 'The House [of Commons] does not assert an exclusive jurisdiction to deal with criminal conduct, even

where this relates to or interferes with proceedings in committee or in the House': at [83].

106 [1995] 1 AC 321, 338.

107 Ibid 335.

108 *Obeid v R* [2015] NSWCCA 309, [131], where the court rejected the argument for the reasons given by the primary judge, which were as follows: 'It is at this point that the argument breaks down. It elides the distinction between the function of an MLC in communicating with the Executive and its employees on the one hand and whether a particular communication had the requisite nexus with proceedings in Parliament on the other. ... In this case the relevant action is not communicating with the [E]xecutive generally but communicating with Mr Dunn about the renewal of the leases in particular. There is nothing to suggest that particular communication had any connection to Parliamentary proceedings much less that denying it privilege was likely to impact adversely on the core business of Parliament': *R v Obeid* (No 2) [2015] NSWSC 1380, [132]-[133]. See also *Obeid v R* [2017] NSWCCA 221, [139] (Bathurst CJ, Lemming JA, R A Hulme, Hamill and N Adams J agreeing).

109 See *Ombudsman Act 1974* (NSW) ss 35A-B.

110 Ibid s 35A(1).

111 Ibid ss 35B(1), 35B(4).

112 See Bathurst, above n 1, 42. For a discussion of some of the issues, see Sarah Withnall Howe and Yvonne Haigh, 'Anti-Corruption Watchdog Accountability: The Limitations of Judicial Review's Ability to Guard the Guardians' (2016) 75 *Australian Journal of Public Administration* 305.

113 [2017] NSWCA 275, [71].

114 Bathurst, above n 1, 45.

115 Ibid 44.

116 Ibid.

117 Ibid 45.

118 See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See also Gummow, above n 24, 23.

119 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, [99]. See also *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 249 CLR 398.

120 *Kaldas v Barbour* [2017] NSWCA 275, [346]-[361] (Basten JA, Macfarlan JA agreeing); [150]-[198].

121 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 595 (Brennan J).

122 As was pointed out by Basten JA in Police Integrity Commission v Shaw (2006) 66 NSWLR 446, [66].

123 See *Cunneen v Independent Commission against Corruption* [2014] NSWCA 46, [124].
Although note that the High Court has held that certiorari could issue to quash a report where the only legal force was that the Minister had to consider it before coming to his or her own decision: *Hot Holdings v Pty Ltd v Creasy* (1996) 185 CLR 149. Cf *Parker v Anti-Corruption Commission* (unreported, Western Australia Supreme Court, Full Court, 31 March 1999) where the court held that certiorari was available to review the report even where it was not a pre-condition for further action, because it was something that an appropriate authority could use as a basis for disciplinary action against the report's subjects. As Aronson, Groves and Weeks note, the decisions are not easy to reconcile: see above n 64, 868. Nevertheless, cases like *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 show that courts are willing to issue declarations that such reports are a 'nullity' even though not amenable to certiorari: at 148-9. See also *Police Integrity Commission v Shaw* (2006) 66 NSWLR 446, [65] (Basten JA).

124 See *Kaldas v Barbour* [2017] NSWCA 275, [177]-[197] (Bathurst CJ), [356]-[357] (Basten JA).

125 Ibid [196].

126 See, eg, Gummow, above n 24, 20.

127 Note also that s 75(v) does not explicitly mention certiorari, however, it may issue in the exercise of an implied ancillary or incidental authority of s 75(v) jurisdiction: *Edwards v Santos* (2011) 242 CLR 421, [53] (Heydon J) citing *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 90-91 [14] approved in *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 673 [63]. In *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, Gaudron and Gummow JJ stated the following in relation to s 75(v): 'The power of this Court to issue certiorari is not stated in Ch III of the *Constitution*. Rather, in a matter such as the present, the conferral of jurisdiction to issue writs of prohibition and mandamus implies ancillary or incidental authority to the effective exercise of that jurisdiction. In the circumstances of this matter, that includes authority to grant certiorari against the officer of the Commonwealth constituting the Tribunal': at [14]. See also Pape v Commissioner of Taxation (2009) 238 CLR 1, where the defendants submitted that the plaintiff did not have standing to challenge the payment of a tax bonus to anyone but himself. Gummow, Crennan and Bell JJ stated in relation to declaratory relief that 'The disposition of the controversy between the plaintiff and the Commissioner and the Commonwealth does not turn solely upon facts or circumstances unique to the plaintiff. If the plaintiff succeeds in establishing, as a necessary step in making out his case for relief, that the Bonus Act is invalid, then the reasoning of the court upon the issue of invalidity would be of binding force in subsequent adjudications of other disputes. Hence the very great utility in granting declaratory relief in the plaintiff's action. In this way the resolution pursuant to Ch III of the *Constitution* of the plaintiff's particular controversy acquires a permanent, larger, and general dimension. The declaration would vindicate the rule of law under the *Constitution*. The fundamental considerations at stake here were recently affirmed and explained in *Plaintiff S157/2002 v The Commonwealth*': at [158].

128 Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476.

129 Ibid [73] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

130 (2014) 88 NSWLR 240.

131 Ibid [52] (Basten JA), [184] (Ward JA), (Bathurst CJ agreeing at [7]).

132 [2017] HCA 33.

133 Ibid [48].

134 See ibid at [3].

135 Ibid [53].

136 Ibid [65].

137 Ibid [66].

138 Bathurst, above n 1, 58.

139 *Ross v Costigan* (1982) 41 ALR 319, 330 citing *AG (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644. See also *Lockwood v Commonwealth* (1954) 90 CLR 177.

140 Section 51(xxxix) gives the Commonwealth Parliament the power to legislate with respect to 'matters incidental to the execution of any power vested by this *Constitution* in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth'.

141 The Australian Senate's 2017 Report also defines the following agencies as comprising part of the existing 'multi-agency' framework: the Attorney-General's Department, the Australian Federal Police, the Inspector General of Intelligence and Security, the Australian Electoral Commission, the Australian Securities and Investment Commission and AUSTRAC: see Senate Select Committee on a National Integrity Commission, Parliament of Australia, *Select Committee on a National Integrity Commission*, (2017) 16. It further notes that 'Other agencies referred to as playing 'a role safeguarding the integrity of government administration' include: the Australian Prudential Regulation Authority; the Department of Human Services; the Department of Defence; the Department of Foreign Affairs and Trade; Treasury; the Australian Taxation Office; the Fair Work Ombudsman; the Australian Competition and Consumer Commission; the Inspectors-General of Taxation, Intelligence and Security and Defence; the Australian Electoral Commission, the Department of Finance; the Office of National Assessments; and the Parliamentary Service Commissioner. In addition, individual agencies are responsible for implementing internal policies to prevent, detect, investigate and respond to corruption and misconduct under the Commonwealth's fraud control policy, the Australian Public Service (APS) values, the APS Code of Conduct and the *Public Service Act 1999*': at 15.

To trust or not to trust: in family law

By Giles Stapleton

The assets of a trust will only be the property of a party to a marriage, if that party has the level of control of a 'puppet master' and a lawful right to enjoy the benefit of them. If those criteria are not satisfied, the assets will be excluded from the joint balance sheet for 'contributions' analysis but may be a financial resource of that party in the balancing act of what is 'just and equitable'.

Justice Rees' decision in *Harris & Dewell & Harris [2016] FamCA 938* and the Full Court's decision in the appeal from that decision [*Harris & Dewell & Harris [2018] FamCAFC 94* (Strickland, Murphy and Johnson JJ)], show that trust can be placed in the courts to reach a thoroughly considered and well-reasoned conclusion about whether assets of a trust are property of a party to the marriage.

That doesn't necessarily mean that the principled-conclusion will seem 'right': especially when the husband conceded in *Harris* that he had exercised control over the trust, had engaged in dealings on its behalf, had directed agents on its behalf, had the benefit of the use of assets of it as security for his personal borrowings and accepted there had been an intermingling of his funds with funds of the trust.

The husband had the 'run of the trust' and Justice Rees was satisfied he had treated it as if it were his own since 2002, about eight years before separation.

One might think that would bring the assets within the scope of the husband's 'property' for the purposes of analysing what the 'just and equitable' outcome between the parties would be but that wasn't the case because he did not have a 'lawful right to benefit from the assets of the trust'. In other words, he was not a legal or beneficial owner of the units in the unit trust.

After those trust assets were excluded from the pool of assets, Justice Rees found the husband's contribution to the pool to be 65 per cent and the wife's 35 per cent.

That outcome might be thought a worryingly narrow view of the underlying reality of

the husband's conduct and control. It might be so narrow as to create a clear opportunity for those looking for one. However, it was upheld by the Full Court based on principles established by the High Court (*Ascot Investments Pty Ltd v Harper (1981) 148 CLR 337 and Kennon v Spry (2008) 238 CLR 366* and the Full Court (*Ashton & Ashton (1986) FLC 91-777* and *Davidson & Davidson (1991) FLC 92-197*).

The Full Court referred to Gibbs J's judgment in Ascot in which his Honour said 'there is nothing in the words of the sections [in the Act] that suggests that the Family Court is intended to have power to defeat or prejudice the rights of third parties, or nullify the powers, of third parties, or to require them to perform duties which they were not previously liable to perform'.

At [67], the Full Court confirmed the principle established by earlier authorities that property of a trust can be property of a party when the evidence establishes that the 'person or entity in whom the trust deed vests effective control is the 'puppet' or 'creature' of that party': [67]. But, the Full Court also said, control itself is not sufficient. What is required is a 'a lawful right to some benefit from the assets of the trust' in the party to the marriage [the puppet master].

Justice Rees and the Full Court also relied on a conclusion to that effect in the decision of Finn J in *Stephens & Stephens (2007) FLC 93-336*.

However, the Act does give the court an additional 'approach' under which equity and justice might anyway be achieved with respect to assets of a trust. That is to find the assets to be a 'financial resource' of the party through s 75(2) of the Act [spouse maintenance considerations] which is imported into the property considerations by s 79(4) of the Act.

In this case Justice Rees decided the trust assets were not 'property' of the husband but were a 'financial resource'. That, and other relevant 'future needs' factors, caused her Honour to find the wife entitled to a further 17.5 per cent of the assets. In the final outcome, the wife's interest of 35 per cent increased to 52.5 per cent of the $16.7 million pool.

The Full Court upheld Justice Rees' decision, dismissing the husband's appeal and wife's cross-appeal. The husband's unsuccessful special leave application was based on a different issue.

So, the principle established in *Ascot* and developed in *Stephens* and upheld in *Harris* is now confirmed as the law. It might be a 'principle' that could be perceived as excessively narrow.

While it may incline cynics towards forward planning and to re-arrange their 'trust' affairs, the structure of the Family Law Act and the broad scope of the discretion possessed by the court will continue to limit the effect of the conduct of a party to a marriage that attempts to gain an unfair advantage.

Trust can be placed in the courts to act within their power and exercise their discretion to conclude what is ultimately 'just and equitable'.

New barristers: one-size-fits-all or equal opportunity?

By Antony Cheshire SC

The lot of the young is to rail against any suggestion that things were better in the *olden days*. Indeed, if history allows us to learn from our mistakes, then things should be better now. Issues such as the resurgence of the far right and antisemitism in Europe and America's retreat into insularity, however, have echoes of the early 20th century and should cause us to question whether we are indeed repeating the mistakes of history.

One of my daughters wrote on my birthday card this year: *'You're a good dad'*. Initially this seemed a rather underwhelming compliment, but it emerged that it was meant as her reassurance to someone who questions, analyses and worries. And this brings me to my pet worry for this issue, which is our system for supporting our readers and new barristers and our failure to provide equal opportunity of access.

There is a well-worn path from university to law school to a solicitor's firm, but no-one would suggest that this suits everyone: the SAB/LPAB courses have allowed many solicitors to practise without a law degree; many solicitors have come to the profession from different careers; and many now start with firms as paralegals rather than junior solicitors. A diversity of different avenues promotes an equal opportunity of access into the legal profession.

So, why are we so reluctant to embrace, promote and support different avenues for coming to the bar? Our structure has become far too rigid and there are a lot of very good candidates who have been put off coming to the bar.

Why do we tell people that they should work as a solicitor *'for a few years'* before coming to the bar? I went straight to the bar in London (in 1992) and have never worked as a solicitor. I have never regretted that, but whenever I raise it here and suggest that it might be right for some people to go straight (or early) to the bar, it is brushed off on the basis that we do things differently here. That may be so, but that does not mean that it always has to be that way.

There is a sizeable contingent that did

come straight to the bar in New South Wales, have been very successful and seem very happy with that choice. So why the resistance?

It is suggested that lawyers need to make contacts as solicitors in order to generate work when they come to the bar, but it is often the case that anticipated work from previous employers never eventuates. There may be many reasons for this, including the size of the firm, the respective areas of practice and a potential reluctance on the part of some solicitors to brief work to former subordinates.

It is then suggested that lawyers need to learn the legal system before coming to the bar, but some will have little exposure to litigation and some will receive little or poor quality instruction. Indeed, one might think that the bar is better placed to provide that instruction.

It is true that some people who have come straight to the bar have not succeeded, but that does not lead to a conclusion that no-one should. It is also true that those who come straight (or early) to the bar are likely to need greater support, at least initially, but that provides a reason to provide that support not a reason to tell them not to come. Equal opportunity should include those who wish to come straight to the bar.

There is an important albeit unintended consequence of telling students that they should spend several years as a solicitor before coming to the bar.

The traditional model here has people coming to the bar in their late 20s or early 30s, but for some women that is when they may be thinking about having children. The early years at the bar can be extremely difficult and stressful. For some women, the prospect of trying to start a career at the bar while at the same time having children (and, for at least some of them, being their full-time carer for a period) may be a disincentive to coming to the bar.

As my repeated use of the word *'some'* should make abundantly clear, I am not suggesting that this is the case for all women, but it is likely to be the case with some. Indeed, even if it is only one, then that woman has not been given an equal opportunity of access to a career at the bar.

A person who has come straight (or at least early) to the bar is then able to establish a career and reputation over 10 years or so before having children or taking time off to care for them; and it is likely to be easier to resume a career with young children than to commence and establish one.

The statistics of women at the bar may support this view. In England and Wales, where the traditional route is to go straight to the bar, women make up 52 per cent of pupils and 37 per cent of the practising bar (from a total of about 16,500); whereas in New South Wales the comparable figures are 35 per cent of readers and 23 per cent of the practising bar (from about 2,500).

Furthermore, people who come straight (or early) to the bar are likely to have fewer financial commitments at that stage of their life. Thus, for at least some people, coming to the bar in their mid 20s is likely to be a more realistic financial proposition than in their mid 30s.

Encouraging different models of access is likely to lead not only to an improvement in equal opportunities for women but also people from many different backgrounds.

During the first six months of my pupillage (equivalent to the reader's year), I was not entitled to take paid work and I spent the whole time with my pupil master: sitting in his room, doing his chamber-work and observing him on the telephone, in confer-

ences and in court and dealing with clerks, peers, solicitors, clients and judges. I did pro bono work throughout the year and during my second six months I was able to take paid work, but I stayed in his room. This meant that he was easily available to answer the stupid questions of a new barrister, which he did patiently, without complaint and indeed willingly. Other members also provided encouragement, input and support. That year provided an outstanding grounding in the legal system and the practice of a barrister.

Floor members here are generally aware of their responsibility to support new members by providing work and assistance. It is the support of the tutor, however, that is critical. In my view, it is all too often lacking, particularly to the reader who has little experience in the legal system. It is precisely this area that needs to be improved to encourage those people who wish to come straight (or even early) to the bar that there are proper support networks in place.

Many tutors see their role as providing work, either directly or through referrals and introductions, together with an open-door to the reader, but there is often little in the way of pro-active support. There appears to be a reluctance here for barristers to share rooms, but in my view readers should be encouraged where possible to sit and work in the same room as their tutor, even if only from time to time. That immediate exposure to an established barrister and his or her practice is invaluable.

The emphasis in that first year should be on learning, with earning being secondary. That raises a potential need for financial support. While initiatives encouraging equal opportunities to those at the bar, such as Equitable Briefing, are very important, the initial concern of someone looking to come to the bar is surviving that first year. We have little in place to support those from financially less privileged backgrounds.

For my pupillage year, which included six months of not taking paid work, my floor of barristers paid me £6,000 (which is equivalent to about $22,000 in today's prices). It was very welcome for me, but some of my colleagues could not have gone to the bar in London without it.

Lincoln's Inn Fields Photo: Chris Winslow

Floors could easily introduce such a system here, either for all readers (as was the case for me in London) or on a discretionary basis for those in financial need. By way of example, an annual contribution of $1,000 from each member of an average floor here would provide about the equivalent level of financial support to a reader that I received. There could be a graded contribution where more senior members contribute a larger sum (as generally happens with floor fees in England) or junior members being exempt; and the reader could be required to repay a portion of the grant where their earnings exceed a certain level (as occurs in some chambers in England).

I think we have become complacent or lazy in accepting a standard model for how people come to the bar without considering that there are some people who would thrive outside of that model or simply would wish to do things differently. We need to improve the support for the readers and new barristers, in particular in the level of input from their tutors and, where it is needed, financial input from the floors.

I have been judging the Law Society schools' mock trial competition for many years. After giving feedback on the performances and before giving the scores, I always tell the students that the bar is a wonderful profession, but it is hard and you have to really want to do it. Relevantly here, I tell them there are many different ways of coming to the bar and that for some it may be better to come straight (or early) to the bar: there is no normal! Some of them have done work experiences with me and it is inspiring to see some of them now commencing their legal careers. They are from many different backgrounds and I would like to be able to reassure them that the support they may need at the bar will be available. At the moment, I am not sure that is the case.

John Langshaw Austin: Law, common sense and language

By Kevin Tang

Introduction

John Langshaw Austin (26 March 1911 - 8 February 1960) was a mid-20th century philosopher of language who must not be mistaken for John Austin, the 19th century high priest of positivism. As an Oxford Don, J L Austin had only a few publications and he died young. His career was disturbed by WWII when he worked for the British Intelligence Corps on code breaking. He was highly decorated with an Order of the British Empire, the heroic French Croix de Guerre and the USA made him an officer of the Legion of Merit. However, his real eminence was as a thinker. After World War II, J L Austin returned to academic philosophy and became the White's Professor of Moral Philosophy at Oxford. JL Austin is famous for his philosophy of language and developing the theory of speech acts; the difference, if any, between what we say and what we do.

Common sense and the law intersect on many levels. Some would reduce the law to nothing more than common sense. As Lord Sumption said in an interview in the 1990s, when still at the London Bar appearing in *Ex Parte Pinochet Ugarte*,:

> Legal practice needed a qualification that wasn't too difficult to obtain. Most law is only common sense with knobs on. Although we spend a lot of time looking through these ancient tomes, everyone knows what the answer is likely to be.

The irony is that common sense in the law is uncommon.

Language and common sense

In a nutshell, Austin asserted that we use language to do things as well as assert things. He wrote about the essence of language and its meaning- we often ask that others understand sentences and statements to mean a

particular thing, that is, we wish to elicit a certain reaction from the person we are speaking to. Common sense may help us along the way to understanding what we say to each other. This all might seem obvious. The common sense element comes in to assist with context and in understanding what a person says and means at a particular time.

Kyle Glenn @ unsplash

Austin's account of the many ways in which we use language to describe things was explained in his most famous book *How to do Things with Words* (1955/1962). His central thesis was: philosophy reacts negatively to common sense because it does not appreciate the content of and commitments of common sense.

For example:

> You are reading this page in a magazine. You are reading the words that have been printed on the page. Do you have any doubt that you are sitting down and reading this page?

Philosophers are suspicious of what common sense asserts is before their very eyes.

Austin loved the example showing the difference between accidents and mistakes.

> Two friends have the same dog (German short haired Pointer) and the dogs run around a small woodland daily at dusk. One day one of the friends decides that he doesn't like his dog anymore. He shoots it and it dies. To his shock and horror he discovers that he has shot his friend's dog. Has he shot the dog by accident or mistake? He goes to his friend and says 'I'm sorry I shot your dog by *accident*' or should that be *by mistake*?

Austin loved such an exquisite example of the difference in words and meanings and how the use of words such as 'accident' or mistake' can cast certain other meanings on how a dog was shot.

He used a many in his philosophical writings. The message is that perceptual experience is what it is, but the ways in which we use language might change our appreciation of it ie. what we understand another person to have said and what, in fact, the other person meant. Intended meaning of what we say, however

subtle, is in the ear and mind of the listener.

Austin's views on common sense are contained in his book *Sense and Sensibilia* (1962). He said that our perceptual experiences - our experience of seeing, hearing, smelling, touching and tasting are all shaped or informed by other things which we experience.

Austin called these other common experiences 'drygoods' and in that stable of diurnal experiences he counted: hearing other's voices, seeing rivers, mountains, experiencing pictures on walls and on a screen in a cinema etc...

Other philosophers use illusions or delusions to justify or defend their view on which of our experiences can exist independently, of other worldly things we perceive. Hallucinations could create such an experience for you. To go back to our experience of reading a page in a magazine: you could be having an hallucination of the printed page in front of you. You would not be experiencing the printed page, it might be that you are experiencing nothing at all. You might merely seem to yourself to be experiencing something.

Austin's view asserts that the printed page shapes our experience. That is, the experience of seeing the printed page is of a different nature from the experience of having a hallucination about the printed page.

Austin was concerned about that last critical challenge: our inability to distinguish a genuine perceptual experience from its hallucinatory counterfeit experience. Austin argued: why can't it be that in a few cases, perceiving one sort of thing is exactly like perceiving another?

How do we conclude that those experiences must share the same nature? Things with different natures might appear like one another. For example, if I am told that an apple is different in nature from a piece of soap, do I expect that no piece of soap could look just like an apple? Or a golf ball shaped piece of soap is also an example. Austin did not say that things that appear exactly alike must have the same nature.

Austin argued that traditional philosophical perplexities have arisen through a mistake. The mistake of taking as statements of fact, certain utterances which are either nonsensical or intended to be something quite different. That might be so. Common sense often comes to the rescue in order to understand the meaning intended.

Austin formulated some ingenious categories of utterances. The three types are:

1. A *locutionary act* is an utterance with a particular meaning, an act that can sometimes be classified by its content. If *I promise that I'll be home for dinner* or *I promise that I'll work late*, my actions are instances of two different locutionary acts. One with the content that *I'll be home for dinner*, and one with the content that *I'll work late*.

2. An *illocutionary act* is classifiable not only by its content but also by its force (as a case of stating, warning, promising etc...). If I promise that *I'll be home for dinner* and later state that *I'II be home for dinner*, my actions are instances of the same locutionary act: both actions involve the content that *I'll be home for dinner*. However, my actions are instances of different illocutionary acts. One has the force of a promise and the other has the force of a mere statement.

3. A *perlocutionary act* is an act classifiable by its 'consequential effects upon the feelings, thoughts, or actions of the audience, or of the speaker, or of other persons'. If you warn that the ice is thin, in an illocutionary act, then i might achieve a variety of perlocutionary effects as a result. Eg. I may persuade someone to avoid it, or I might encourage someone to take a risk.

For Austin distinctions like these meant everything. There was failure to acknowledge the importance of the *illocutionary act*. When attempting to treat stating something as a *locutionary act* rather than an illocutionary act, as something that is achieved just by saying a meaningful sentence. For example '*I promise that I'll be home for dinner*', can be treated as a way of stating something about oneself (a *locutionary act*), or a way of promising something (a *perlocutionary act*). Austin also said that you can fail in stating something not because you use a nonsensical sentence, but because the right conditions for comprehension are not present.

Conclusion

Austin's broad approach to philosophy of language and action continues to fascinate. Even philosophers who do not like Austin's claims and arguments about language and common sense are likely to acknowledge the distinctions that he drew illuminate thought on the subtleties of common sense. Common sense does serious work in the lives of lawyers, especially when interpreting the meaning of what is said. Echoing Jonathan Sumption QC, as his Lordship was, the essence of the Law is common sense.

From Countess Lovelace to Ross

A brief overview of artificial intelligence (and its increasing use in the legal profession)

By Farid Assaf SC – Banco Chambers[1]

Introduction

In the annals of the history of computing, a more unlikely collaboration would be difficult to imagine. On the one hand Charles Babbage (1791 – 1871), the English polymath widely acknowledged as the father of modern computers and on the other Ada, Countess of Lovelace, the (only legitimate) daughter of famed English poet Lord Byron and considered by many to be the first ever computer programmer. In 1833 Babbage demonstrated his newly constructed Difference Engine (a mechanical calculator) to Lovelace and her mother (whom Byron dubbed the 'Princess of Parallelograms'). Lovelace was inspired by what she saw and went on to become an esteemed mathematician in her own right.

Her most famous contribution was the translation of a paper from French to English written by Luigi Menabrea in 1842 (who besides becoming prime minister of Italy also examined the mathematics of structural analysis). In the paper, Menabrea discussed Babbage's 'Analytical Engine' – a successor to the Difference Engine and considered to be the first ever computer (at least conceptually). Not content with simply translating the paper, Lovelace prepared detailed notes of her own which included a suggested algorithm that could program the engine.[1]

Lovelace's notes also contained an observation which some have considered to be a dismissal of artificial intelligence. She wrote: 'The Analytical Engine has no pretensions whatever to *originate* anything. It can do *whatever we know how to order it* to perform. It can follow analysis; but it has no power of anticipating any analytical relations or truths.' In his seminal paper Computing Machinery and Intelligence, Alan Turing sought to countenance Lovelace's perceived negativity towards artificial intelligence (AI). In that paper, Turing posed the question 'Can machines think?' To answer the question, Turing devised a test for artificial intelligence whereby a machine attempts to convince a human interrogator it really is

human through a series of written responses to various questions.

The so-called Turing Test has been criticised by researchers in artificial intelligence. Instead, some researchers suggest the Lovelace Test (named of course after the Countess). An artificial agent, designed by a human, passes the Lovelace Test only if it originates a program that it was not engineered to produce. In other words, the Lovelace Test requires a computer to create something original, all by itself.

There has been a significant increase in AI research since the publication of Turing's paper in 1950. In its inaugural 2017 AI Index, Stanford University estimates that the number of AI research papers produced each year since 1996 has increased more than nine-fold, AI class enrollment at Stanford during the same time-frame has increased eleven-fold and there are now fourteen times the number of active US startups developing AI systems than there were in 2000.[2] Notwithstanding this increase in activity, AI researchers are yet to develop technology which passes the Lovelace Test (or for that matter the Turing Test, at least on a consistent basis). Even so, the surge in interest in AI has pervaded a significant number of industries including the law. AI technologies are now routinely used in a wide variety of industries including health, finance and teaching.

This article briefly explores the current status of AI, its future development and its possible practical uses for the legal profession.

What is AI?

Despite the term 'artificial intelligence' being coined in 1956 by American computer scientist John McCarthy, there is no universal definition of the expression. At the risk of over-simplification, AI can simply be described as 'non-biological intelligence'.[3] The Oxford dictionary defines AI as 'the theory and development of computer systems able to perform tasks normally requiring human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages.' This definition refers to the various metrics used by researchers to determine whether a non-biological entity truly exhibits artificial intelligence. As will be explained below researchers have been able to build technologies that display some of these attributes but are far from achieving general human level intelligence.

The state of AI technology and predicted future advancements

For present purposes, three broad phases can be described for AI and its evolution: now, near and next.[4] The present epoch is described as one of narrow AI. Narrow AI technologies focus on a limited task designed to replicate and surpass human intelligence.[5] Currently, AI systems already outperform human intelligence in many domains[6] including defeating human champions in a wide variety of games such as checkers (1994 with the CHINOOK program); backgammon (1979 with the BKG program); chess (1997, Big Blue against Garry Kasparov); scrabble and more recently Jeopardy! in 2011. Jeopardy! is a television game show with trivia questions covering a variety of topics including history, geography and literature. In 2011, IBM's Watson defeated two former winners of the game-show.[7]

The near phase encompasses artificial general intelligence (AGI) or human level machine intelligence (HLMI) which is yet to be developed and is defined as AI 'capable of performing all intellectual tasks that a

human brain can.'[8] Estimates as to when this next phase will commence vary, however approximately 50 per cent of recently surveyed AI researchers predict the year 2040 as when that milestone is likely to be reached, whereas 90 per cent of researchers predict AGI would be reached by about 2075.[9] The next phase is artificial superintelligence (ASI). In his *New York Times* best-selling book *Superintelligence*, Nick Bostrom, a professor of philosophy at Oxford University, predicts that superintelligence will be achieved 'relatively soon after' achieving HLMI.[10] In the book he opines that a 'plausible default outcome' of the creation of machine superintelligence is 'existential catastrophe.'[11] The future is not entirely dystopian with Bostrom suggesting humanity could utilise what he calls 'indirect normativity' to effectively delegate to a superintelligence the reasoning required to select certain universal (benevolent) values. He summarises such an approach as a heuristic principle which he labels 'epistemic deference', that is, a superintelligence which 'occupies an epistemically superior vantage point: its beliefs … are more likely than ours to be true. We should therefore defer to the superintelligence's opinion whenever feasible.'[12]

Artificial or 'augmented' intelligence?

During the present transitional phase to HLMI, narrow AI technologies are producing what some have labelled augmented intelligence (sometimes referred to as intelligence amplification). The goal of augmented intelligence is not to replace humans, but rather capitalise on the combination of algorithms, machine-learning and data science to inform human decision-making abilities.[13] IBM is at the forefront of this augmented intelligence research and development. Rob High, Vice President and CTO of IBM Watson, explains IBM's approach in the following way: 'If you look at almost every other tool that has ever been created, our tools tend to be most valuable when they're amplifying us, when they're extending our reach, when they're increasing our strength, when they're allowing us to do things that we can't do by ourselves as human beings. That's really the way that we need to be thinking about AI as well, and to the extent that we actually call it augmented intelligence, not artificial intelligence.'[14] One of IBM's key technologies in developing augmented intelligence is its Watson technology. IBM describes Watson as a cognitive system built on the current era of programmatic computing which utilises deep natural language processing. The uniqueness of the Watson technology is to combine the capabilities of natural language processing (by helping to understand the complexities of unstructured data); hypothesis generation and evaluation (by applying advanced analytics to weigh and evaluate a panel of responses based on only relevant evidence) and dynamic learning (by helping to improve learning based on outcomes to get smarter with each iteration and interaction).[15] The Watson technology is currently used in a wide array of industries including medicine, finance and now law.

AI and the legal profession

Academics and entrepreneurs have identified a number of AI technologies suitable for use in the law and legal practice. In his 2017 book *Artificial Intelligence and Legal Analytics* published by Cambridge University Press, Kevin D. Ashley, a Professor of Law and Intelligent Systems at the University of Pittsburgh, explains and explores the AI systems currently available and that can be specifically adopted for legal work. Ashley explains that the goal of much of the research in AI and law has been to develop 'computational models of legal reasoning' (CMLRs) that can make legal arguments and use them to predict outcomes of legal disputes.[16] A subset of CMLRs known as computational models of legal argument (CMLAs) implements a process of legal argumentation as part of their reasoning.[17] While researchers have made significant progress in developing such models some obstacles have arisen. So far for example, the substantive legal knowledge employed by computational models has had to be manually obtained by legal professionals from legal sources. This inability to automatically connect CMLRs directly to legal texts has limited the researchers' ability to apply their programs in real-world legal information retrieval, prediction and decision-making.[18]

However, recent developments in computerised question answering (such as Watson), information extraction from text (which summarises the essential details particular to a given document) and argument mining (which involves automatically identifying argumentative structures within document texts) promise to change that. All three technologies usually rely, at least in part, on applying machine learning to assist programs in processing semantic information in the texts.[19] Another technique which may assist researchers' ability in producing CMLRs for real-world applications is text analytics or text mining. This technique refers to a set of linguistic, statistical and machine learning techniques that model and structure the information content of textual sources for business intelligence, exploratory data analysis, research or investigation.[20] In the legal context, this technique can be applied (which Ashley refers to as 'legal analytics') so as to derive substantively meaningful insights from legal data.[21] Ashley predicts that some CMLRs and CMLAs may soon be linked with text analysis tools to enable the construction of a new generation of legal applications. As Ashley explains, 'CMLRs and CMLAs developed in the AI and law field will employ information extracted automatically from legal texts such as case decisions and statutes to assist humans in answering legal questions, predicting case outcomes, providing explanations, and making arguments for and against legal conclusions."[22] The above concepts are best explained by way of examples.

Examples of AI technology used in law

Predictive Coding

Predictive coding, also known as Technology or Computer Assisted Review (TAR), is a discovery-specific, dialogic application of machine learning technology in which a program develops, applies and refines a predictive document-search model based on search terms, document categorisations and feedback given by human case managers.[23] TAR uses machine learning to identify relevant documents. The process involves a small team initially reviewing a seed set of documents. Once complete, a computer identifies similarities and patterns within the entire set of documents and attempts

to determine coding that will be useful for additional document sets.[24] The United States has been an early adopter of TAR. In *Da Silva Moore v Publicis Groupe et al* (2012) 287 F.R.D 182, Judge Peck, a then federal magistrate judge for the United States District Court for the Southern District of New York, observed, in an opinion specifically addressing the issue, that TAR was the best methodology to process the nearly three million-odd documents in that case (a sex discrimination case) as opposed to manual review. Numerous other US cases have taken a similar approach as have English courts (see for example the 2016 case of *Pyrrho Investments Limited & Anr v MWB Property Limited* [25]). TAR has also been adopted in Australia. In *McConnell Dowell Constructions (Aust) Pty Ltd v Santam Ltd (No 1)* [2016] VSC 734 the plaintiff identified approximately four million potentially relevant documents. After referring to the US and English cases mentioned above, Vickery J of the Supreme Court of Victoria endorsed the suggestion of a court-appointed special referee that the parties use TAR to increase the efficiency of the document review. His Honour noted that the use of technology in civil litigation should facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute as required by section 9 of the *Civil Procedure Act 2010* (Vic).[26] The Supreme Court of Victoria has also issued a specific practice note dedicated to the use of technology in civil litigation[27] where the court makes clear that practitioners are expected to consider the use of technology as early as possible. The Federal Court has also issued a similar practice note.[28]

Ravel Law and Lex Machina

Ravel Law is a startup by two former Stanford law students who have sought to disrupt traditional text intensive legal research. One of the most distinctive features of Ravel's user interface is the display of legal research search results – rather than appearing as blocks of text, search results appear as an interactive visualisation. Case results are displayed as bubbles of various sizes – landmark cases are depicted as larger bubbles while less important cases appear smaller. The relationship between the various case bubbles are depicted graphically. Search results can also be filtered in a number of ways such as rulings from various courts or dates. Another distinctive aspect of Ravel's platform is its analytics suite which includes court analytics; judge analytics; and case analytics.[29] The analytics suite analyses case data to produce practical summaries. For example, using the judge analytics function users can see how a particular judge will respond to a particular application based on past data involving relevant factors.[30] For example: 'Judge Susan Illston in the Northern District of California grants 60 per cent of motions to dismiss, which makes her 14 per cent more likely to grant than other judges in the district.' At the time of writing the Ravel Law technology is available to LexisNexis Advance users in the United States.

Similar to Ravel Law, Lex Machina uses natural language processing to analyse court documents that are publicly available to try to predict things like the ruling of a particular judge in a particular case or the behaviour of a particular lawyer.[31] Lex Machina uses natural language processing to analyse court documents that are publicly available to try to predict matters such as the ruling of a particular judge in a particular case, the behaviour of a particular lawyer and the litigation history of particular parties.[32] Lex Machina originated with a particular focus on IP, however, since its acquisition by LexisNexis, Lex Machina has now branched out into other practice areas such as trademark and copyright litigation.[33]

"If to err is human, how do I explain this mess."

United Archives GmbH / Alamy Stock Photo

Ross

Based on question-answering computer system IBM Watson, ROSS is a cloud-based system that uses natural language processing and machine learning capabilities to understand, research and provide answers to legal research questions.[34] IBM's Watson, upon which ROSS is based, is in turn reliant on what is referred to as Unstructured Information Management Architecture ('UIMA'), which is a framework which uses a series of software components called annotators to analyse text and draw increasingly abstract inferences about textual meaning.[35] Upon provision of an answer, the human interacting with ROSS then tells the system whether the answer provided was relevant and ROSS uses this information to learn to produce just as relevant or more relevant answers in the future.[36]ROSS's current capability extends to bankruptcy, intellectual property and labor and employment law in the United States.

IBM's Debater

IBM describes Project Debater as, 'the first AI system that can debate humans on complex topics.' IBM says that Project Debater relies on three 'pioneering capabilities.' First, data-driven speech writing and delivery, which is said to be the ability to automatically generate a whole speech and deliver it persuasively. Secondly, is listening comprehension, which IBM describes as the ability to understand a long spontaneous speech made by the human opponent in order to construct a meaningful rebuttal. Thirdly, is the system's ability to model human dilemmas and form principled arguments made by humans in different debates based on a unique knowledge graph. IBM claims that by combining these core capabilities it can conduct a meaningful debate with human debaters. The development of Project Debater has required IBM to venture into new and discrete areas of AI research such as argument mining (i.e. identifying an argument and its position with respect to the relevant topic); debate speech analysis (which entails the ability to understand and rebut the text of the opponent's speech and the development of text to speech systems (i.e. the ability to interact with its surroundings in a human-like manner). For readers who are interested, IBM has released datasets for Project Debater which sets out the various comprehensive research papers relied upon for the project. The link to those datasets is contained in the end notes to this article.[37]

In a presentation held in San Francisco on 18 June 2018, IBM demonstrated the Debater technology with a real-time debate with a human on the topic of whether government should subsidise space exploration. IBM's

debater had no awareness of the debate topic ahead of time. Each side gave a four-minute introductory speech, a four-minute rebuttal to the other's arguments and a two-minute closing statement. According to media reports, the AI Debater 'held its own.'[38] During the debate, the AI cited sources, indulged the audience's affinity for children and war veterans, utilised analogies and even made a few 'passable' jokes. Having viewed extracts of the debate[39], the writer can confidently say that members of the New South Wales Bar should not be concerned about job security – at least at this stage.

Data Privacy Advisor - Thomson Reuters

Data Privacy Advisor is another AI tool based upon Watson technology. Launched earlier this year, the Advisor is a tool primarily designed to assist compliance officers keep up to date with the myriad of privacy regulations faced by businesses around the world. The tool contains global statutory and regulatory data privacy country guides for more than 80 countries, question answering capability using natural language through IBM Watson-enabled technology as well as curated news, analysis and blog content specific to data privacy.

Conclusion

It is hoped that this article has provided some insight into the world of AI and its application in the legal profession and that the popular cacophony[40] regarding AI can be placed into context. At this stage of research, and at least for the foreseeable future, the legal profession, and professionals, are likely to be greatly assisted by the various augmented intelligence technologies being developed. We are a long way from technology being able to satisfy Countess Lovelace's quite demanding test for AI. The literature suggests however that it is almost inevitable that day will arrive although it is likely to be towards the end of this century. The consequences of this for the legal profession will need to be examined in a subsequent article.

Gualtiero Boffi / Alamy Stock Photo

ENDNOTES

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Blockchain and cryptocurrency for barristers

By Emma Beechey

Litigation relating to blockchains, cryptocurrencies and 'ICOs' is inevitable. It is therefore worth knowing at least a little about them and how they work. This article aims to provide the briefest of introductions to this fascinating world.

Blockchain

A blockchain is a trustless, decentralised ledger. 'Ledger' as in a bookkeeping document in which one records credits and debits against each account within that ledger. 'Decentralised' in that copies of exactly the same ledger are stored on thousands of computers around the world. 'Trustless' in that one does not have to trust a centralised controller, such as a bank, to put correct entries onto the ledger. Rather, a network of computers work together following a set of fixed rules to process transactions. In this way, thousands of people can agree on who owns the assets recorded in the ledger and they can trade those assets with one another without having to go through an intermediary such as a bank.

Bitcoin and other cryptocurrencies

The original blockchain was bitcoin, which the inventor(s) (pseudonymously named Satoshi Nakamoto and anonymous to this day) called a peer-to-peer electronic cash system.[1] 'Peer-to-peer' meaning that, like cash, one person can pay another person without having to make the payment through an intermediary. Unlike cash, bitcoin and other cryptocurrencies are native electronic currencies. They are intangible. Each exists only on its own blockchain. Unlike cash, cryptocurrencies are not issued by a state. Like the currencies issued by modern states (fiat currencies), bitcoin and other cryptocurrencies are not backed by gold or anything else. Like fiat currencies, their value is based on a collective belief that they have value.

Cryptocurrencies use a system of cryptography called public key cryptography, which allows a person to publicise their public key (called an 'address' in relation to blockchains) so that people can send cryptocurrency to that address, while keeping completely private their private key. Only the person who knows the private key is able to withdraw cryptocurrency from the address. Owning bitcoin simply means that you have the private key to the address. To transact with bitcoin, a person signs a transaction request cryptographically using his or her private key, then broadcasts that transaction to the network. It is stored in the network as an unconfirmed transaction until it is placed into a block on the blockchain and the transaction is thereby executed.

Other cryptocurrencies include either (the native currency of the Ethereum network), XRP (the native currency of the Ripple network), litecoin, monero, zcash and tether (pegged to the valued of the US dollar).

"I'll give you a HUGE bonus in bitcoins if you can explain to me what the hell they are."

Legally speaking, what is cryptocurrency?

As with any asset, cryptocurrencies can have different characterisations for different legal purposes.

In Australia, cryptocurrencies are treated as money for the purposes of GST.[2] However, for income tax purposes, as with foreign currencies, cryptocurrencies are CGT assets that can trigger a CGT event on sale. [3]

ASIC does not consider cryptocurrencies to be financial products.[4] It appears that the US Securities and Exchange Commission agrees, at least so far as bitcoin and ether are concerned.[5]

The European Court of Justice has held that bitcoin is a currency and therefore its supply is exempt from the imposition of value added tax (VAT) in the European Union.[6] However, the United States Internal Revenue Service considers bitcoin and other cryptocurrencies to be commodities.[7]

In some US criminal cases, bitcoins have been treated as currency. For example, as the money in a money laundering conspiracy [8] or as the money transferred in an illegal money transferring business. [9]

ICOs and tokens

An ICO is an initial coin offering, a play on the concept of an IPO (initial public offering). The 2017 ICO craze has now died down but it has not died out entirely.

In an ICO, someone wishing to raise money – hopefully for a bona fide business venture – offers 'tokens' to investors who contribute money either in fiat currency or more commonly in bitcoin or ether. The tokens are said to have various rights attaching to them. For example, a right to a percentage of the profits of the business venture or a right to use the tokens to transact on a future digital platform to be created as part of the business venture. These offers are made to the world at large in a 'whitepaper' attached to the ICO and in other public statements by the offerors. Those buying the tokens probably believe that they have entered into a contract with the

Photo by Andre Francois on Unsplash

offerors and are entitled to the rights offered in connection with the tokens. However, the offerors are usually a loose and sometimes pseudonymous collection of people and the offered rights are both so vaguely described as to be incapable of enforcement and completely dependent on the commencement and success

"It's not fair. I get 10 years for counterfeiting and people make fortunes with cryptocurrency!"

of the business venture.

Regulators in many countries have been grappling with ICOs, in particular whether or not tokens meet the definition of a security in the US or a financial product or managed investment scheme in Australia.[10] The answer will be different for each different type of ICO.

The distinctive benefits of blockchains and cryptocurrencies

Decentralised and censorship-resistant

Bitcoin is decentralised. There is no authority that can be ordered to shut down the network, to modify transactions or to refuse certain types of transactions or transactors. Its decentralisation also makes it censorship-resistant. Other blockchains achieve decentralisation and censorship-resistance to lesser degrees. Some, such as private corporate blockchains, do not aim for censorship-resistance and are decentralised only to the extent required to prevent there being a single point of failure which can be targeted by attackers.

Permanent and immutable

A blockchain is a permanent and immutable record of past transactions. For bitcoin and many other cryptocurrencies, the records are made permanent and immutable by a system called 'proof of work'. In a proof of work system computers compete to find a large number that meets certain specific criteria (mining). Finding the number takes a significant amount of computing power and hence a significant amount of electricity. It is therefore costly. The reward for the successful computer is known as the block reward, currently 12.5 bitcoins per block. The successful miner broadcasts the new block which contains transactions from the unconfirmed transaction pool. Those transactions become confirmed transactions and all miners move on to trying to find the next block. An additional feature which makes all blockchains difficult to retrospectively alter is that all blocks on a blockchain are cryptographically linked together. Any attempt to change one block would require changing all subsequent blocks to be effective. It is not literally impossible to modify a secure blockchain such as bitcoin. Rather, it is so costly and computationally impractical that it is impossible in practice.

Complete history

A blockchain contains a complete history of all transactions ever undertaken in the cryptocurrency which is native to that blockchain.[11]

Digital

Because cryptocurrencies are native to the digital world, they can be transferred rapidly through digital communications systems such as the internet. Because they are both digital and peer-to-peer, they can be sent across national borders as easily as they can be sent to a person in the next room.

Pseudonymous (not anonymous)

There is a common misconception that cryptocurrency transactions are anonymous. They are not.[12] Rather, they are pseudonymous. A name is not required to transaction with cryptocurrency, but a cryptocurrency address is required. Anyone looking at the blockchain can see the amount and source of any cryptocurrency arriving at an address or departing from that address. Telling people one's cryptocurrency address – a necessary step in receiving payments – also allows those people to see all past and future transactions from that address. A person may have many cryptocurrency addresses on one blockchain but a careful analysis of the blockchain will be able to link together many such addresses. A US company called Chainalysis specialises in providing this sort of de-anonymising service for the bitcoin blockchain to governments and corporations.

Exchanges

If a person wants to convert cryptocurrency into fiat currency (rather than spending the cryptocurrency directly), that person will either need to trade their cryptocurrency for cash, or they will need to use the services of at least one intermediary: a cryptocurrency exchange or a bank, or both.

A bitcoin exchange is an online marketplace where buyers and sellers of bitcoin can trade with each other via an orderbook managed by the exchange. To use an exchange, a user creates an account with the exchange. The user then deposits either traditional currency or bitcoin. Traditional currencies are deposited by way of a bank transfer to the exchange's bank account. Bitcoin is deposited by sending bitcoin to a bitcoin address nominated by the exchange. The relevant amount is then credited to the user's account. The user can then sell the bitcoin for traditional currency, or vice versa. Having bought or sold, the user can then withdraw the proceeds from their exchange account to their preferred destination by way of a bank transfer or bitcoin transfer.

Almost all exchanges now require users to prove their identity when signing up for an account, in order to comply with anti-money laundering requirements imposed on the exchanges by most countries. This makes

exchanges an excellent target for preliminary discovery or subpoenas.

Other applications of blockchain technology

'Smart contracts'

The Ethereum blockchain markets itself as being able to perform smart contracts. Cryptocurrency lawyers are fond of saying that 'smart contracts' are neither smart, nor are they contracts. A smart contract is a computer program which instructs a blockchain to make a certain transaction if certain criteria are met, for example at a certain time, or if a certain number of digital signatures have been provided (used to operate a multi-signature cryptocurrency wallets), or if a certain authority has provided a certain input (used to execute escrow transactions or bets). ICO tokens are almost all issued as smart contracts on the Ethereum blockchain.

Timestamping

A much more interesting application of blockchain for barristers is its ability to provide evidence of the time before which a certain event must have occurred. Each block on a blockchain is added one-by-one over time. Each block has a time stamp. In its simplest form, timestamping exists for every cryptocurrency transaction. There is an immutable record that a certain transaction occurred at a certain time. In its more advanced form, any data (e.g. a contract, a novel, a digitised picture) can be converted into a cryptographic hash of that data. Then, the cryptographic hash can be recorded on a blockchain. There are various commercial operators providing this service and almost all of them use the free and open source OpenTimestamps protocol which has been timestamping data to the bitcoin blockchain since 2012.[13]

Asset ledgers

Blockchain is also being used to create immutable, tamper-resistant ledgers of the provenance of certain high value goods, such as diamonds.[14] The success of such initiatives depends on two critical factors: whether the initial data inputs onto the blockchain can truly be trusted and the level of security of the chosen blockchain.

Other implementations

Blockchains are also being used or developed for many different implementations, some of which may be successful, others of which may prove to be too costly, too inefficient or too easily de-anonymised to be useful. Examples include online voting systems,[15] shipping supply chain ledgers,[16] patient health records,[17] medical data for researchers,[18] digital identity systems and an 'Australian National Blockchain' being developed by Herbert Smith Freehills, CSIRO and IBM for management of commercial contracts.[19]

"This is Pete, our cryptocurrency expert."

ENDNOTE

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9 *United States v Murgio*, 209 F. Supp. 3d 698 (S.D.N.Y. 2016).

10 ASIC Information Sheet 225: Initial coin offerings and crypto-assets, published March 2017, updated March 2018. In March 2018, the ACCC delegated its powers to ASIC to enable ASIC to take action under the Australian Consumer Law in relation to crypto-assets.

11 There is one exception: where a person hands over a private key to another person, thereby transferring ownership of the cryptocurrency which is accessible by using that private key. This is the cryptocurrency equivalent of a cash transaction.

12 Except on privacy coin blockchains such as monero and zcash.

13 See https://opentimestamps.org/. This project, created by well-known bitcoin contributor Peter Todd, is in my opinion one of the best examples of a free, non-profit public service built on the bitcoin blockchain.

14 For example, the Everledger project, which operates on the Ethereum blockchain, see https://www.everledger.io/.

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Courtroom 2.0:
How to create the courtroom of the future

Joe Edwards and Ingmar Taylor SC report from the Federal Court Digital Practice Forum

What is the optimum way to use technology in the life cycle of a courtroom dispute? The question is not a new one; indeed, we've been asking it ever since those days back in the mid-1990s when IT-types first breathlessly told us about this new thing called 'electronic mail'. But looking around the courtrooms of Australia, it is difficult to avoid the conclusion that we have failed to think systematically about how to realise the full potential of technology in our in-court lives.

On 5 October 2018, the Federal Court of Australia and the Law Council of Australia set out to change this by convening the Federal Court Digital Practice Forum. The idea behind the forum was to draw together thought leaders from across the legal profession to identify and discuss:

- 'best practice principles' for the use of technology in each step in the litigation process (from commencement of the dispute through to the delivery of judgment);
- obstacles to the implementation of the best practice principles; and
- opportunities to implement the best practice principles in accordance with the Federal Court's fundamental objective – and duty – to deliver justice expeditiously, efficiently and cost-effectively.

Invitees to the forum came from every part of the legal profession – the bench, court administration, the bar, national and international law firms, government legal practice, the community legal sector and the legal support industry – and, as you would expect, the perspectives they represented were diverse.

The forum was launched by Chief Justice James Allsop AO. The chief justice began his remarks by noting that technology has already fundamentally altered the Federal Court's 'back office' functions: every matter in federal jurisdiction now has a 'digital court file'. The chief justice explained that, without the digital court file, it would have been impossible for the Federal Court to implement its shift over the past five years to 'National Practice Areas', an initiative that has arguably done more than anything since the Court's creation to realise the goal of creating a truly national institution. In the chief justice's view, the next challenge is to work out how to bring these back office reforms

to the 'front of house'; or, as his Honour put it, to go from 'digital storage' of material to 'digital presentation' of material in the courtroom. The chief justice suggested that, while 'this country and this court are well-advanced' in the move towards digital hearings, we are still behind the 'astonishing' strides made in the federal court system in the United States and also in commercial courts in China. The chief justice remarked that, if the Federal Court can succeed in creating a 'digital foundation for litigation', it would enable the Court to work not only nationally, but to 'conduct litigation from all around the world': 'the transformative possibilities are enormous'. The chief justice expressed the hope that the forum might become a 'standing working group or structure' to 'harness the ideas of others' as the digital transformation of justice continues. As the chief justice said, 'technology is *not* an optional alternative – it's here and it's essential'.

The forum continued with a panel discussion between Justices Robert Bromwich and Stephen Burley of the Federal Court; Sue Gilchrist, a partner at Herbert Smith Freehills; David Prince, principal solicitor at Kinslor Prince Lawyers; and Kiri Parr, Regional Legal Counsel at Arup.

Ms Gilchrist and Ms Parr kicked off the conversation, explaining how technology is reshaping large and complex litigation, and especially the discovery process. A common theme in their observations was that optimum use of technology in the courtroom depends on all actors – judges, counsel, solicitors and court staff – having the necessary skill set, and perhaps as importantly the necessary confidence, to use technology. As Ms Parr noted, gone are the days when a discovery process can be managed by a 'junior lawyer who's pretty good at tech'. Early engagement with IT professionals has become critical in any document-intensive litigation, and both the 'personal preferences' and 'skill sets' of actors in the courtroom will need to change if the benefits of a digital courtroom are to be realised.

Mr Prince, a specialist migration lawyer, focussed on how increased use of technology in the courtroom may create barriers to justice as much as break them down. Mr Prince observed that, while internet-accessible smartphones may be ubiquitous, laptop computers and iPads are not – and reading a 500-page court book on one's smartphone is no way to prepare for a hearing that may have significant personal consequences. Mr Prince gave other examples too, such as the challenge for conducting an 'etrial' or 'teletrial' posed by an unrepresented litigant who wishes to hand up to the bench hundreds of pages of hard copy documents or by a non-English speaking litigant who is in a different place to his or her interpreter.

Justice Burley returned to question of access to justice, noting that any shift to digital hearings would not mean the end of a physical courtroom: 'there is no danger we'll throw the baby out with the bath water'.

Justices Bromwich and Burley rounded out the panel discussion. Justice Bromwich suggested that the embrace of technology need not involve everyone having to get an IT degree. As his Honour pointed out, simple technological solutions – such as the use of Excel spreadsheets and PowerPoint – had proven invaluable in the trials stemming from Operation Wickenby and Operation Pendennis: it would have been 'simply impossible' to run the matters in purely 'paper-based fashion'. Justice Burley returned to question of access to justice, noting that any shift to digital hearings would not mean the end of a physical courtroom: 'there is no danger we'll throw the baby out with the bath water'. That said, his Honour sounded a note of caution about unthinking opposition to digital hearings, observing that 'a lot of counsel are very resistant to change', especially those who run busy, successful practices with little use of technology. Both justices agreed that rolling out digital hearings for the purpose of interlocutory disputes was a 'great idea' to build experience and confidence, both on the bench and in the profession.

After the panel discussion, the forum broke into small groups to discuss some of the key issues raised by the use of technology in the courtroom. While the range of topics was wide – covering everything from how predictive and natural language processing technologies could reshape the discovery process to how chatbots and translation modules could permit litigants from culturally and linguistically diverse backgrounds to participate meaningfully in dispute resolution – a particular theme that ran through the discussion was whether new technologies, and especially digital hearings themselves, should be 'opt in' or 'opt out'. Many representatives from the commercial bar and big firms favoured an 'opt out' system, seeing it as necessary to drive change across a technologically conservative profession. However, many from the government and community legal sectors expressed more caution about the potential for new technologies to reinforce the 'digital divide' and entrench existing injustices. Jessica Der Matossian, the Federal Court's Digital Practice Registrar, confirmed that, at this stage, the Court has no plans to make digital hearings the 'default' position.

The forum concluded with drinks and canapes. Invitees – and indeed the wider profession – were encouraged to continue the discussion by sharing their ideas with the Federal Court at the following email address: FCALCAdigitalforum@fedcourt.gov.au

Dangerous Dicta?

The use of decisions of the courts of foreign jurisdictions in submissions before Australian appellate courts

By Belinda Baker

> The Court's discussion of these foreign views … is therefore meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans'.

Introduction

In the United States, the citation of the decisions of foreign courts has from time to time attracted vociferous criticism. In 2005, references to foreign and international law by judges of the United States Supreme Court in invalidating the death penalty for juveniles and in striking down laws prohibiting same sex sodomy led to a public outcry. The *New Yorker* featured an article which described Justice Kennedy as 'the most dangerous man in America' because of his citations of foreign law. Legislation was even introduced into the United States Congress which attempted to make it an impeachable offence to cite foreign law in support of a constitutional decision.

Within the United States Supreme Court at that time, the debate was intense, with Scalia J criticising the majority's use of foreign decisions as not only 'meaningless dicta' but 'dangerous dicta', arguing that the court 'should not impose foreign moods, fads or fashions on Americans.' In *Roper v Simmons*, which concerned the constitutionality of the death penalty for juveniles, Scalia J again forcefully expressed his dissent to the majority's references to decisions of foreign courts,

stating 'the basic premise of the court's argument – that American law should conform to the laws of the rest of the world – should be rejected out of hand.'

Fortunately, the use of foreign decisions by Australian courts has not attracted the same controversy. Ever since federation, Australian courts have looked to the courts of foreign jurisdictions for guidance in the determination of novel legal questions. As a colony of Britain, it was necessary for Australian courts to look to the decisions of the courts of the United Kingdom in resolving Australian disputes. Indeed, the decisions of the Privy Council were binding on Australian courts for almost a century after federation, and it was only after appeals to the Privy Council were abolished that the decisions of that body could be considered to be a decision of a 'foreign' jurisdiction in any real sense.

Yet it is not just the decisions of courts of the United Kingdom that Australian courts have historically looked to for guidance when addressing difficult or novel questions of law. Prior to the abolition of Privy Council appeals, the Australian legal system was 'institutionally tied' into an international judicial system supervised by the Privy Council in London. This connection instilled into Australian lawyers a generally comfortable attitude towards the use of foreign decisions. In addition, as various provisions of the Australian Constitution had been modelled on provisions of the US Constitution, it was natural for Australian courts to look to US decisions for guidance as to the interpretation of those provisions.

Indeed, in *D'Emden v Pedder*, the newly constituted High Court described American constitutional decisions as 'not an infallible guide, but as a most welcome aid and assistance.' Similarly, in *Davison v Vickery's Motors*, Isaacs J stated that the judgment of any tribunal in which the common law was 'administered by judges of high attainments, great learning and wide experience' should carry 'great weight'.

In other words, from the earliest days of federation, Australian judges recognised that the difficult questions that arose for determination before them had often been previously considered by judges in other (particularly common law) jurisdictions, and that the logic and wisdom of those judges could be of assistance in developing Australian law, even where those decisions were not binding.

Of course, different views have been ex-

pressed at different times by Australian judges about the weight to be given to foreign law in respect of particular legal questions. For example, in the *Engineers Case*, in overturning the American inspired doctrine of intergovernmental immunities, the majority held that 'American authorities, however illustrious the tribunals may be, are not a secure basis on which to build fundamentally with respect to our own Constitution [but] on secondary and subsidiary matters they may … afford considerable light and assistance.'

In short, debate about the use of foreign law in Australia has never triggered the antipathy seen in the United States. Indeed, while the past century has seen a marked decline by Australian courts in the citation of the decisions of courts of the United Kingdom, Australian superior courts continue to obtain guidance from those decisions as well as the decisions of other foreign courts, particularly those in the United States, Canada, Hong Kong and New Zealand.

'American authorities, however illustrious the tribunals may be, are not a secure basis on which to build fundamentally with respect to our own Constitution [but] on secondary and subsidiary matters they may … afford considerable light and assistance.'

Accepting that foreign law may be used, and is frequently used, by Australian judges to assist in the determination of novel and difficult questions of Australian law, the question then arises as to how counsel may best assist Australian courts to do so.

This article will first address when it can be useful to cite foreign jurisdictions and second, how to approach the decisions of foreign courts. Finally, this article will provide some guidance and tips as to the most effective ways of researching the decisions of foreign jurisdictions.

When can it be useful to cite the decisions of foreign courts?

> I'm in favour of good ideas … wherever you can get them. (The then Supreme Court nominee, Elena Kagan, responding to a US Senator's inquiry as to whether judges should ever look to foreign law in constitutional or statutory interpretation.)

Citing foreign decisions will be most useful when counsel is addressing a novel issue, or where counsel is endeavouring to persuade the court (particularly the High Court) to develop the law in a new direction or to depart from an existing line of case law. It is in these kinds of areas in which courts will be most assisted (and will be most willing) to turn to the decisions of foreign courts for guidance.

For example, in the *Mabo* appeal, Ron Castan QC made effective use of decisions of appellate courts of Canada, the United States as well as more traditional United Kingdom authorities in persuading the High Court to recognise, for the first time, the existence of native title in Australia. Many of those decisions were in turn cited by the majority justices as supporting their conclusion that the appellant's submissions should be accepted.

Similar use of foreign authority was also made by Sir Maurice Byers QC in *Kable v Director of Public Prosecutions* in submitting that an implication should be drawn from the Constitution that prohibits State legislatures from conferring functions on State courts which are incompatible with the exercise of federal judicial power. In his Honour's concurring judgment, Gummow J drew upon a number of these authorities, in particular adopting the language of the United States Supreme Court in *Mistretta v United States*, which held that the reputation of federal courts 'may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.'

It is not just in the High Court that reference to the decisions of foreign jurisdictions may be of assistance. Novel or difficult questions will typically first arise in intermediate appellate courts, and, like the High Court, those courts may be assisted by the reasoning of courts of foreign jurisdictions. For example, in *Cesan v The Queen*, Basten JA, in dissent, referred to the principle enunciated by the United States Supreme Court, that trial by jury was a trial of an issue by jurors 'under the direction and superintendence of the court', in finding that a trial presided over by a sleeping judge was not a lawful trial. (Those authorities of the United States Supreme Court were in turn, referred to by French CJ and Gummow J in each of their Honour's concurring judgments allowing the appeal against the appellant's conviction.)

In both the High Court and intermediate courts of appeal, reference to the decisions of foreign courts will be of most assistance where there is commonality in the history of the jurisprudence in question. For example, the interpretation of provisions of the *Constitution* which were drawn from the United States *Constitution* (such as s 80) will often be assisted by reference to decisions of United States courts concerning the right to trial by jury. Similarly, decisions relating to the interpretation of provisions of international treaties, such as the *Convention relating to the Status of Refugees*, will frequently be assisted by the analysis of decisions of the courts of jurisdictions which are also signatories to the relevant Convention.

At times, consideration by a foreign court of a particular dispute may also provide guidance. For example, in holding that defamation proceedings against Google should not have been summarily dismissed, the High Court referred to similar litigation against Google in which summary dismissal applications had been refused by various courts in New Zealand and Hong Kong.

Even where there are textual differences between the Australian and foreign laws, an examination of the decisions of foreign court may nonetheless be of assistance. (Provided, as outlined below, that the differences are constantly borne in mind, and expressly acknowledged in counsel's submissions). For example, in *Air New Zealand v ACCC*, Nettle J observed that 'despite differences between competition law in the United States, Europe and Australia, the area of a geographic market is essentially an economic concept and therefore logically to be determined according to similar considerations in each jurisdiction.'

In each instance, the decision of a foreign court will be most effectively used where the foreign court decision confirms an interpretation or principle which is reached through the application of orthodox legal reasoning.

Finally, it should also be borne in mind that assistance may be gained from an analysis of the decisions of foreign jurisdictions, even if counsel determines that it is not necessary or appropriate to cite the decision in his or her written or oral submissions. The following exchange between Stephen Breyer, Associate Justice of the United States Supreme Court, and an unknown congressman illustrates the point:

In both the High Court and intermediate courts of appeal, reference to the decisions of foreign courts will be of most assistance where there is commonality in the history of the jurisprudence in question.

> Justice Breyer: If I have a difficult case and a human being called a judge, though of a different country, has had to consider a similar problem, why should I not read what the judge has said? It will not bind me, but I may learn something.
> Congressman: Fine. You are right. Read it. Just don't cite it in your opinion.

The way in which the foreign judge frames the questions for determination, the analogies

used by the foreign judge, the foreign judge's inductive or deductive logic, his or her identification of unforeseen consequences and even the foreign judge's turn of phrase may each provide invaluable assistance to counsel in framing the submissions to be advanced.

It is essential that counsel understand where the foreign court's decision fits into its jurisprudential landscape. This requires an understanding of the history and broader context of the jurisdiction that is being cited.

Approaching the decisions of foreign courts

> American case law is a trackless jungle in which only the most intrepid and discerning Australian lawyer should venture. It is possible to find American authority to support almost any conceivable proposition of law.

As a decision of a foreign court is not precedent, there is little utility in simply recording that a foreign court reached the result contended for, or worse, listing *every* decision of *every* court in the world that has reached that particular finding. The persuasive use of foreign authority requires counsel to understand and analyse *why* the foreign court reached the finding that it did. As Isaacs J held in *Davison*, 'short of emanation from a single source, every potion should be at least tasted and appraised before being swallowed.'

The analysis of why a foreign court has reached a particular finding will assist the court in determining whether the foreign decision is persuasive in our local context. However, the task of determining why the foreign court has reached a particular finding in a given case is not straightforward.

The starting point for consideration of this issue will, of course, be with the foreign court's reasons. Those reasons may be directly applicable to the issue in contention in the proceedings. On the other hand, the reasons may indicate that the concern that has driven the foreign court to the particular finding is one which is not relevant, or which must be treated with caution in the Australian context. For example, American cases concerning the right to free speech must be approached with particular caution in the Australian context, where there is no constitutional 'right' to free speech.

However, at times, a significant matter which is driving a particular result may not be apparent from the reasons of the foreign court. For example, the American Bill of Rights infuses many aspects of American law which may not be anticipated by Australian lawyers. In particular, the right to due process contained in the Fifth Amendment is overlaid not just upon the American criminal law, but also American tort law, contract law and property law. This influence of the Bill of Rights will not always be expressly stated in the reasons of an American court. Those matters may have been addressed by previous decisions, or may be an unstated premise of the decision.

For this reason, it is essential that counsel understand where the foreign court's decision fits into its jurisprudential landscape. This requires an understanding of the history and broader context of the jurisdiction that is being cited. It is necessary to read not just isolated decisions of the foreign court, but the decisions which are cited by those decisions, as well as textbooks and commentary of the jurisdiction in question.

While the reasons of the foreign court are fundamental to determining its persuasive value, the status of the court being cited should also not be overlooked. Decisions of appellate courts in the United Kingdom, the United States of America, Canada, New Zealand and Hong Kong will obviously carry more weight than authorities of less established jurisdictions. Similarly, the decisions of respected jurists, such as Holmes J, Cardozo J and Learned Hand J of the United States, and McLachlin CJ of the Canadian Supreme Court, will also carry more weight than the decisions of lesser known judicial officers.

Of course, counsel must also understand where the foreign decision lies in the hierarchy of the foreign nation's judicial system. Counsel would not cite a District Court decision in support of a proposition that had been disapproved by the Court of Appeal. Similarly, counsel should not cite a decision of the Provincial Court of Manitoba if the Canadian Supreme Court has spoken authoritatively on the question. But, short of emanation from a supreme source, every potion should at least be tasted and appraised before being swallowed.

Again, American decisions must be treated with particular caution in this respect. While Sir Anthony Mason's description of American case law as a 'trackless jungle in which only the most intrepid and discerning Australian lawyer should venture', may be somewhat strongly expressed, the American jurisprudential system differs from that in Australia in important respects. These differences must be borne in mind when citing the decision of any American court.

For example, in contrast to the Australian High Court, which is the final court of appeal for both federal and State questions, the Supreme Court of the United States is *only* the final court of appeal for federal questions. As a result, the United States Supreme Court will defer to a State Supreme Court on State questions, such as the proper construction of a State statute. The absence of effective review by the United States Supreme Court of the decisions of State courts also has the effect that the common law in the United States has developed independently in each of its 50 jurisdictions.

Finally, counsel should not cite any decision of a foreign court before first comprehensively researching Australian authorities addressing the issue, including decisions of intermediate appellate State and Territory courts. The decisions of foreign courts may be persuasive, but they cannot supplant the decisions of other intermediate appellate Australian courts, which must be followed by intermediate courts unless the court considers that the decision in question is 'plainly wrong'.

How to research foreign law

> Referring to [foreign decisions] means extra work, even though a majority of our Court does so only occasionally. But we believe it is worthwhile, for doing so sometimes opens our eyes.

For the reasons outlined above, the decisions of foreign courts may be of great assistance to the advocate, but those decisions must be carefully approached. More than a quick Google search is required before making reference to a decision of a foreign court.

Sir Anthony Mason's description of American case law as a 'trackless jungle in which only the most intrepid and discerning Australian lawyer should venture',

There are a number of websites which may be of assistance in researching not only foreign law, but also in gaining an understanding of the jurisdiction and context of the decision that is being cited. Some websites include:

> *Harvard Law School Library's Free Legal Research Resources on Foreign and International Law* – contains links to online search tools and databases. It has a particularly good coverage of US law (under the link for Federal Law and government documents): https://guides.library.harvard.edu/c.php?g=310432&p=2072003#s-lg-page-section-2071999.
>
> *Yale Law School's 'Country Research Guide'*, which contains a country-by-country guide with connections to the

best research guides and databases for each country: https://library.law.yale.edu/research/guides/all-countries.

New York University's 'GlobaLex', which also contains a country-by-country guide to legal research, including commentary addressing the structure of each nation's political and judicial system, and points of jurisprudential difference for various subject matters: http://www.nyulawglobal.org/Globalex/#.

The Library of Congress' 'Guide to Law Online', which contains an annotated guide to sources of information on government and law available online. It includes selected links to useful and reliable sites for legal information: http://www.loc.gov/law/help/guide.php.

University of Melbourne - Approaching Foreign and Comparative Legal Research - a beginners guide for approaching legal research in a new jurisdiction (unfortunately, a large part of the site is only available to Melbourne university staff and students): https://unimelb.libguides.com/approachingforeignresearch.

In order to understand the history and broader context of how the subject matter is dealt with in the jurisdiction being cited, it will also be helpful to review reputable textbooks of the jurisdiction in question. Such texts will assist counsel in locating relevant authority, as well as providing essential background information about the context and history of that authority. The Bar Library holds a number of textbooks from other jurisdictions. Texts which are not available in the Bar Library may be obtained from other libraries (including the Law Courts library) on interlibrary loan for a small fee.

Once the context of the jurisprudence is located, electronic databases may be used to find authority that is directly on point, and to determine whether the authority is still 'good law'.

There are various electronic databases for this task, some of which are available free of charge and some which require a paid subscription.

Some of the free electronic resources include:

Worldlii - provides a single search for databases on the following legal information institutes: AustLII (Australia); BAILII (Britain); CanLII (Canada); HKLII (Hong Kong); LII (USA – administered by Cornell); NzLII (New Zealand); and PacLII. It includes citation history and full text searchable decisions: www.worldlii.org.

PACER - Public Access to Court Electronic Records (PACER) is an electronic public access service that allows users to obtain case and docket information online from US federal appellate, district, and bankruptcy courts: https://www.pacer.gov.

The High Court of Australia Overseas Bulletin – includes summaries of decisions of the Supreme Court of the United Kingdom, the Supreme Court of Canada, the Supreme Court of the United States, the Constitutional Court of South Africa, the Supreme Court of New Zealand and the Hong Kong Court of Final Appeal: www.hcourt.gov.au/library/overseas-decisions-bulletin.

Some of the subscription only databases include:

When researching foreign law, it is always worthwhile to attend the Bar Library in person. The librarians at the Bar Library are invaluable in assisting counsel in the research of decisions of foreign jurisdictions.

Lexis Advance - contains primary and secondary materials of Singapore, Canada, New Zealand, India and Malaysia, including Halsbury's laws of Singapore, Halsbury's laws of Canada, Laws of Hong Kong and Laws of New Zealand and LinxPLus (New Zealand), QuickCite (Canada) and Canadian Digest.

WestlawInternational - contains an extensive collection of US materials including the Restatements of the Law, American Jurisprudence, Corpus Juris Secundum) and international content from Canada, Hong Kong, Korea, United Kingdom, European Union including United Kingdom (e.g., Archbold: Criminal Pleading, Evidence and Practice, Palmer's Company Law, Woodfall's Landlord and Tenant) and Canadian (eg Waters' Law of Trusts in Canada, Brown, Supreme Court of Canada Practice) treatises.

BestCase library - Westlaw Next Canada - contains a large collection of Canadian case law sources.

LexisLibrary UK - primarily focuses on the United Kingdom jurisdictions, and contains Halsbury's Laws of England, Halsbury's Statutes of England, Atkin's Court Forms and many major treatises (Duncan & Neill on Defamation, Williams on Wills).

Heinonline - a fully searchable comprehensive collection of US and International law journals. Other collections include US Supreme Court Reports and library of sources, US Code and Federal Regulations, Canadian Supreme Court Reports and Statutes, International Treaties.

The free databases are of assistance in preliminary searches, particularly to determine whether there is any useful discussion of a legal issue in authorities of a specified jurisdiction. However, those databases are not exhaustive, and it is necessary to utilise the subscription-only databases for a comprehensive review of the authorities of a specified jurisdiction.

While many chambers hold Westlaw and/or LexisNexis subscriptions, most chambers do not subscribe to the more expensive international extensions of those databases. Fortunately, the Bar Library subscribes to each of the above databases. These databases are accessible on any of the computers in the Bar Library. In addition, Heinonline is available from the Bar Library's webpage, using counsel's Bar Association login details.

When researching foreign law, it is always worthwhile to attend the Bar Library in person. The librarians at the Bar Library are invaluable in assisting counsel in the research of decisions of foreign jurisdictions.

A final suggestion

It will be apparent from the above that the research of foreign law can be both labour intensive and costly, particularly when counsel is researching a jurisdiction with which he or she is unfamiliar.

However, the discriminating use of junior counsel, particularly a reader, will often be beneficial from both a time and cost saving perspective. As well as the savings in hourly rates, many junior barristers of the New South Wales bar are experienced in researching case law of foreign jurisdictions (some with post-graduate qualifications from universities in jurisdictions such as the United Kingdom, the United States and Canada). Utilising junior barristers and readers can ensure that the client has the benefit of the assistance to be gained by the judicious citation of decisions of foreign jurisdictions, whilst minimising the cost of doing so.

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The Fifth Asian Mediation Association Conference

David Ash, Frederick Jordan Chambers

Over two days in October, the Asian Mediation Association held its fifth biennial conference in Jakarta. The theme was 'Can Mediation Survive in a World of Trumpian Negotiators?' It was a tale of cross-cultural harmony that the Indonesians, courteous to a fault, checked with their US contacts to ask whether the president might be offended. 'Why?' was the unanimous response.

The plenary talk on the topic was delivered by Messrs Raymond Lee and Said Faisal, members of the organizing Indonesian Mediation Centre. As advocates we will all have experienced – even if we do not call them by their theory names – the basic bargaining styles.

- Distributive bargaining is the competitive bargaining strategy in which one party gains only if the other party loses.
- Integrative bargaining is where parties collaborate to find a 'win-win' solution to their dispute. It seeks mutually beneficial agreements based on the interests of the disputants. This is the basis of the so-called Harvard model, the model taught and used by mediators around the world.

The speakers pointed out that there were two water bottles on the speakers' table and three speakers including the moderator. It is easy to see – if not resolve – the application of either of the orthodox strategies. Or you can dwell on them for ages. It may merely become a question of whether King Solomon slices the third bottle vertically or hortizontally.

President Trump's style isn't necessarily negative. It just may have a different scope. One element of the president's approach is 'think big'; start with the idea that 20 bottles are needed. Where the matter goes, well that's another thing altogether.

We were reminded of Roy Cohn. Cohn is a study for any lawyer. Many of us will recall that he was the lead on Senator Joseph McCarthy's investigation into Communist activity in the 1950s. Long after McCarthy was dead, Cohn was practising in New York

Photo by Daryan Shamkhali on Unsplash

City. So to the New York Times of 23 December 2017:

> Although both [Messrs Murdoch and Trump] parlayed their inheritances into global power, they have stubbornly viewed themselves as outsiders at odds with the establishment. When Mr. Murdoch entered the British newspaper market in 1968, London society shunned him and his vulgar tabloids, The Sun and The News of the World, which he used to wound his enemies and advance his political interests. Mr. Trump withstood a similar wariness among the elite after he made himself a Manhattan player through his brazen deal making and hucksterism.

To make their way upward in New York, both men relied on a powerful friend, the lawyer Roy M. Cohn, a ruthless fixer who made his name in the 1950s as the chief counsel to Joseph McCarthy, the Red-baiting senator, before representing some of the city's most powerful figures, including the mobster John Gotti and the New York Yankees owner George Steinbrenner.

Mr. Cohn connected Mr. Trump to Mr. Murdoch and the tabloid he bought in 1976, The New York Post. The upstart developer saw that he could benefit from the brash daily — especially its Page Six gossip column, which started a year after Mr. Murdoch became the paper's owner.

One has to have a working philosophy

Most of us see mediation as closing down a dispute. It can be difficulty to carry such a framework into a place where a party may be thinking of opening up avenues we have never heard of.

Another session saw a lively discussion about UNCITRAL's model for mediation. UNCITRAL provides legal standards by use of conventions, model laws and other means. Since the 1980s, states interested in being involved with and parties to, international commercial arbitrations have had the benefit of access to UNCITRAL's model law and rules.

Flagging compromise

Singapore, well-represented at the conference, is spearheading a similar role for UNCITRAL in mediation. As I understand, the process moves to its next UN milestone in December this year. The address from the Singaporeans provoked questions about the value of formal structures in an essentially informal process.

Compare arbitration. Yes, both are voluntary. But arbitration involves voluntary submission. The submitting party may not

Photo by Capturing the human heart. on Unsplash

like the result and an enforcement process is necessary for this reason alone. Theoretically, mediation is no different. A party agreeing one day may wish to renege on the next. But experience tells us that this happens rarely in mediations.

If this is so, the questioners wanted to know, why impose requirements on what best operates as an ad hoc process? The project's supporters replied that yes, mediations had a high rate of resolution in the complete sense, ie they didn't have to be enforced. That said, there was a place for a structure which lent confidence to parties considering involvement.

There are strong arguments each way. Two hundred and fifty years ago, Lord Mansfield was faced with modernizing English commercial law operating a century behind the continent. He succeeded and went on to make England the centre of commercial law. Two tools were the simplification of the given case and a utilization of general principle. Those tools are vital but can often operate in tension. The same tension operates here, and the resolution will be watched with interest by all affected.

The conference ranged from maritime and building disputes to medical negligence and to family law. Dr Paul Gibson from Sydney gave useful insights into the social brain and the way it works in mediations (and elsewhere!)

Campbell Bridge SC shared the stage with two delegates from Nepal. The topic was mediating complex disputes. Bridge drew upon his experience to give some case hypotheticals which were well-received. The Nepalese team led by Ms Preeti Thapa gave an insight into the work of the Asia Foundation. The next time we reflect on our frustration in a mediation at 2.30pm with the parties are going nowhere, consider the difficulties of a recent federation and democracy, Maoist and royal biases, a feudal past and widespread gender bias, with regular physical upheaval as well, usually in the form of earthquakes. Delegates were privileged to get an insight into an ambitious program of community mediation intended to be instrumental in forging a peaceful society for the future.

The win-win Wow mediation technique

I gave a paper on mediation advocacy, sharing the stage with Mr Anil Xavier, the current president of the Indian Institute of Arbitration and Mediation, and George Lim SC, a noted Singaporean mediator who spoke about building a career as a mediator.

The conference was launched by the Indonesian Minister for Law and Human Rights and addressed by the Governor of Jakarta. The minister hails from northern Sumatra and his attendance (with the musicians who preceded and followed him) was a healthy reminder of the importance of diversity to Indonesia, a place with hundreds of cultures. As for the governor, the 2017 election occurred in circumstances where the former Christian governor had been jailed for blasphemy. As governor, he has his work cut out, balancing the demands of a large Muslim constituency and those of the wider electorate in a time of change. He has great presence and has been mentioned as a future president.

One of the delegates remarked to me that the Australian media's obsession with politics was the good fortune of a stable country where nothing seriously reportable happens. An interesting perspective.

Big. Diverse. We would do well to understand Indonesia better.

Whatever, these keynote speakers are leaders of a complex, huge and rapidly modernizing nation to our immediate north. The convenors of the conference achieved something special in having them both deliver engaging talks about the power of peaceful dispute resolution and its utility at all levels.

The national conference rise2018

By Penny Thew

Relevant. Resilient. Respected. In his opening address to the ABA's national conference, rise2018, the president of the Australian Bar Association Noel Hutley SC spoke of these three themes of the conference in the context of emerging national and international legal issues.

The themes of relevance, resilience and respect were chosen by the ABA in an attempt to focus the work of women and men in the legal field on addressing divisive and disruptive issues confronting the profession.

The notion of **relevance** was aimed at evoking the role of the profession not only in the practise of law but also in law reform, with practitioners being both advocates for justice as well as technicians assisting with developing practical legal solutions. In an era of the profession being awash with often contentious law reform proposals from Royal Commissions and other inquiries, the solutions available in response require not only political will but also legal knowledge and expertise.

In this context there were conference sessions, given by both members of the judiciary and the bar, aimed at law reform and other political and social issues, including issues impacting First Nations people and the case for treaties, the Australian Law Reform Commission inquiry into the role of the Federal Court of Australia in supervising class actions and litigation funding, the Royal Commission into Institutional Responses to Child Sexual Abuse, criminal liability of corporations and individuals and managing civil litigation in the 21st century in an increasingly electronic era.

The notion of **resilience** was aimed at the need for and ability of the profession to adapt to change and disruption, including in response to the 'drumbeat' of the threat of technological change, in order to retain its relevance and respected position. In this respect, the Honourable James Allsop AO, chief justice of the Federal Court of Australia, spoke about the future of the independent bar in Australia. The president said that the ABA in this context has a duty and is committed to identifying opportunities for, and promoting the skill and competence of, Australian counsel and judiciary in international jurisdictions. To that end a number of sessions were dedicated to international commercial arbitration.

The essential element of **respect** referred to the profession maintaining the highest standards of practice, with the conference presenting an opportunity to discuss best practice and developments in taxation, commercial and criminal law. The president spoke of the convergence of all areas of law, with all areas moving closer together and the need for the bar to be seen as, and to be, a continuum rather than be divided into separate sections.

In line with these themes, the first keynote speaker, chief justice of the High Court of Australia, the Honourable Susan Kiefel AC, addressed the conference on *Change in the Legal Profession*. The central theme of her Honour's address was that the maintenance of respect for the profession was essential to the rule of law and that garnering this respect dictates our continued relevance.

The chief justice referred to a prediction that the next two decades would see more change in the legal profession, including as a result of the impact of technology, than

Past-president of the ABA, Noel Hutley SC

the profession has seen in several hundred years. Her Honour drew an analogy between the demise of the centuries-old order at the English Bar of serjeant-at-law (*servientes ad legem*), and the threats currently facing the bar today. The chief justice noted that the high professional and ethical standards imposed on the serjeants, who appeared in the Court of Common Pleas, to the exclusion of others during their peak from the time of Edward I, were very similar to the standards now imposed on barristers. Chief Justice Kiefel said that the lesson that can be gained from examining the decline of the serjeants, is that not all things last forever. Their demise came about as a result of strong competition from the 'lower' (and ultimately successful) ranks of barristers of the day, the emergence of written rather than oral pleadings, and the increasingly excessive number of those permitted to enter the order of Serjeant-at-Law.

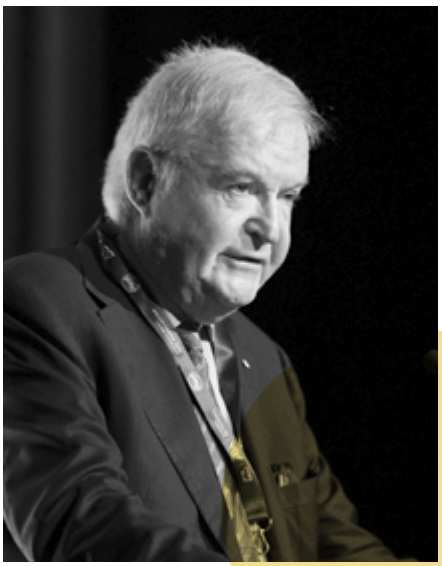
In the context of tracing the recent history of the development of the legal profession and its regulation in England and Australia, Chief Justice Kiefel reminded us that 2018 is the centenary of the admission of the first woman in New South Wales [Victoria, Tasmania, Queensland and South Australia having allowed it earlier]. The New South Wales admissions board refused women the right to practise on the basis that the word 'person' in the expression 'suitable person' to practise as a lawyer did not include women. Legislation was required to overcome this interpretation.

The chief justice foreshadowed that two aspects of the legal profession will dictate its survival, particularly in the face of technological change. The first of these is the ability of lawyers to evaluate complex evidence, the process of which is so informed by human experience as to defy the capacity of technology to entirely replace human analysis. The second is the continued necessity for litigation involving legal reasoning and logic allowing for more than one possible outcome, which again defies the application of technology.

Chief Justice Kiefel noted that these skills alone do not ensure the ongoing relevance of the bar. The continuing relevance of the bar will depend largely on society's perception of the bar and what it stands for. The unique characteristics of barristers that must be maintained are integrity, independence, intellectual rigour, obedience to the duty to the courts and a strong sense of public duty. Her Honour expressed the view that the rule of law essential to our society depends upon the enduring survival of a strong bar.

The Honourable Tom Bathurst AC, chief justice of the Supreme Court of NSW, addressed the conference on *The Role of the Commercial Bar in the Mid-21st Century,* adhering to the theme of current and future rapid change. Chief Justice Bathurst spoke of the days when he commenced at the bar in 1977; days when trolleys were only for shopping, phones were fixed to a desk and briefs were delivered in folders (as opposed to by digital means). He said that his practice had changed entirely by the time he was appointed chief justice of the Supreme Court in 2011 and was of the view that the bar will be unrecognisable in another 35 years, in likelihood not involving wigs, trolleys or wood-panelled courtrooms.

Chief Justice Bathurst spoke of the market now being a 'buyers' market', by which he meant that corporate clients in particular have a far greater say in the choice of work carried out on particular matters, and that being in a buyers' market means that barristers must be aware of the needs of clients to be able to provide holistic legal solutions. This in turn means that the range of 'softer skills', such as empathy and the capacity to listen, would become increasingly relevant, as would the characteristics of being independent and ethical, as clients increasingly expect views about what is feasibly to be achieved by litigation and other forms of dispute resolution and holistic solutions. He noted that clients increasingly dislike '11-page detailed advices', where five pages are dedicated to why a particular position is right, five pages are dedicated to why it is not 'and the eleventh page blank'.



The Hon Susan Kiefel AC, chief justice of the High Court.

The Hon Tom Bathurst AC, chief justice of the Supreme Court of NSW

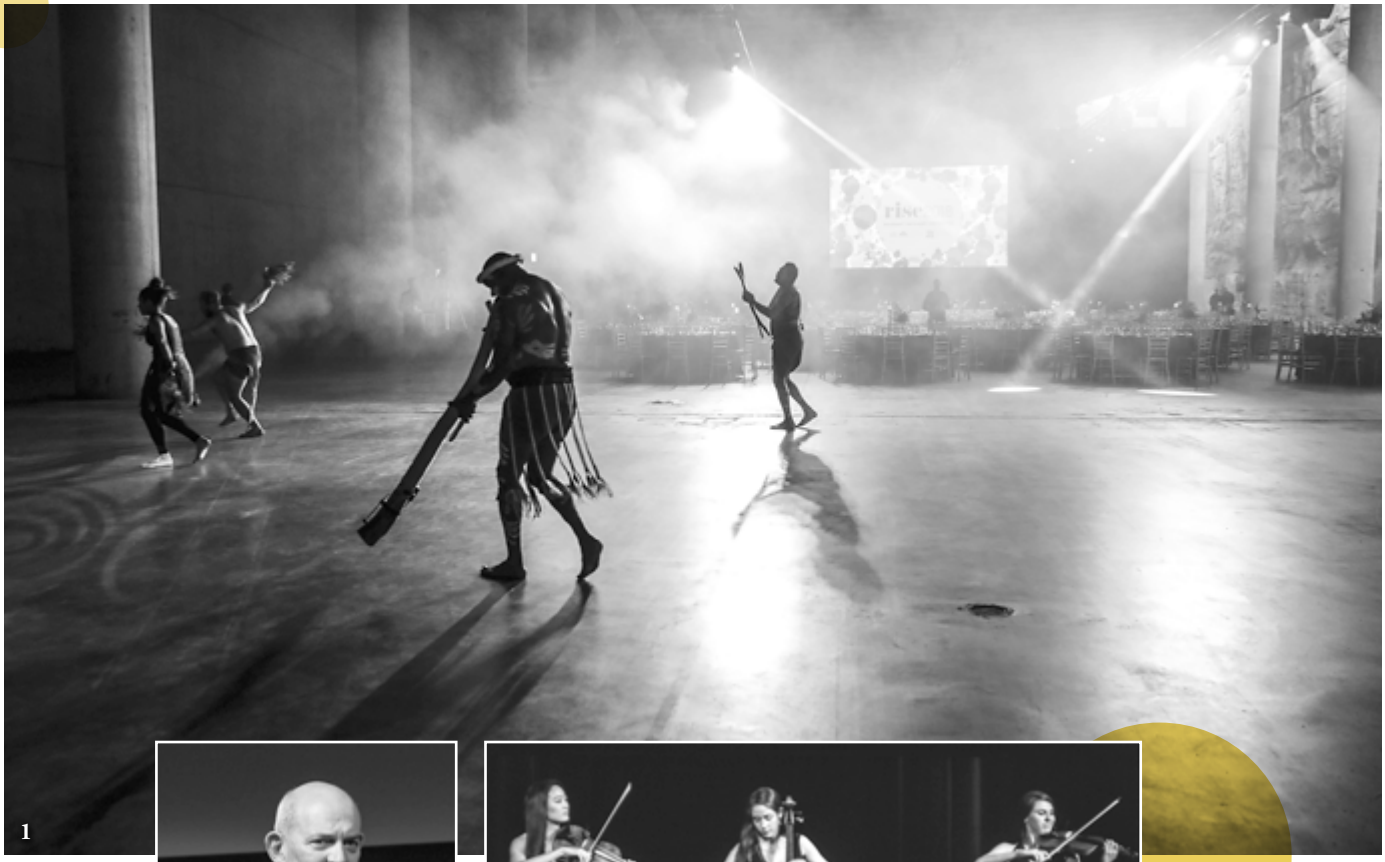
conference dinner

Conference Dinner

The black tie dinner was held on the evening of Friday, 16 November at The Cutaway Barangaroo.

More than three hundred guests heard the guest of honour, Malcolm Turnbull, engage in a frank discussion about recent events.

conference dinner



1 Diramu Aboriginal Dance Troupe welcome guests to the venue at The Cutaway Barangaroo
2 Tim Game SC, president of the New South Wales Bar Association
3 Strings En Vogue entertain the guests
4 The Hon Mark Dreyfus QC MP; immediate past-president of the New South Wales Bar Association
5 Arthur Moses SC

As was reported in the *Australian Financial Review* on 16 November 2018, Chief Justice Bathurst predicted that current 'online reputation systems' providing annual lists of leading advocates could be the precursors to other online rating methods. He predicted a 'Bar Advisor' app, similar to Trip Advisor, in which clients would post about performance and price, allocating 'stars' or ratings and providing commentary about barristers to the effect of 'I got good value from X today, pretty cheap' – or the opposite. The chief justice said that 'it can and will happen' and that the bar ought not allow itself to be seen as old fashioned, anachronistic and elitist but should instead rely upon its 'flexibility and absence of bureaucratic structure' to showcase its ongoing relevance.

In terms of the automation of basic legal tasks from which the chief justice says the bar must not think it is immune, the chief justice referred to IBM's artificial intelligence legal research tool, ROSS, powered by Watson. Chief Justice Bathurst was of the view that repetitive and routine legal work is far more susceptible to technological change than work that is bespoke and unique, giving as an example the introduction of electronic case management which, while eliminating the need (and cost) each week of hundreds of directions hearings about uncontroversial matters, has already impacted on the work of the junior bar, which once consisted largely of such briefs.

This observation was echoed in a later session, when the Honourable Justice Julie Ward, Chief Judge in Equity, and the Honourable Justice Jacqueline Gleeson of

conference welcome function

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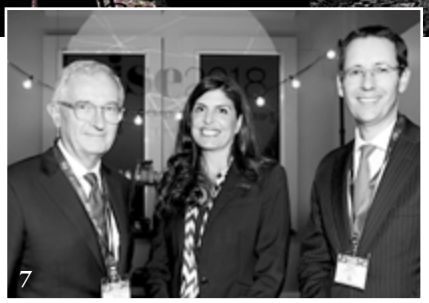
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Welcome function

The conference welcome reception was held at Pier One Sydney Harbour.

The guest of honour was the Hon Mark Speakman SC MP, attorney general for New South Wales.

6 Welcome drinks
7 The Hon James Allsop AO, chief justice of the Federal Court; Gabrielle Bashir SC; Angus Stwart SC
8 The Hon Mark Dreyfus QC MP; Tim Game SC; the Hon Mark Speakman SC MP
9 The Hon Mark Speakman SC MP, attorney general of NSW
10 Kristen Deards SC
11 Jessie Rudd, Adrian Ryan SC, Katrina Howard SC and Jennifer Batrouney QC, president of the ABA

the Supreme Court, in a panel session titled *Managing Civil Litigation in the Courts of the 21st Century*, spoke of the use of technology and the online court system in the efficient management of civil litigation, identifying that such changes reflect the mandate to conduct hearings in a manner that is 'just, quick and cheap.'

Like Chief Justice Kiefel, Chief Justice Bathurst ultimately predicted that while technology will bring about change, written and oral advocacy, as well as other high-level, more complex skills of barristers, would remain vital. These views were picked up by the Honourable Justice David Hammerschlag and the Honourable Justice John Middleton of the Supreme Court in the session *The Fate of Old Time Advocacy Skills in Modern Commercial Litigation*, in which both emphasised that good advocacy remains critical, providing clarity and simplifying issues so that they can be efficiently determined.

Chief Justice Bathurst finally foreshadowed that, in line with the shift in the UK to civil litigation being conducted increasingly online and with mediation a compulsory step, the 'A' in alternative dispute resolution would be replaced with an 'O', for '[compulsory] online dispute resolution'. He said that changes such as these represent an opportunity for barristers to show that they can add value to these processes and that barristers will need to develop the skills necessary to use these technologies.

conference day one

Conference Day One

Day one of the conference began with the Celebrating Women in Law Breakfast, with guest speaker Julia Baird.

1 Julia Baird
2 Karen Espiner (Younes & Espiner Lawyers), Cindy Penrose, CEO of the Australian Bar Association, Jessica Meech (Younes & Espiner Lawyers)
3 Fairfax and Roberts at the Celebrating Women in Law Breakfast
4 Lee May Saw, Penny Thew, Brenda Tronson, Ingmar Taylor SC, Sonia Tame

conference day two

Conference Day Two

Saturday, 17 November opened with an address by the Hon Christian Porter MP, Commonwealth attorney-general, followed by Chief Justice James Allsop AO.

Breakout speakers included, among others, the Hon Justice Virginia Bell AC and the Hon Michael McHugh QC.

The conference ended with a Q&A panel discussion chaired by the ABC's Tony Jones.

5 The Q&A panel with Tony Jones
6 Chief Justice James Allsop AO
7 The Hon Christian Porter MP, Commonwealth attorney general
8 David Marr and Phillip Ruddock do battle in the Q&A
9 Hon Justice Virginia Bell AC

Bench and Bar Lunch

A Bench and Bar Lunch was held on Tuesday, 25 September at No.10 The Bistro. Nearly 70 members enjoyed fine food, fast service and lively conversation.

Uluru Statement from the Heart

Voice, Treaty, Truth

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

In May 2017 a convention of First Nations People from across the continent, including elders, academics, delegates and activists, gathered at Yulara in the Northern Territory and adopted the Uluru Statement from the Heart.

The Statement from the Heart calls for a 'First Nations Voice' to parliament to be enshrined in the Constitution; and for the establishment of a Makarrata (or peace making) Commission to facilitate a process of treaty-making between State and Commonwealth governments and the First Nations and truth-telling about their history.

The statement has been endorsed by the Referendum Council, the New South Wales Bar Association, the Law Council of Australia and the Australian Bar Association.

On 5 November 2018, Andrew Smith introduced a session in the Bar Association Common Room, hosted by the First Nations Committee, where members heard about the statement and were encouraged to sign it to register their support.

Thomas Mayor, who is a custodian of the Statement, spoke passionately and movingly of his travels to communities around Australia with a canvas inscribed with the statement. He was followed by the Honourable Justice Michael Slattery, Chris Ronalds AO SC, Tony McAvoy SC and Arthur Moses SC.

The core proposal for a First Nations voice to parliament may have been rejected by Prime Minister Malcolm Turnbull, but the statement continues to gather significant support. Information, including the text of the statement, is available at www.1voiceuluru.org.

As the statement concludes:

> ***In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.***

Bar Practice Course 02/2018

Back Row: Kai Luck, Douglas McDonald-Norman, Daniel Meyerowitz-Katz, John Tryon, Michael Bersten, Matthew Cobb-Clark, David Smith, Josie Dempster, Christian-Florin Vulpeanu, Nicholas Bentley

Third Row: Grace Keesing, Nigel Oram, Jonathan Tsang, Andrew Munro, Michael Connor, David Edney, Anna Garsia, Sarah McCarthy, Anthony Strik, Geoffrey Diggins

Second Row: Sarah Woodland, Jonathan Adamopoulos, Denise Kaiti, Amy Campbell, Jeremy Farrell, Elizabeth Esber, Kiel Roberts, Sebastian McIntosh, Jerome Entwistle, Daniel Grippi

Front Row: David Lewis, Mark Robertson, Shelley Scott, Victoria Engel, Kathryn Boyd, Ruwan Wathukarage, Elina Yasumoto, Angela McDonald, Meredith Ziegler, William Richey

Back Row: Grace Keesing, Denise Kaiti, Josie Dempster, Anna Garsia, Sarah McCarthy

Middle Row: Sarah Woodland, Shelley Scott, Amy Campbell, Elizabeth Esber

Front Row: Victoria Engel, Meredith Ziegler, Kathryn Boyd, Angela McDonald, Elina Yasumoto

One year on: Five women silks of 2017 discuss work, confidence and leadership

Gail Furness SC sat down with Lesley Whalan, Melissa Gillies, Naomi Sharp, Katharine Morgan and Ruth Higgins and asked them to reflect on their first year since taking silk. They candidly discuss the selection process, how their practices have changed and what they expect from the years ahead.

The application process

What was your experience of applying for silk and, in particular, the requirement to provide a table in respect of all cases, including contested interlocutory applications, in which you have appeared in the previous 18 months?

Lesley Whalan: I found the process fairly onerous, in terms of meeting the requirements under the protocol, but I think it was a really good process in the sense that I was able to reflect on my career at the bar and how I evolved into an applicant for silk. And I think that it was really useful to go back over the work that I had done, the cases that I appeared in, remembering the people that I had worked with, the people that had mentored me. That was all very useful.

Naomi Sharp: The process was very time consuming, but it does show the thoroughness with which applicants for silk are vetted. On the upside, it was interesting to reflect in detail about how I had occupied 18 months of my working life and the diverse nature of matters I worked on. One of my colleagues gave me very useful advice in telling me to create the table 18 months out from the time I wished to apply for silk and then periodically update it rather than having a mad rush to prepare the table just before the cut off date for the application.

Katharine Morgan: I remember when I did my first draft of the application itself, and gave it to someone, and they said, 'You sound like a hack who's making do.' I think that the discipline of the table really helps. Doing the table and then writing my submission helped me with the different categories in the protocol. You set out each criterion and you work out which of the cases from the table matches the relevant criterion.

Ruth Higgins: The introduction of the table of 18 months' practice is such a great initiative. It's objective and democratic and must assist the silk selection committee in assessing relativities of different applicant's practices quickly and fairly. And it's simple to do. You measure out your life in coffee spoons and see whether it stacks up. As for the application letter, I asked two people I trusted for copies of their successful applications, borrowed what I liked, and added some of my own thoughts. I agree with Lesley that the process of setting that all out is emotionally interesting. It is like writing your own report card. I felt on the one hand proud of all my efforts and concerned that they wouldn't be enough. And I felt incredibly grateful to the silks and solicitors who had supported me over the years.

Melissa Gillies: Up until the cut off date I was in two minds about whether to apply or not. I found the application process really settled the question for me. I did underestimate the time that the application process would take which in part was a product of grappling with the question of whether I should apply. After days of working on the application I realised that I should apply. Like Ruth it also showed me in a really scientific way where my supports had come from in the past year-and-a-half. It also showed me how I had developed as a practitioner.

Katharine Morgan: My first thought was that eighteen months out is too late. You know, I think it's something that is you think that one day it's something that you want, then you will be trying to develop aspects of your practice that you would describe as 'barrister-like' i.e. on your feet, advocating, being strategic in cases.

Ruth Higgins: I agree the lead time must be longer than 18 months. It should be a process that refines itself.

Melissa Gillies: I also struggle with the idea that it is strategic. It should be organic in the sense that you start to do the harder cases and realise that you are developing to the extent that silk might be on the horizon.

Katharine Morgan: Yeah, sure. Exactly. You want to develop a balanced practice.

Naomi Sharp: I think Kate is spot on about trying to develop a balanced practice. And that can be tricky at times. I think it is very important to invest in developing your skills by accepting the briefs most likely to develop those skills. For example, cross-examination skills.

Ruth Higgins: And also seeking out matters in which you are arguing against a silk and junior, which Commonwealth and State work will often offer you. Although, commercial work does so too.

Katharine Morgan: What has changed in the last one or two years is the expectation of written references. I think that is very hard.

Lesley Whalan: I got opponents to give me a written reference and a verbal reference, and my second written reference was a solicitor I was working with at the time.

Naomi Sharp: I think the references are a very important part of the application process.

Ruth Higgins: I asked two senior silks with


Lesley Whalan


Melissa Gillies


Naomi Sharp


Katharine Morgan


Ruth Higgins

whom I had done a great deal of work (and also been against a fair bit) to provide written references and asked another silk and a partner at a law firm to be available for oral references. Each of them could speak in real detail about working with me. That process is humbling: people you greatly respect support you and endorse you and that is, independent of the outcome, quite a lovely thing.

Katharine Morgan: One thing with me though, is they put my name, they put 'Katharine Morgan'. Various people told me they didn't know it was me. I basically stood in Phillip Street and Macquarie Street with a megaphone. At the High Court bows Arthur [Moses] announced me as, 'Katharine Morgan, also known as Kate Morgan,'; and the chief justice called me 'Katharine, known as Kate'. So it ended up as being a nice story.

I don't know if you had this, Lesley, but did you ask people before you applied? A few of your crucial silks and colleagues?

Lesley Whalan: No.

Katharine Morgan: I did. I asked someone whom I had appeared against, in a four-week trial. I thought if anyone's going to have a view, they'll have a view.

Naomi Sharp: I did seek guidance from my colleagues about the right time to apply for silk.

Ruth Higgins: Me too. I had a little cache of trusted silks and solicitors whom I spoke to for a couple of years before I actually applied. One, whom I won't name, said the most gloriously gnostic thing when I asked him the year before I actually did apply, whether I should apply: 'I trust your judgement completely. You will get it when you apply. But when you apply will be a function of your judgement.' I felt all a little Luke Skywalker in the presence of Yoda and decided to apply the next year. And got it. So he was right.

Melissa Gillies: Again as a product of being in two minds about applying I didn't necessarily ask people if I should apply but was gratified that a variety of people simply said to me, 'You are applying this year aren't you.' It wasn't really framed as a question. As Ruth's Jedi master told her when the moment is right a constellation of things happen. Firstly, people approach you and tell you that you should. Secondly, you start to think that it might be a good idea and thirdly, you sit down and do the application which demonstrates if the moment is right.

Katharine Morgan: The problem is trying to time your run at it. I remember a female barrister, having this very conversation with a male and a female, and the male said, 'Well, this is when I want to get silk, so I'm going to start doing appeals and blah blah,' and the female barrister just looking at him and saying 'What do you mean 'you're going to start doing appeals?' On what planet can you choose whether appeals come to you or not?' And of course, it did, they did come to him and not to her, and so she didn't have that choice to try and generate her appellate practice. So it's all very well to say that that's what you want to do, but it's not possible if the work doesn't come.

Ruth Higgins: Timing is so important but your perspective on it can change. Me and my partner Tamson had been offered Visiting Fellowships at New College in Oxford for 3 months from October 2016. When we accepted that, I effectively decided I would not be applying in July 2017 because I'd taken a chunk of time out of my table. But when it came to it, because I'd been keeping my table for a couple of years, I thought that the three months would not be the thing that would make or break it. Also, I had spent those three months thinking law thoughts in a different way.

Naomi Sharp: I think it's very important to have the experience of being on your feet for a considerable period before applying for silk. And leading juniors. You have to demonstrate that you occupy a position of leadership.

Ruth Higgins: I completely agree with Naomi. Crucially, it also makes the transition easier because there is a natural progression as opposed to a step change. It's important to remember that the question is not just: Will I get it? But also: Will I thrive if I get it?

Katharine Morgan: I think it's essential to already to be practising like a silk. If you haven't got essentially a silk's practice when you apply, you have to be an otherwise standout candidate for some other reason – and there have been people who have got it who haven't operated as a silk in the sense of run their own matters and had juniors for a year or two.

Lesley Whalan: I absolutely agree that you have to have a silk's practice to meet the criteria. And I think that I had consciously moved in the direction of not being led myself and encouraging my solicitors to provide me with juniors, which they did in cases where that was warranted, so that was really, really good. I think that some senior junior women lack the confidence to move in those directions and stop being led.

Naomi Sharp: I too agree.

Gail Furness: But you say that as though it's all under our control.

Lesley Whalan: Do I?

Gail Furness: Yes, it isn't under our control. To say to stop being led, that either means that you reject briefs where you are being led or you say to the solicitor, 'Treat me as a silk and give me a junior' and I'm not sure that that's always going to happen.

Lesley Whalan: No, I accept that it doesn't always. But it's something to strive for.

Katharine Morgan: I think that the best message you can send is this idea that you can be more proactive than you think. You probably can't do as much as you would like to do, in terms of the kind of practice you would want, but you can probably be more strategic. And to look at the criteria a long way out and just think, 'Well, how am I going to get myself in this position? Can I do this kind of work that will get me on my feet in front of all the judges?' I just think that the judges have incredible sway and they need to see you on your feet running cases.

Naomi Sharp: I agree with Kate's view. It's good advice. In retrospect, I wish I had thought more about that at the time.

Ruth Higgins: The significance of the judges cannot be understated. I had a pretty specific strategy around eight, nine years out of increasing my Supreme Court work because I had had a historically very Federal Court weighted practice. And of course,

introducing that kind of diversity in fact improves your practice and makes it more fun.

Gail Furness: I know a couple of judges who have said to me over recent times, Supreme Court judges, that they just don't see enough women on their feet. They get the list, but they just don't see them and therefore don't know who they are.

Katharine Morgan: Well Gleeson J kept stats for a while. I think it was less than three per cent for female, less than five per cent – and that's the Federal Court.

Lesley Whalan: When you see those statistics they're astonishingly bad.

I know a couple of judges who have said to me over recent times, Supreme Court judges, that they just don't see enough women on their feet. They get the list, but they just don't see them and therefore don't know who they are.

Naomi Sharp: It's completely appalling. I wonder what it is in the High Court.

Ruth Higgins: There was an article about that in the ALJ a couple of years ago. The stats are bad. But they are improving and they will continue to improve.

Melissa Gillies: I feel quite removed from that experience. In the Family Court and the Federal Circuit Court it is not unusual to have a bar table with only female practitioners, a female judge and female court staff. There is also a wealth of trial experience available to competent practitioners. There are literally months in my diary where I have run back to back trials. There is no better way of preparing yourself for the transition and earning the attention of the people who will be consulted on whether or not you are ready for the appointment than consistently running trials.

The announcement

Katharine Morgan: I spent the morning with Tim Game, who was on the committee. He didn't mention it, I didn't mention it, so I was convinced I was not going to get it.

Lesley Whalan: I was in Melbourne. I had just settled an infant brain damaged case the day before and I was flat after gearing up for that. It was meant to start before a jury for five weeks on the following Monday, which is a public holiday for us but not in Melbourne, but we settled.

Naomi Sharp: I was in Tilba mowing the lawn in an attempt to distract myself.

Ruth Higgins: I took the morning off and sat down by the water at Birchgrove and focussed on being grateful for whatever outcome occurred because either would teach me something. But all of those zen-tastic efforts aside, I was gut-gnawingly nervous.

Melissa Gillies: I was sitting at Melbourne Royal waiting to compete on my horse. I had a deal with my clerk that if I got it she would ring and if I didn't she would text so I could slink off and have a moment by myself to recover my composure. It wasn't a very pretty performance on my horse that day but we did get a ribbon.

Katharine Morgan: It was a bit unpleasant at the time that the silk were announced. There was unhappiness that there were so many women on the list as a proportion. And that's always complicated.

Katharine Morgan: It was the closest they had come to half. They came close a couple of years ago. And that was just unpleasant. It left a bad taste in my mouth, knowing that there were people complaining on that basis.

Lesley Whalan: Questions were raised about whether a quota had been installed.

Melissa Gillies: Until last week I was the only female silk in NSW that had a dedicated family law practice. The application process permitted me to hold my head high amongst what I thought was some really negative publicity about the number of women appointed and confirm to me that I deserved it. There will always be people that will say that someone got something for some reason unrelated to ability. I had to develop the attitude of, 'Let them.'

Expectations

Lesley Whalan: I think the best way that I can answer it is that I didn't expect there to be a big change in my practice, and there hasn't been.

Naomi Sharp: One of the lovely things is that I always get a junior now and I've had the opportunity to meet a lot of new and talented barristers.

Ruth Higgins: I expected that people who had always briefed me would continue to: not in all cases, but in appropriate cases. I have a perhaps simplistic view that if you bring good will and effort to your interactions in the world it will, in large part, come up to meet you. I assumed I would get some new kinds of work and some component of essentially equitable briefing briefs for a commercial female silk.

Katharine Morgan: I'll tell you something that I found very interesting, and pitch in Lesley if you have this perception. One was that, like Lesley, I've been practising for the last three or four years with juniors and have been on my feet a lot my entire practice despite the commercial stuff. I was still surprised at my own level of confidence increasing in terms of 'yes, this is what we should do, forget about that, we're doing this,' and sitting there with people and just saying 'buck stops with me, I'm captain of the ship', how many more metaphors can I think of. But actually feeling confident in that decision, even though it was the same decision I would've made a month before, but somehow it was different. So that I've been surprised at.

I took the morning off and sat down by the water at Birchgrove and focussed on being grateful for whatever outcome occurred because either would teach me something. But all of those zen-tastic efforts aside, I was gut-gnawingly nervous.

Lesley Whalan: I think that there is a higher degree of confidence placed in you by solicitors and a higher degree of confidence that you place in yourself as a barrister. And I agree that a noticeable difference has been to be more seen and heard.

Naomi Sharp: I share Kate and Lesley's perception that there is a certain amount of respect that comes with the appointment to senior counsel.

Ruth Higgins: Like Kate, I was surprised at

how quickly and comfortably I was willing to take control for how matters are run; even with very senior solicitors who have been running cases for much longer than I have - although I always want to know what they think and why they think it. Solicitors expect that degree of confidence and are entitled to it. It's part of the gig. And it's a brilliant part of the gig too.

Mentoring

Gail Furness: Do you feel that you should be a mentor to younger women at the bar? Is that leadership role in your minds?

Lesley Whalan: Yes.

Katharine Morgan: I've always been.

Ruth Higgins: I agree: all women should look out for each other. I had five brilliant women readers before taking silk, alongside some very great men, and you have to extend the networks beyond that too.

Katharine Morgan: I think that has changed for me over the years, definitely. For me more recently, it's very much having a preference for female juniors and obviously not putting up with crap. You know, if someone says something inappropriate, calling it out in front of the female juniors and being conscious of inappropriate behaviour. I think I'm much more public, much more standing up to that behaviour in public and modelling that behaviour for juniors and female solicitors.

Lesley Whalan: I've always had a kind of mentoring ethic I suppose and I wouldn't say that I've noticed a big difference before and after taking silk in the way that I've approached that.

Naomi Sharp: One of the things that I have most enjoyed about my time at the bar has been the terrific support network of female barristers and I've always been very happy to be a part of that network, both as a beneficiary and as a mentor. The crew of female barristers I know are really so clever and so fun. I think there is a really strong tradition of more senior women mentoring more junior women at the NSW Bar. I've always tried my best to assist in the career development of my more junior female colleagues.

Ruth Higgins: There's not much to add to that. The most obvious thing we can do is put forward great young women for junior briefs and recommend other women silks when you are jammed and can't accept a brief. Our generation of women lawyers are so deeply indebted to the previous two generations. We're the beneficiaries of years of progress on their part, both the large gestures and the quotidian nudging of existing norms to begin

new forms of work practice. We have the opportunity to tell our own story about this and to involve younger women in that narrative.

Lesley Whalan: I think that some of your colleagues, say, in your chambers, look to you to take more of a leadership role.

Lesley Whalan: I think it's important to communicate that getting silk and going for silk is about wanting to lead. I think you've got to want to model the right behaviour ethically, professionally – and I think that's one of the criteria.

Melissa Gillies: I really haven't noticed a difference. My door opens with questions as much as it did before the appointment and I will always be grateful for that. It is one of the fun parts of being a senior practitioner, whether that is silk or otherwise.

One-year in

Lesley Whalan: It's been the same for me, work-wise and practice-wise.

Katharine Morgan: I got my first plaintiff matter. In fact, you know, that's actually a very interesting point. I've got my first ever in this year. So one is a plaintiff med-neg one, and I got an appellant (a plaintiff) in the Court of Appeal. And the other one is a class action applicant in the Federal Court.

Naomi Sharp: I think my practice has been a natural progression and has steadily evolved. I fretted a lot about experiencing a dip in my practice upon taking silk. There was definitely a period when I was not receiving calls at the same frequency but I'm currently as busy as I ever had been. I suspect most new silks have first year jitters for a while.

Ruth Higgins: It's been great fun. The most noticeable and rewarding change for me has been a high level of appeal work in the Federal and Supreme courts and in special leave applications. I still get the core kinds of work I did before: defendant class action, respondent competition law with a bit of Crown/Commonwealth work in there too, energy arbitrations, insolvency, schemes of arrangement. But I also get things I've never done: tax, industrial relations and the like. One thing that has been deeply rewarding is going up immediately against the silks I deeply respected and worked with a lot: Justin, Noel, Bret, John, Neil Young and the like. It impels you into the role.

The five women silk appointees from NSW took their bows before the High Court of Australia on Monday, 5 February 2018. Kate Morgan SC (second from the left); Lesley Whalan SC (7th from the left); Ruth Higgins SC (3rd from the right); Naomi Sharp SC (2nd from the right); Melissa Gillies SC (1st on the right).

Melissa Gillies: One of the junior barristers on my floor commented on how much more relaxed I appeared in the months after the appointment. He made the observation that he had noticed the same thing with other silks who had been appointed in our jurisdiction in the past years. His theory was that we were all so stressed in the 12 to 18 months before the application was going in trying to make every matter count for our application and that translated into feeling the pressure of each and every appearance. Reflecting on that I think he is right. After a couple of months there was a definite experience for me of exhaling and thinking, 'I've got this'.

Gail Furness: So what are your expectations going forward in terms of what work you're going to do? Kate?

Katharine Morgan: Well I leave the jurisdiction, as you know, in six weeks and four days, so who knows? People might have forgotten me in July. I've got matters that won't even be on yet, so they'll be still around.

Naomi Sharp: I'm really looking forward to seeing how my practice as a silk develops. Currently I'm doing a lot of work for the regulators, which I very much enjoy, but it would also be good to spend some time on the other side of the record.

Ruth Higgins: I'm excited to see what happens and would be pretty happy if it stayed as it is right now.

Gail Furness: Now, women in increasing numbers are going to the bench, and silks are obviously the main source. Have you thought about that? Going to the bench?

Lesley Whalan: It's not something that really appeals to me. I'm really happy at the bar and I'm not focussed at all on that kind of an appointment.

Katharine Morgan: I think the world agrees and I'm happy for you to leave this in, that my temperament is ill-suited to judicial life.

Naomi Sharp: Kate I'm sure that last statement will be quoted at your swearing in. Judicial appointment is something I would certainly consider at some time in the future.

Ruth Higgins: My dad was a judge and I've always thought it's a very meaningful way to participate in civil society. I want to spend time really mastering the business of being a silk, but think it would be a great honour to be a judge one day.

Melissa Gillies: Acting as an arbitrator has certainly been a real eye opener about what life on the bench would look like. I'm happy doing what I am doing.

Downsides?

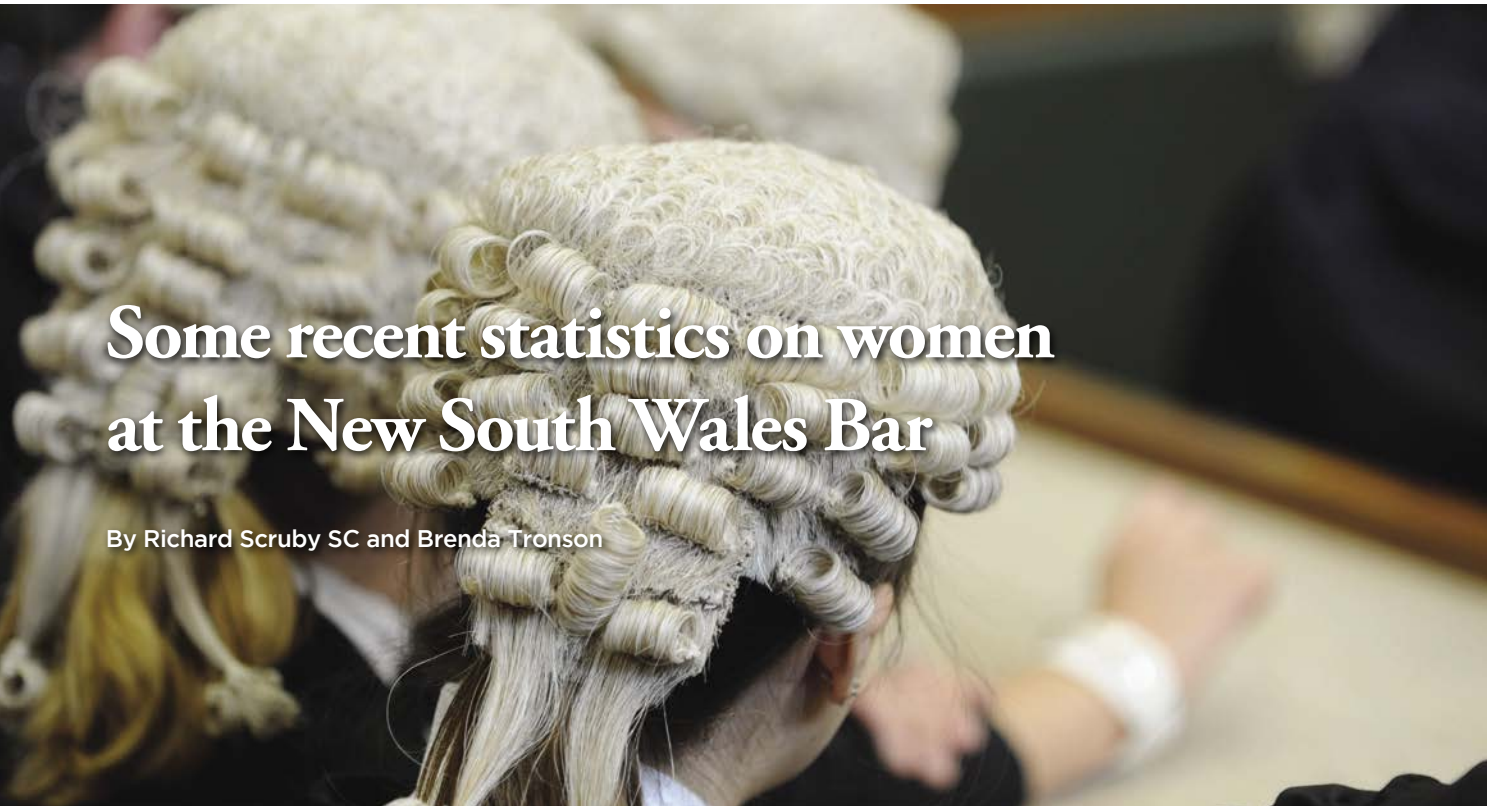
Lesley Whalan: No, I can't say there has been.

Naomi Sharp: Not for me. One year in I'm very happy where this is going.

Ruth Higgins: Nor for me. So far it's a very rewarding and happily challenging thing.

Melissa Gillies: None. I even prefer the lighter robes!

Katharine Morgan: The never ending helpful comments about the 'problem' of female silks 'not sticking around'.



Some recent statistics on women at the New South Wales Bar

By Richard Scruby SC and Brenda Tronson

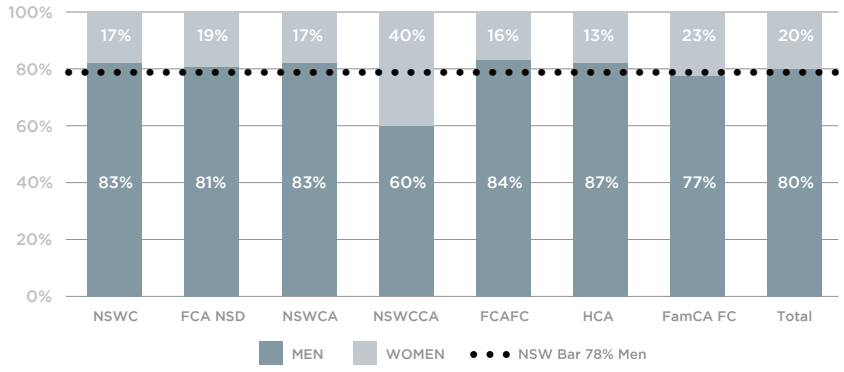
It is often said that one does not see many women appearing in court. Is this due merely to the fact that only 22 per cent of barristers in New South Wales are women? Do women barristers obtain proportionately the same amount of work as men? Is there a difference in the type of work they receive? This article takes a statistical approach to examining these questions by analysing data collected by the Equity and Diversity Committee and the Women Barristers Forum.

For the administration of justice to be most effective, its participants have to be representative of the community they serve. The members of the independent bar of New South Wales are important participants in the system of justice in this state and the New South Wales Bar, to be as effective as it can, has to be representative of the community it serves. A diverse bar is more representative of the community than one that is not.

Is the New South Wales Bar diverse? There does not seem to be any satisfactory way to measure diversity and there has not so far been any attempt to measure the diversity of the New South Wales Bar. It would be necessary first to identify the groups whose representation is in question and then find a way to measure the extent to which they are represented at the Bar. It is not clear how one could to do either of these things in a comprehensive or accurate way.

A diverse Bar is not the same as one in which men and women are equal participants. But that is an important part of a diverse Bar. In other words, one aspect of diversity is the representation of women at the Bar. There are different ways in which that can be examined. One simple and obvious way is to look at the percentage of women that have a practising certificate in New South Wales. The percentage as at 30 June 2017 was 22 per cent and as at 30 June 2018 it was 23 per cent.[1] On any number of bases, these figures are low. To take only a few:

Chart 1: All appearances by gender - all superior courts, Nov 2016 - April 2017



The percentage of barristers who were women as at 30 June 2017 is the same as the percentage of solicitors who were women in 1990.

- About 50 per cent of the adult population in New South Wales are women.
- Since October 2016, at least 50 per cent of all practising solicitors in Australia have been women.[2]
- As at June 2018, 51 per cent of all practising solicitors in New South Wales were women.[3]
- The percentage of barristers who were women as at 30 June 2017 is the same as the percentage of solicitors who were women in 1990.[4]
- In 2015, 59 per cent of solicitors entering the profession for the first time were women.[5] In 2015/2016, 34 per cent of people taking the bar course were women.[6]
- Since 1993, 50 per cent or more of Australian law graduates have been women.[7]

As part of its attempts to increase diversity, one of the aims of the New South Wales Bar Association is to increase the number of women barristers. Why are only 22 per cent of all barristers women? Is it because, when they come to the Bar, women barristers get less work or less opportunities to appear in court? There is a widespread perception that one does not see many women appearing in court. Is the perception correct? If it is correct, is it due merely to the fact that only 22 per cent of barristers are women? Is the position different in different jurisdictions?

In the last 18 months the Equity and Diversity Committee and the Women Barristers Forum attempted to obtain more data that might shed light on these questions,[8]replicating in concept a study undertaken by Kate Eastman in 2015. They used AustLii to look at the number of appearances of women barristers over particular periods from 2016 to 2018 in the following courts: the Supreme Court of New South Wales, the New South Wales registry of the Federal Court at first instance, the New South Wales Court of Appeal, the Court of Criminal Appeal, the Full Court of the Federal Court, the Full Family Court and the High Court. A total of 1383 judgments were analysed across all courts for the period November 2016 to April 2017, and a further 2530 judgments were analysed across the Supreme Court of New South Wales, the New South Wales registry of the Federal Court (first instance) for the period from May 2017 to April 2018. Because the survey considered only judgments that appear on AustLii, no data were collected for jury trials. No data were collected for special leave applications in the High Court. Appearances by solicitors were not considered. Appearances by interstate counsel were included.

For each case, the following data were collected: senior and junior counsel, the judge (in the case of first instance decisions), whether the briefing entity was a public or a private entity. Public entities were treated as all government agencies or statutory authorities, whether State or Commonwealth. A briefing entity was, with one exception, regarded as the ultimate client (for example, a local council that instructs a private firm of solicitors counted as a public entity). The exception was that where Legal Aid acted as solicitor this also was counted as a public entity. The purpose of the distinction was to capture decision making which was governed, on the one hand, by governmental policy and, on the other, by private interests. With the considerable assistance of

Chart 2 - 3: All appearances by gender - All superior courts, Nov 2016 - April 2017

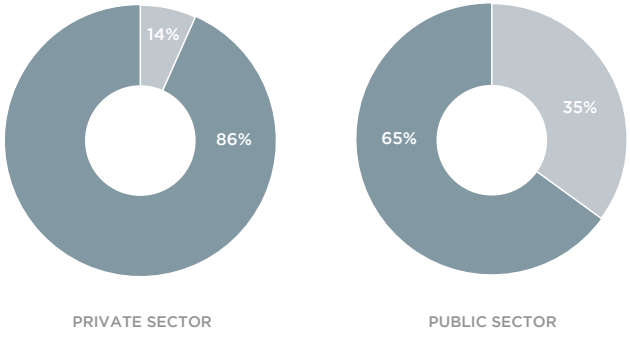


Chart 4 - 5: All appearances by gender - Supreme Court and FCA Sydney Registery, Nov 2016 - April 2017

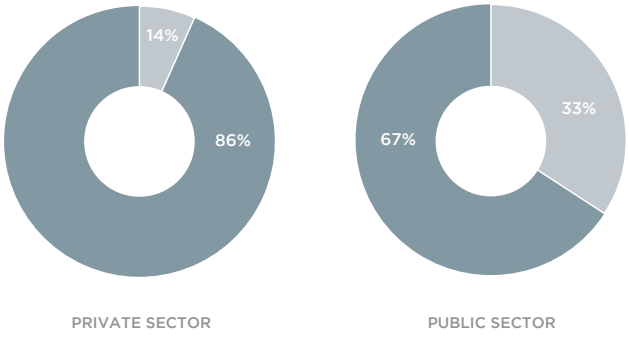
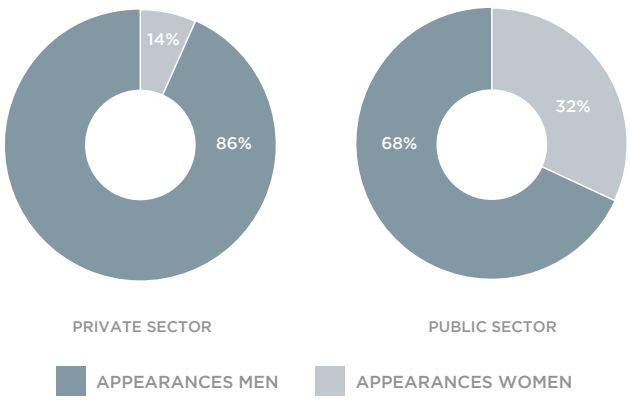


Chart 6 - 7: All appearances by gender - Supreme Court, Nov 2016 - April 2017



For the Supreme Court of New South Wales and the New South Wales registry of the Federal Court (first instance) for the period from May 2017 to April 2018, the data were very similar, with women constituting 18 per cent of the overall percentage of barristers appearing in each court and overall.

Ting Lim from the New South Wales Bar Association, the data were collected and entered into Excel spreadsheets. Filters can be applied to those spreadsheets to examine particular aspects of the results.

The results of part of this analysis were discussed at a CPD presentation in March this year. Some further data have been gathered since the time of that presentation. Charts additional to those presented here, some of which are updated versions of the information presented in March, are available on the Bar Association website.

An overview of the results of the analysis for all courts in the period from November 2016 to April 2017 appears in Chart 1 below. It breaks down appearances in each of the courts by men and women. The dotted line is drawn to indicate the level of representation that one would expect if it matched precisely the percentage of men and women barristers with practising certificates over this period.

For the Supreme Court of New South Wales and the New South Wales registry of the Federal Court (first instance) for the period from May 2017 to April 2018, the data were very similar, with women constituting 18 per cent of the overall percentage of barristers appearing in each court and overall.

These results largely replicate the results of the Eastman paper. That paper looked at the same courts over the period July 2014 to October 2015. The overall percentages of women appearing in the Eastman paper were slightly lower across all courts except the Full Court of the Family Court: they were, respectively, 16 per cent, 15 per cent, 14 per cent, 38.5 per cent, 15.6 per cent, 17.5 per cent, 28.3 per cent.[9]

One result reported in the Eastman paper was an apparent difference between public and private sector briefing. That paper found that women obtain more public sector briefs and fewer private sector briefs than one would expect if briefs matched the percentage of practising men and women barristers.[10] This result was also been noted in a study conducted by Reynolds and Williams on High Court appearances (including special leave applications).[11]

Data collected in the present study show the same result. That is the focus of this article: the difference between the extent to which women and men are briefed by public and private entities. This aspect of the analysis is depicted in Charts 2 and 3, which present this difference for the period November 2016 to April 2017.

The significance of the difference between public and private sector briefing can be seen in more detail by an examination of data for appearances in the Supreme Court of New South Wales and the New South Wales Registry of the Federal Court. During the period November 2016 to April 2017, women accounted for 18 per cent of all appearances in both courts, taken overall. If these appearances are broken down into public and private sector briefs, a different picture emerges.

Charts 4 and 5 provide a pictorial representation of the distribution of private sector and public sector briefs for both courts during this time.

Charts 6 and 7 provide a pictorial representation of the distribution of private sector and public sector briefs in the Supreme Court for the same period.

In the Sydney registry of the Federal Court for this period the figures were similar: women accounted for 14 per cent of all private sector appearances and 33 per cent of all public sector appearances.

Chart 8 - 9: All appearances by senior counsel - Supreme Court, Nov 2016 - April 2018

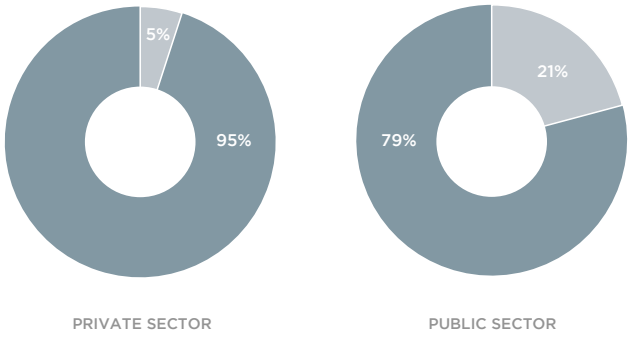


Chart 10 - 11: All appearances by junior counsel - Supreme Court, Nov 2016 - April 2018

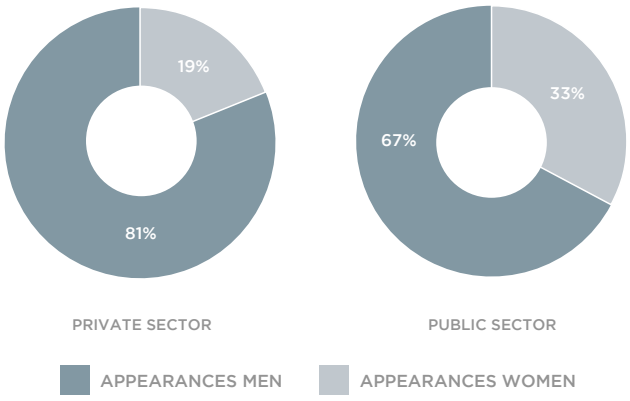
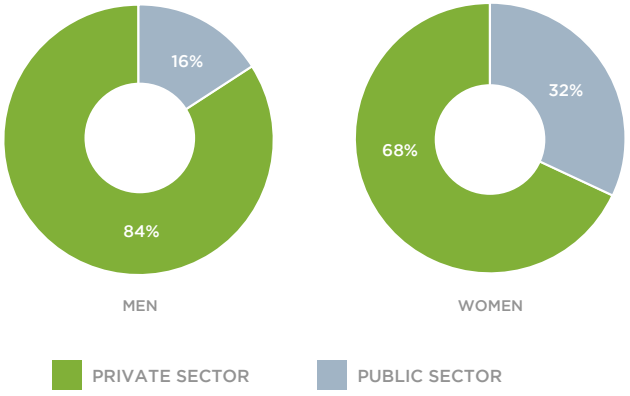


Chart 12 - 13: Appearances for public sector vs private sector - Supreme Court, Nov 2016 - April 2018



One would expect that, if women receive a disproportionately low number of briefs from the private sector, then that would translate into a disproportionately low number of briefs in equity and commercial cases. This is borne out by the data.

Undertaking the same exercise for the period May 2017 to April 2018:

- Women accounted for 16 per cent of all private sector appearances and 29 per cent of all public sector appearances in the Supreme Court.
- Women accounted for 16 per cent of all private sector appearances and 26 per cent of all public sector appearances in the Sydney registry of the Federal Court (first instance).
- Women accounted for 16 per cent of all private sector appearances and 28 per cent of all public sector appearances in both courts overall.

For the entire period, November 2016 to April 2018:

- Women accounted for 15 per cent of all private sector appearances and 30 per cent of all public sector appearances in the Supreme Court.
- Women accounted for 16 per cent of all private sector appearances and 28 per cent of all public sector appearances in the Sydney Registry of the Federal Court (first instance).
- Women accounted for 15 per cent of all private sector appearances and 29 per cent of all public sector appearances in both courts overall.

The difference between public sector and private sector briefing can be examined by looking at the matter from the perspective of senior and junior counsel. During the period in question, about 10 per cent of all senior counsel and about 24 per cent of all junior counsel with practising certificates in New South Wales were women.[12] The distribution of public and private sector briefs for each of junior and senior in the Supreme Court for the entire period is depicted in Charts 8 to 11.

The figures in the Sydney registry of the Federal Court over the same period were similar: 5 per cent of private sector senior counsel appearances and 16 per cent of all public sector senior counsel appearances were women. For junior counsel the percentages were 20 per cent and 31 per cent respectively.

Another way to look at the effect of what seem to be different public and private sector briefing practices is to see what percentage of total appearances by women and men are accounted for by public and private sector briefs. For the Supreme Court of New South Wales, this is depicted in Charts 12 and 13.

In the Sydney registry of the Federal Court for the same period, public sector briefs constituted 19 per cent of briefs for men and 33 per cent for women.

Public sector briefs made up only 19 per cent of all appearances in the Supreme Court and 22 per cent in the Sydney registry of the Federal Court in the period under consideration. The higher percentages of appearances for women in the public sector thus have only a small impact on overall percentage rates of appearance.

One would expect that, if women receive a disproportionately low number of briefs from the private sector, then that would translate into a disproportionately low number of briefs in equity and commercial cases. This is borne out by the data. The appearances in the Supreme Court can be filtered to examine appearances before judges who typically sit in the commercial and technology and construction lists of that Court.[13] When those filters are applied, the following statistics emerge for the period November 2016 – April 2018:

- Women accounted for 84 out of 699 total appearances, or 12 per cent.
- Women silks accounted for 8 out of 226 appearances by silk, or 3.5 per cent.
- Women juniors accounted for 76 out of 481 appearances or 16 per cent.

The proportion of appearances by women, and by women junior counsel, improves slightly if one looks at the results for appearances across all of the Equity Division over the same period. The proportion of appearances by women silks drops. Those figures are:

- Women accounted for 356 out of 2189 total appearances, or 16 per cent.
- Women silks accounted for 14 out of 591 appearances by silk, or 2.5 per cent.
- Women juniors accounted for 342 out of 1598 appearances or 21 per cent.

There does not seem to be anything about the practice areas of men and women barristers that might explain these differences. Practice areas are self-identified by practitioners to the New South Wales Bar Association. As at 30 June 2017 the percentages of women to men in the main practice areas in the courts the subject of the present survey was as follows:

- Commercial Law: 24.2 per cent / 75.8 per cent (total 698)
- Equity: 24.3 per cent / 75.7 per cent (total 588)
- Common law: 20 per cent / 80 per cent (total 332)
- Crime: 27.9 per cent / 72.1 per cent (total 405)
- Public and Administrative: 29.7 per cent / 70.3 per cent (total 508)
- Tax: 22 per cent / 78 per cent (total 118)
- Family Law: 40 per cent / 60 per cent (total 172)
- Appellate: 24.8 per cent / 75.2 per cent (total 549)

It is difficult to see how this distribution of practice areas could account entirely for the differences between public and private sector briefs. They help explain why women receive more than 22 per cent of public sector work in that they indicate higher participation rates in public and administrative law and crime. They put the 23 per cent of all appearances by women in the Full Court of Family Court into context. But they do not help explain why women receive less than 22 per cent of private sector work. They also raise other obvious and

Women appear in court at a level beneath what one might expect even having regard to their low numbers at the Bar.

important questions: why, if 24 per cent of barristers practising in the commercial and equity sphere are women, were only 12 per cent of appearances in commercial and construction list matters or 16 per cent of Equity Division matters appearances by women barristers?

The court in which women had the highest percentage of total appearances was the Court of Criminal Appeal, where 42 per cent of all appearances were women. These are, in one sense, very positive figures. However, the public-private divide is apparent also in this jurisdiction. On the basis of our definitions of public and private briefing entities, public sector briefs account for 62 per cent of appearances in this court. If briefing practices were gender neutral, one would expect that about 62 per cent of appearances for both men and women would be accounted for by public entities and about 38 per cent by private entities. However, this is not reflected in the data. The data collected show that 49 per cent of all appearances by men were for public entities and 51 per cent for private briefing entities. In contrast, 81 per cent of appearances by women were for public briefing entities and 19 per cent were for private briefing entities.

A similar conclusion can be drawn from the figures referred to above in the Supreme Court and Federal Court from data collected over a longer period. It will be recalled that in Supreme Court, 19 per cent of all appearances were public sector briefs and 81 per cent private but these percentages are not reflected in the distribution of appearances as amongst men or as amongst women. In that court 32 per cent of all appearances by women were on public briefs and only 68 per cent private, whilst the figures for men were 16 per cent and 84 per cent respectively (see Charts 12 and 13, above). In the Federal Court, 22 per cent of all appearances were public sector briefs and 78 per cent private. In that court, 33 per cent of all appearances by women were on public sector briefs and 67 per cent on private sector briefs; the respective figures for men were 19 per cent and 81 per cent.

Conclusions

Statistics do not often find favour as a mode of persuasion in litigation: they tend to be, as Windeyer J once said, interesting but not useful.[14] Although the statistics considered in this article are not offered in that context, the data that produced them has some obvious limitations. They do not measure the length of cases, and treat appearances on a six-week trial as the same as appearances on a two-hour motion. They do not include cases that settle before judgment. They do not take into account or measure the extent to which men and women have speaking roles in court. They do not include all courts and tribunals in the state.

However, we would suggest that there is no particular reason to think that the results would have shown increased levels of participation by women had these matters been taken into account. We also suggest that the data we have discussed are useful for at least two reasons.

First, both alone and in conjunction with the data obtained in the Eastman paper, they suggest that women appear in court at a level beneath what one might expect even having regard to their low numbers at the Bar. To return to one of the questions posed at the beginning of this article, they suggest that the perception that one does not see many women in court is not due merely to the fact that there are not many women at the Bar.

Secondly, the data support the need for the Equitable Briefing Policy. The rates of appearances by women on public sector briefs (35 per cent across all courts for the period from November 2016 to April 2017, and 28 per cent for the Supreme Court and the Sydney registry of the Federal Court (first instance) for the period from May 2017 to April 2018) need to be evaluated by reference to the target set under that policy for all women counsel (30 per cent). The rates of appearances on private sector briefs are well below that target. In general, public sector agencies have been applying equitable briefing initiatives for over a decade and the data are consistent with such initiatives driving a more equitable distribution of work.

To return to another of the questions posed at the beginning of this article, one obvious way to encourage more women to come to the Bar and to remain in practice is to seek to ensure that women barristers are briefed by the sector from which both the most and best paid legal work emanates: the private sector.

ENDNOTES

1 NSW Bar Association Annual Reports.

2 Urbis, 'National Profile of Solicitors 2016: Report', 24 August 2017: https://www.lawsociety.com.au/sites/default/files/2018-04/NATIONAL per cent20PROFILE per cent20OF per cent20SOLICITORS per cent202016.compressed.pdf. More information about statistics in the solicitors' branch are available from the Law Society of NSW website at https://www.lawsociety.com.au/advocacy-and-resources/gender-statistics/profiles-surveys-and-statistics.

3 Law Society of New South Wales, Practising Solicitor Statistics as at 30 June 2018: https://www.lawsociety.com.au/sites/default/files/2018-07/201806 per cent20Practising per cent20Solicitor per cent20Statistics per cent20-per cent20Jun per cent202018.pdf.

4 Taylor and Winslow, 'A statistical analysis of gender at the NSW Bar', *Bar News*, Winter 2004, p20.

5 Law Society of NSW 2015 profile, summarised at: https://www.lawsociety.com.au/advocacy-and-resources/advancement-of-women/gender-statistics.

6 NSW Bar Association Annual Report, p12.

7 'Beyond the Statistical Gap', Law Council of Australia (2009), p10.

8 We wish also to thank the following people who worked on collecting data: Thomas Arnold, Madeleine Bridgett, Bronwyn Byrnes, Matthew Cobb-Clark, Jeh Coutinho, Ermelinda Kovacs, Natasha Laing, Sarah McCarthy, Douglas McDonald-Norman, Jennifer Mee, Meg O'Brien, Jayne Treherne and Marea Wilson.

9 A copy of the Eastman paper can be downloaded from the following site: https://www.kateeastman.com/wp-content/uploads/2017/02/Visible-Targets-June-2016-Kate-Eastman-SC.pdf

10 The definition of 'public briefing entity' in the Eastman paper is the same as ours, save that the Eastman paper takes Legal Aid briefs to be private briefs.

11 (2017) 91 ALJ 483.

12 The New South Wales Bar Association Annual Report for 2016/2017 gives percentages as 10.2 per cent and 24.4 per cent respectively. The percentages for 2017/2018 were 10.9 per cent and 24.6 per cent respectively. In this article we have generally rounded percentages to the nearest 1 per cent.

13 We think it is plain that nothing in this article suggests that there is any connection between any judge, judges or court and the extent to which women appear. We do not think there is any connection. However, this footnote has been included for the avoidance of any doubt.

14 Parker v The Commonwealth (1965) 112 CLR 295 at 311. His Honour was referring to statistics about the rate of remarriage for widowed women tendered in evidence on an assessment of damages under Lord Campbell's Act. See also De Sales v Inglis (2002) 212 CLR 338 at [71].

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The vogue word 'plurality'

David Ash, Frederick Jordan Chambers

The non-resident and plurality-gaping Prelats, the gulphs and whirle pooles of benefices.

1642, John Milton, Apology for Smectymnuus[1]

A plurality opinion is an appellate opinion not having enough judges' votes to constitute a majority but receiving the greatest number of votes in support of the decision.

With a plurality decision, the only opinion to be accorded precedential value is that which decides the case on the narrowest grounds.

2016, Brett M Kavanaugh & ors, The Law of Judicial Precedent[2]

Introduction

'Plurality' has had many meanings: more than one, many, more than one but less than half, more than half… and that's before we get to the more technical ones.

In a 21st century of Pax Americanus there is one particularly technical meaning, a peculiarly post facto form for use in the mists of precedent. Australia has not adopted the use. Instead, it has developed its own use. This article explores the recent rise of the word in Australia and compares the use in the two legal systems.

In terms of legal time, the development in Australia has been rapid. In 1998, a plurality opinion of the High Court of Australia was unknown.[3] In 1999, the word in this sense appeared for the first time in a High Court judgment. In 2007, the word in its various majesties hit Austlii's case law database 47 times; in 2012, 575; and in 2017, 945. To 31 October of this year, 'plurality' is at 833. We may reach 1,000.

The US Supreme Court

The world remains fascinated by the machinations of US Supreme Court appointments. Apart from the spectacle and this year a plurality of darker themes, we know that appointments affect us. Legal argument about the power of a US state to make a particular law or the inability of the federal executive to broaden its reach, rapidly becomes a vehicle for worldwide debates about the facts underlying the case. Abortion, the death penalty, corporate involvement in the political process, these things engage us all.

An end to a gruelling process

The authors of the book from which the second quote at the top of this essay is drawn include Bryan A Garner. Professor Garner is America's best-known legal lexicographer and the editor of *Black's Legal Dictionary.* His name appears first on the hardcopy cover. Yet the others are co-authors of the whole, and the existence of this plurality is acknowledged in our own bar library's catalogue. One has now been elevated to the US Supreme Court after a bruising appointment process.

Most of us understand that court as a place where 5 + 4 is a different sum from 4 + 5. That is useful. But the underlying arithmetic can be much more complex. Justice Kavanaugh has spent his judicial life on a court of appeal whose job is the process of discerning the precedent from such a case. He will spend the rest of his judicial life writing one or other of the judgments which create the process. Before moving to the broader history of the word, I shall explain its peculiar operation in the US.

A woman of plurality

John Cleland's *Memoirs of a woman of pleasure* was first published in London in 1748. Popularly known as *Fanny Hill*, a play on *mons veneris*, it has made regular appearances in porn prosecutions over the centuries. The US Supreme Court had its say in *Memoirs v Massachusetts*.[4] The syllabus states:

> Appellee, the Attorney General of Massachusetts, brought this civil equity action for an adjudication of obscenity of Cleland's Memoirs of a Woman of Pleasure (Fanny Hill), and appellant publisher intervened. Following a hearing, including expert testimony and other evidence, assessing the book's character but not the mode of distribution, the trial court decreed the book obscene and not entitled to the protection of the First and Fourteenth Amendments. The Massachusetts Supreme Judicial Court affirmed, holding that a patently offensive book which appeals to prurient interest need not be unqualifiedly worthless before it can be deemed obscene.

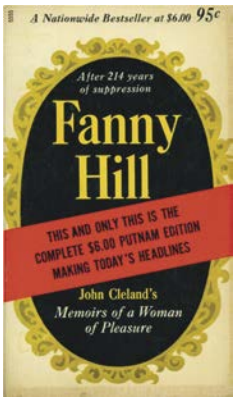
Justices Clark, Harlan & White in dissent would have dismissed the appeal. The six other justices allowed it. Justice Brennan, joined by the chief justice and Fortas J, applied a test that 'a book cannot be proscribed as obscene unless found to be utterly without redeeming social value'. Justice Black joined in the result, but on the basis put by him in an earlier decision:

> I believe the Federal Government is without any power whatever under the Constitution to put any type of burden on speech and expression of ideas of any kind (as distinguished from conduct).

Justice Douglas wrote to the same effect. Justice Stewart had a different view again, proscribing only hardcore pornography:

> . . . Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material . . . cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment. . . .

Of the justices in the voting majority, a plurality of three used 'utterly without redeeming social value', two refused to impose a burden, and a unity looked to an absence of even a pretence of value. By the way, my reading of the US definition precludes the idea that there



A red letter day for the court

can be two plurality opinions within one plurality decision. Had Justices Black & Douglas written a joint judgment, it could not have been one of two plurality opinions.

The Marks rule

In *Marks v United States*,[5] the court explained the way that other courts should read decisions such as Memoirs:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices,
>
> 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . .'
>
> Despite the quote (of an earlier opinion of Stewart, Powell and Stevens JJ) the test is known as the Marks rule. 'In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices to support the judgment.' [6]

The plurality decision v the plurality opinion

A plurality decision is a decision which contains the plurality opinion. The opinion has no greater force inside the decision than that. It may set the precedent and it may not. This is because the precedent in a plurality decision belongs only to the opinion which decides the case on the narrowest grounds.

Thus if three justices decide that no law can ban any book and two justices (together or separately) decide that a law can ban a book if the law is directed to an absence of social value, then the precedential value of the majority is found in the reasons of the two justices and not of the three.

The matter has been made more complex by the approach of the Third Circuit to Marks. In the words of the authors of the 2016 text:[7]

> [In one case, the Third Circuit] continued, 'if three Justices issue the broadest opinion, the two Justices concur on narrower grounds, and one Justice concurs on still-narrower grounds, the two-Justice opinion is binding because that was the narrowest of the opinions necessary to secure a majority.' This statement differs from strict Marks analysis, under which the one-Justice opinion would control as the narrowest. The mathematical element ('necessary to secure a majority') appears to be a Third Circuit gloss. Among the other circuits, only the Ninth Circuit has expressly cited the Third Circuit's reasoning, but neither adheres to it exclusively.

An ununited plurality

The Marks rule is predicated on the existence of at least one opinion which has more than two judges although I don't think it is necessary for it to operate. I mean, if five different views emerge as the majority of five from a bench of nine, why would the narrowest opinion not still prevail.

But what if there is no narrowest opinion? What if there is no commonality across a majority in the result. What happens when none can be discerned?

In 2001, the High Court considered whether a person who had arrived in Australia in 1966 on his father's UK passport and who had never taken out Australian citizenship, was subject to or beyond the reach of, the *Migration Act*.[8]

A majority held that he was beyond the reach and not liable to be returned to the UK, as he qua British subject had become a subject of the Queen of Australia. However, each member of the majority reasoned a different cut-off date for this privileged status. For one, it was 1973 (the year of Mr Whitlam's *Royal Styles and Titles Act*); for two writing separately, it was 1987 (with substantive changes to the *Citizenship Act* upon the triumph of the *Australia Act* reforms); the last did not need to state a position but in a later case identified the date as the passage (or better, passages) of those reforms in 1986. There was a commonality in the result, to be sure. And there was, I think, a qualitative commonality found in the emergence of an Australian monarch. But there was no quantitative commonality, the necessary element by which other courts in the polity could apply a rationale to future cases.

A later chief justice of Australia was left to deal with the result as a trial judge in the Federal Court:[9]

> In my opinion, there is no binding principle in Re Patterson which assists me to a decision in this case. I consider that I should not apply to this case the proposition that British subjects living in Australia were not to be regarded as aliens until after 1987. In my opinion the appropriate position to take is the minimum position adverted to by McHugh J (although not definitively). On that position the division of allegiances between the Queen of the United Kingdom and the Queen of Australia became clear and the status of British subjects who were not Australian citizens also became clear as aliens for the purpose of the Constitution in 1973 upon the enactment of the Royal Style and Titles Act 1973. This approach is the most conservative approach to the decision in Re Patterson which, having regard to its divergent reasoning, should be seen as disturbing pre-existing law to the least extent necessary consistent with the outcome.

Justice French's reasoning has similarity to the Marks rule, as applied to a group of unity opinions forming a majority.

Meanwhile, the High Court reconsidered its position. Three members of the court in *Shaw* observed that *Long* itself 'illustrates the inconvenience and lack of useful result from Patterson.' However, the members did not endorse the 'minimum position' approach of French J. They preferred to state the task in the following manner:[10]

> Any consideration of the significance to be attached to Patterson must involve the determination whether Patterson was effective to take the first step of overruling the earlier decision in Nolan v Minister for Immigration and Ethnic Affairs. In our view, the Court should be taken as having departed from a previous decision, particularly one involving the interpretation of the Constitution, only where that which purportedly has been overthrown has been replaced by some fresh doctrine, the elements of which may readily be discerned by the other courts in the Australian hierarchy. On that approach to the matter, and as Long indicates, the decision in Patterson plainly fails to pass muster.

Three members of the court separately disagreed. This left Heydon J. Justice Heydon agreed in the conclusion reached in the joint reasons. This, as we shall see, makes the joint

reasons an Australian plurality. Whether it makes the joint reasons a plurality in the US sense depends, of course, on how Heydon J proffered the concurrence:

> It was common ground between the applicant and the Solicitor-General of the Commonwealth that while it is now the case that British subjects who are not Australian citizens are aliens, in 1901 British subjects were not aliens. Hence the argument between the parties postulated the axiomatic correctness of the proposition that in 1901 British subjects were not aliens, and concentrated on the question of when and how the change occurred. Understandable though this approach is, there is an unsatisfactory element in it. It is not in fact self-evident that from 1 January 1901 all British subjects were not aliens, and inquiry into a subsequent date on which, or process by which, they became aliens tends to proceed on a false footing so far as it excludes the possibility that on 1 January 1901 some of them were aliens. Much has been said in this Court and elsewhere, and much more could be said, in denial of that possibility, but there are arguments that that possibility is correct, and its correctness should be left open until a case is heard in which the contrary is not simply assumed, but fully debated. The stance of the parties makes it inevitable that the Court must proceed on the assumption on which the case was argued. On that assumption, the orders proposed by Gleeson CJ, Gummow and Hayne JJ should be made for the reasons they give.

The premise for the operation of the Marks rule is the absence of a single rationale explaining the result enjoying the assent of a majority. On one view, Shaw does not qualify. The reasons of three had a rationale explaining the result and it enjoys the concurrence of the fourth member of a bench of seven. On the other hand, the fourth member only embraced the rationale on an assumption or, arguably, declined to embrace the rationale without further argument. In the result:

- Prior to Patterson, Nolan held the field. After 1948 (the passage of the Citizenship Act) a person could be an alien notwithstanding that they were a British citizen.
- From Patterson and by virtue of Long, after 1948 and up to 1973 such a person could not be an alien.
- From Shaw, three members of a seven-bench court returned to 1948, while one member flagged the possibility of a further jump to 1901.

The precedential universe is expanding at a great rate. And if there is a place in the firmament for the ever-minimising position or for the obiter plurality, Australia stands ready.

A plurality of views on fracture

On one view, the position in the US is different to that in Shaw. A decision of a nation's supreme court however fractured is precedent. Another court cannot decide that the decision 'fails to pass muster'. Rather, and to pick up then-Judge Kavanaugh: [11]

> Vertical *stare decisis* is absolute and requires lower courts to follow applicable Supreme Court rulings in every case. The Constitution vests Judicial Power in only one Supreme Court. U.S. CONST. art. III, § 1. We are subordinate to that one Supreme Court, and we must decide cases in line with Supreme Court precedent.
>
> Vertical *stare decisis* applies to Supreme Court precedent in two ways. First, the result in a given Supreme Court case binds all lower courts. Second, the reasoning of a Supreme Court case also binds lower courts.
>
> The Marks rule is an essential aspect of vertical *stare decisis*: 'The binding opinion from a splintered decision is as authoritative for lower courts as a nine-Justice opinion. While the opinion's symbolic and perceived authority, as well as its duration, may be less, that makes no difference for a lower court. This is true even if only one Justice issues the binding opinion.' …
>
> In interpreting most splintered Supreme Court decisions, the Marks rule is not especially complicated. But on rare occasions, splintered decisions have no 'narrowest' opinion that would identify how a majority of the Supreme Court would resolve all future cases. Marks itself did not have reason to specifically address that situation. But in that situation, the necessary logical corollary to Marks is that lower courts should still strive to decide the case before them in a way consistent with how the Supreme Court's opinions in the relevant precedent would resolve the current case… The easy way to do that is for the lower court to run the facts and circumstances of the current case through the tests articulated in the Justices' various opinions in the binding case and adopt the result that a majority of the Supreme Court would have reached…
>
> Indeed, if a lower court ever has doubt about the predictive utility of a single opinion from a splintered Supreme Court decision, this opinion-by-opinion methodology is a foolproof way to reach the correct result in the lower court's subsequent decisions. Again, that is really just common sense in a system of absolute vertical *stare decisis*.

Compare the robust retort by Kavanaugh J's colleague in the same matter, a view which is closer to the plurality in Shaw:

> … some Supreme Court decisions yield no binding precedent, but that reality does not trigger vertical *stare decisis* concerns of the sort that trouble Judge Kavanaugh. Such instances are similar to a 4-4 split that affirms the lower court's opinion but does not supply a national rule governing future litigation…
>
> Moreover, where the Court resolves a case with a splintered decision and a binding precedent cannot be found under Marks/King, the disarray among Supreme Court opinions is in important ways akin to the situation where one or more (indeed, perhaps all but one) courts of appeals have resolved an issue one way. In that case it is the duty of a court of appeals facing the issue de novo to resolve it de novo, with of course due recognition of the insights and arguments reflected in the opinions of other courts. That independent approach allows the issue to 'percolate' and facilitates ultimate Supreme Court resolution on the basis of a broad pallet of lower court reasoning...
>
> Judge Kavanaugh's quest for binding Supreme Court precedent leads him to propose that when lower courts are confronted with such complete disarray that no single view meets even his standards…, they should 'strive to decide the case before them in a way consistent with how the Supreme Court's opinions in the relevant precedent would resolve

> the current case.' Well, of course, that is what we always try to do. But the question is whether, looking at a set of opinions that reveal no common core, we should pretend that they have offered a unified body of coherent reasoning and treat that synthetic body of reasoning as binding precedent. Pursuing that approach, lower courts would look more like lower officials seeking to discern the intent of their superiors than like judges engaged in discerning and applying rules of law. Courts are still, or should be, institutions of reason, not will.

Plurality in dissent

Before leaving the substance of the Marks rule, what happens where proposition X is the subject of majority agreement between, say, dissenters and members of a plurality decision other than the authors of a plurality opinion.

For example, the plurality opinion comprising four justices says 'We hold proposition Y to be the law, and on the facts we allow the appeal'; the concurring opinion comprising one says 'I hold proposition X to be the law, and on the facts I allow the appeal'; while the justices in dissent hold proposition X to be the law and dismiss the appeal on the facts.

In the US this remains a hot area of debate and the construct has its own name, the dual-majority. Don't worry. You can tread where I have not and pick up your copy of Michael L Eber's 'When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent'.[12]

Legal language and etymology

Comparing words used in different jurisdictions is a dangerous task. A word's meaning is informed by its environment. Anyway, the people in the environment use the word differently. Moreover, there is the ignorance of the user. I can count on more than two hands (?) the number of barristers who have spoken over the years about the weaknesses of the inquisitorial system. I don't think I know any who have practised in it.

Etymology can be a useful starting place. That's what an etymon is, I guess. It's not perfect, but I'm going to use it when I start talking about 'plurality'.

Two examples first. When I interpret a piece of a document, I look to the text of the piece, and the context of the document, and the object of the document. I might, if required, look at other matters such as the surrounding circumstances known to the authors of the document at the time it was written. The relevance of surround circumstances is controversial. And the controversy is not lessened when the participants refer to the 'context' of surrounding circumstances. Maybe that's Little Context, as we've already met Big Context. And we've all used 'bigger context', haven't we? Etymology is helpful. Text has its root in *textus*, the woven thing, and so context, woven together. Context, for me, ends at the edge of the document. Etymology cannot define, it can merely inform, but I think it has a role to play.

'Join' springs from *iungere*, to join or to yoke. Appellate judges have different ideas on which verb does the better job.

In Australia, the joint judgment – that is, the jointly authored judgment where authorship is public – is a regular species and a species with its own controversy. At least two chief justices in recent memory have encouraged joint judgments. On the other hand, Chief Justices Barwick and Gleeson frequently delivered a concurrence. As is well known, Justice Heydon often preferred to concur than to join. *Shaw* above provides an example.

The US Supreme Court has used 'joint judgment' when discussing a judgment against more than one debtor jointly. But the usual practice in the field of judicial authorship is that one justice will write something and put their name to it, and others will either join or concur. An example:

> STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, O'CONNOR, and KENNEDY, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, post, p. 377. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined.

You will see the first-joined opinion got the numbers, i.e., got to five, so there was an opinion of the Court in a precedential sense.

When the usual practice doesn't yield a majority, the practice, at least in one of the cases discussed later in the essay, is that the author of the plurality opinion will state the order of the court. There is no opinion of the court. As we have seen, in *Memoirs v Missouri*, Brennan J was joined by the chief justice and Fortas J; Black J, Stewart J and Douglas J concurred separately; and three justices dissented. When the result was formally delivered:

> MR. JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE and MR. JUSTICE FORTAS join.

There may be other cases where the result is only announced after each judgment, or the holding of each judgment. My straw poll suggests a plurality of Australian appellate courts announce the result at the end. This is invariably the situation with special leave applications, although the practice there is no precedent in any sense of the word.

However, the commonplace in Australia – the jointly authored judgment – is 'a rare but fascinating variant' in the US.[13] It is fascinating how themes – the strengths and weaknesses of the co-authored judgment – emerge in different jurisdictions wearing only slightly different clothes.

Etymology of plurality

The *OED* has an apt opening for the word: 'Plurality – Origin: Of multiple origins.' The classical Latin *pluralis* is not the immediate etymon, rather it's the post-classical *pluralitis*. And even inside the post-classical period – roughly AD 200 to AD 600 – the shift is from 'more than one' to 'a multitude'.

Stop reading if you hanker for simpler days, the 'one, two, many' counting systems of foraging peoples.[14] Reflect, though, if you enjoy the objective theory of contract formation. The parties agree on delivery of a plurality of umbrellas and two arrive. Where does the court put its reasonable businessperson? Were they expecting a rainfall of umbrellas or a drizzle? If your judge had a big intellectual property practice, it is likely that the reasonableness will fall on 'two or more' and not 'many'. The reason for this is discussed below.

Proceeding in proceedings

Speaking of contract formation, the hot topic in Australia at the moment is the relevance of 'surrounding circumstances'. You can have one circumstance I think but we usually prefer our surroundings to come in a plurality.

But plurality is not to be confused with 'plurale tantum'. This describes those nouns which only have, or usually only get, a plural. We have entrails but not an entrail. We have genitals but not a genital. A curious cross-cultural example is 'faeces'. It is the genitive plural of 'faex', yet our own word for the singular is 'dregs'.

Speaking of dregs, a notice of appeal has its grounds. There is the ground and the hopeless grounds, a filtering process which

usually ends in the opening words of the presiding judge. This process was illumined by Sir Garfield Barwick's identification of a constitutional nexus between plurality and the *plurale tantum:*[15]

> *I mention but to dismiss it a submission based on the plurality of the expression 'external affairs' which would deny that an external affair, because of its singularity, could fall within the power. There is, in my opinion, no substance whatever in the submission.*

A plurality of meanings

Common uses of plurality include 'more than one'; 'lots'; 'more than half'; and 'the largest in the lot'. The first and second uses represent the classical and post-classical dichotomy, better understood as strict -v- colloquial. In Re Tripodi and Director-General of Social Security, the member noted:[16]

> Mr Wood (for the applicant) said that on a head count he had 12 for and 6 against, but readily conceded that it was not a matter of plurality of favourable witnesses that would determine the matter.

If the expression was 'a plurality of', we could understand it to mean 'a multiplicity of' and not 'two or more', multiplicity carrying itself 'the more the merrier'. Without the indefinite article ('an indefinite article' being too tautological for most legal tastes), the word is probably a synonym for 'numbers' but not 'number'. Welcome home, prodigal *plurale tantum*.

Better by half, or almost

Plurality as more than half of the whole is Scottish in origin. It has had strong support. It pops up in *Leviathan*. Jowitt's Plato applied it to Socrates in the *Dialogues*, and he must have been right. As the Oxford wags sang:

> Here come I, my name is Jowett.
> All there is to know I know it.
> I am Master of this College,
> What I don't know isn't knowledge!

Plurality in the field of voting is more nuanced. In the second paragraph of this essay, I described the plurality opinion as a peculiarly post facto form of US precedent. The link between plurality and the post facto state – in the States and elsewhere – may not be that peculiar, merely odd. Consider the term 'plurality voting'. Its most usual meaning is 'first-past-the-post'. In a horse race, first-past-the-post has a clear meaning. But in voting? What can be more post facto than a post which is only seen when all are past?

At any rate and by 1803, a plurality of votes was the greatest number regardless of whether it was a simple or absolute majority.[17] This necessarily scotches the Scotch meaning discussed immediately above.

However, the Americans did not stick at this. By 1828, Mr Webster was defining it, or more correctly, providing as one use of it:

> In elections, a plurality of votes is when one candidate has more votes than any other, but less than half of the whole number of votes given.

The link between US elections observed by Mr Webster and plurality opinions issued by the US Supreme Court is strong. The thesis developed later in this essay is that while Australian and US courts both refer to 'plurality opinions', the references travel alongside the voting difference. Australian use is akin to the 1803 usage and the US use is akin to the 1828 usage.

Before moving to the High Court's use of the word, I note that as far as I can tell, plurality was introduced into Australian usage in 1837, first in statute and then, about seven weeks later, in the NSW Full Court.

On 9 September 1837, Governor Bourke on the advice of the Legislative Council but not on the advice of a non-existent Assembly brought about 'An Act to regulate the temporal affairs of Presbyterian Churches and Chapels connected with the Church of Scotland in the Colony of New South Wales'. As to the mode of election of trustees, persons contributing money for the erection of church buildings were permitted 'to elect by plurality of votes from among themselves any number of trustees…' Doubtless the discussion was vigorous. Sir Richard Bourke was a Whiggish fellow who worked to disestablish the Anglicans and put other churches on the same footing. That he was Irish doubtless annoyed everyone.

Meanwhile, consider Joseph Catterall, born Lancashire 1812, arrived Sydney 1832, married one Georgina Anne Sweetman in 1835. He pressed allegations which ended up in the NSW Supreme Court before Dowling ACJ, Burton and Kinchela JJ. The *Sydney Herald* of 2 November 1837 refers to Mr Catterall's relentless allegations, including those that his wife had committed 'a disgusting act of adultery with an officer of the 28th Regiment (among a plurality of adulteries)'. Catterall had a further run in with the Supreme Court in 1838 before returning to England in the early 1840s and being admitted to the bar.

Toltoys Brix master builder blocks August 1968

Rebecca's Collections on Flickr

A patent plurality

On 26 November 1912, Isaacs J decided that a specification for improved kiln – whose improvements included a plurality of top vents – was worthy of the patent the commissioner had decided to reject. On 7 April 1913, a majority rejected his view and reinstated the commissioner's original rejection.[18]

It is apt that the first use of plurality was in a patent matter. While our justices have used the word in other area, patent appeals take the prize by a long way.[19] For example, in *Weiss v Lufft*,[20] Starke J referred to the appellant's assertions that the invention was particularly useful in printing a plurality of component parts and later that the press comprised a plurality of printing stages. More recently the court has recognised the word's environmental friendliness, taking time in a patent matter to hear argument over a way to provide householders with a plurality of waste bins so that each householder could sort waste into various categories.[21]

Has 'plurality' been a vogue word for patent attorneys? The answer is, better vogue than vague. Whatever shades of meaning the word has taken on through the centuries, it has always retained one, 'two or more', and if you are drafting a document which everyone hopes will found a billion-dollar empire, you are being consistent. If you search the Austlii case law database up to 31 December 1999, only a handful of tribunals (one the High Court) get in to double figures; the Australian Patent Office is the crushing winner at 152.

One US mathematician turned patent lawyer recently posted the following inspirational:[22]

The church in question - St James, Kingston, Isle of Wight

> Story time. I was once involved in a huge litigation — like greater than $1B of damages at stake — involving a patent that had the word 'plurality.' Through some slightly shady twists of fate, the attorney who drafted the patent ended up being a co-owner. This guy was a stereotypically sleazy attorney. 'Better Call Saul, Patent Attorney Edition.'
>
> Early in the case, we were trying to figure out who to sue. We already had something like 90–95% of the industry, but he wanted the remaining 5–10%. He once proposed, with a straight face, that we could get that last little bit by arguing that 'plurality' meant zero or more.
>
> Fortunately, that suggestion was… not accepted.

The most important High Court case for barristers of my vintage was *Interlego AG v Toltoys Pty Ltd*.[23] Alex Tolmer built an empire on the hula hoop, selling the first plastic version from his Melbourne store in the 50s. The litigation was Lego's attempt to kybosh Toltoys' Brix. It was a close call, with Stephen J at first instance and Menzies J on appeal voting for Brix, leaving it to Barwick CJ and Mason J to apply the Danish slice.

Toltoys is no more. The ASIC website shows that the Pty Ltd name was deregistered in 1976. That doesn't mean much one way or the other without more, but one is left to wonder whether the case was the beginning of the end for an Aussie icon.

Kendle v Melsom

Kendle v Melsom was the last High Court decision but one before 'plurality' arose in its current form.[24] Looking back, we can almost sense that the court knew that they were about to leave to one side, one meaning of 'plurality', and that it believed the only appropriate send-off was one swathed in multiplicity.

The chief justice and McHugh J set a fierce pace. In 15 paragraphs, they use the word 16 times, a record that is unlikely ever to be broken. In one paragraph they use it six times. Justices Gummow and Kirby managed eight. Justice Hayne didn't use it but managed the best footnote award, inserting a typically certainty from Jessel MR, 'Of course manager may mean managers in the plural.'

A plurality of judges

As early as 1945, Dixon J used 'plurality' to describe High Court justices:[25]

> In the result, I think that we can but assess the amounts to be awarded by combining the foregoing considerations and applying the figures, as a jury might, to guide us in forming as sound and just an estimate as we can of what the plaintiff should be paid. We cannot do it by calculation, and precision in the application of such relevant figures as the materials do supply is made neither easier nor safer by the fact that in this Court a plurality of minds must determine the final sum.

As far as I have seen, though, the first use of the word to describe a plurality opinion of judges is *Lipohar v The Queen*. Three members observed:[26]

> The federal system operates with what is now the common law of Australia. One consequence is that there do not arise in Australia, as once might have been thought, difficulties with the notion of a distinct 'federal common law' which still are encountered in the United States after the overruling of Swift v Tyson by Erie Railroad Company v Tompkins. In Erie, Brandeis J, delivering the plurality opinion of the court, said that there was 'no federal general common law'.

It is true that the opinion delivered by Brandeis J was joined in by other judges, but it was not a plurality opinion within current American usage. It was a majority opinion.[27]

But this means little. We are in Australia, and the question is what the expression means to us and how we have used it, since *Lipohar*. As discussed above, I think there is a similarity of difference in the 1803 and 1828 descriptions of the plurality vote, and I think the use by Australian courts of 'plurality judgment' since *Lipohar* bears this out.

So in *Corporation of the City of Enfield v Development Assessment Commission*, the High Court observed:[28]

> Differing views on this subject were expressed by Scalia J, concurring with the plurality opinion of Stevens J, and by Brennan J, dissenting, in Mississippi Power & Light Co v Mississippi.

Mr Justice Stevens attracted joiners. Again, the opinion he delivered was not a plurality opinion within the meaning of the Marks rule. The maths was 5 + 1 v 3:[29]

> STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, O'CONNOR, and KENNEDY, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, post, p. 377. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined

Shades of Milton

During ASIC's stoush with Mr Rich after the OneTel collapse, the commission sought discovery of certain documents and Mr Rich opposed it on the basis that contending that the proceedings exposed him to penalties and that, for that reason, he should not be ordered to make discovery.[30] The court observed:

> That is why the privileges against exposure to penalties or forfeiture have been allowed in cases as diverse as those already mentioned and to cases of forfeiture of estate, as for simony, for infringing the Pluralities Act (1 & 2 Vict c 10) , for breaches of covenants in leases, by marriage without consent, or by having acted as agent for the Confederate States of America. Moreover, the privilege against exposure to penalties has been held applicable to preclude an order for discovery by the debtor in a petition for bankruptcy on the basis that the loss of

> civil status consequent on bankruptcy is penal.

The decision of *Boteler v Allington* is referred to in the footnotes.[31] The law was that if a clergyman holding one living took another, the first was avoided. The plaintiff sought discovery to find out whether the defendant with a first living valued at £170 per annum, had taken on another two to a total value of £42 per annum. If this was so, the first living fell and, so the plaintiff asserted, it fell to him as gift to present to another. Lord Hardwicke LC allowed the demurrer, rejecting an ambitious argument that avoidance of the living was not a penalty.[32]

In a later decision, the testator left his money for a benefice on the Isle of Wight, provided that the benefice was never held in plurality by a neighbouring clergyman. By this time and however grasping the prelates, the church itself was grasping for numbers. When the benefice amalgamated with its neighbours, Mr Justice Eve refused to invalidate the gift. 'The rector is rector of the united single parish, not the holder in plurality of the three benefices out of which it has been formed…'[33] There is an essay in why trinitarianism has no place in a pluralist society but I'm not brave enough to write it.

If God has a prelate, so too Mammon and plurality has as/des/cended to the company director. In the decade of Salomon's case, the *Law Times* reported that 'There is a growing feeling that plurality in the matter of directorships is dangerous and to be deprecated.' A century on, the feeling may have grown but the professional director is as strong as ever. One company doctor was described in the UK press as '[t]he self-styled 'pluralist' and '[o]ne of the first advocates for plurality of directorships…'

A plurality in this sense hails at least from the 15th century. Nonconformist scholar John Studley gave us the hierarchy of 'dualities, pluralityes, and totquots'. The last word abbreviates the also alliterative 'totiens quotiens', or 'all you can grab'. The idea may not take off at the bar. A good commercial silk can get a plurality of retainers but if it's a totquot they may find themselves conflicted from ever appearing.

Back to judgment(s)

In *Australian Broadcasting Commission v O'Neill,*[34] Heydon J referred to 'the plurality judgment' in *Bonnard v Perryman*.[35] There, the chief justice read a judgment 'in which [the Master of the Rolls and three lords justices] concurred'. With only Kay LJ in dissent, the judgment was not a plurality in the US sense, but more than one judge participated. One Australian commentator has written:[36]

> … in Australian Broadcasting Corporation v O'Neill [the word] is used, perhaps inaccurately, to refer to the judgment of Lord Coleridge CJ in Bonnard v Perryman, a judgment that Lord Esher MR, and Lindley, Bowen and Lopes LJJ did not join, but with which they concurred.

The point is noted. But Lord Coleridge used the first person plural in the course of the judgment, so Heydon J gets my tick. Tellingly, the commentator takes no issue that the use is not the American use. For my part, Heydon J's use of the word to describe a decision which is neither American nor 20th century is a further illustration that the use by Australian courts from *Lipohar* is both fresh and well-founded in history.

The singularity of 2008

The year 2008 provided a plurality of Rubicons. In *HML v The Queen; SB v The Queen; OAE v The Queen*,[37] Gleeson CJ refers five times to 'the plurality judgment' of Mason CJ, Deane and Dawson JJ in *Pfennig v R*, Hayne J four and Crennan J twice. Thus three members of a court of seven approve 'plurality' in this sense.

Pfennig was a court where five members sat on an appeal against conviction. All members dismissed the appeal. In their reasons, Mason CJ, Deane and Dawson JJ expressed one approach to the admissibility of similar fact evidence, Toohey J substantially agreed, and McHugh J set out a different approach.

One distinguished commentator has taken the view that the three judges were the majority.[38] The three judges and Toohey J together favoured one statement of a principle of law and McHugh J favoured another. The three judges make a majority but possibly not the majority.

Anyway, the reasons of Mason CJ, Deane and Dawson JJ comprised a plurality judgment, in the sense used two years before by Heydon J. Yet and again, *Pfennig* was not a plurality opinion in the US sense. It will be recalled that this is 'an appellate opinion not having enough judges' votes to constitute a majority but receiving the greatest number of votes in support of the decision.' The reasons did comprise a majority. Not, as I have suggested, 'the majority', as the reasons of the majority comprised two opinions over four judges. But a majority, nonetheless.

Later in 2008, four of the seven members of the court[39] referred to 'the plurality judgment' in the 1992 decision of *Jiminez v The Queen*. In *Jiminez*, six members gave one set of reasons and one, again McHugh J, another. Again, McHugh J agreed in the result. For current purposes, this decision is the first time a majority of the High Court embraces the idea of the plurality judgment in the Australian sense. Only the previous year, 2007, two justices had described the same judgment as 'the majority judgment'[40]. I note the two justices were in dissent.

Midway through plurality

In 2009, the chief justice provided a tweak to the new orthodoxy. Six judges sat in *Stuart v Kirkland-Veenstra*.[41] All agreed in the result. Justices Gummow, Hayne and Heydon gave one set of reasons, Justices Crennan and Kiefel gave another, and the chief justice the third. In US appellate usage, there could be no plurality in three members of a six-bench. The chief justice said, consistently with Australian usage to date, 'I agree with the orders proposed in the plurality judgment of' the three judges.

The High Court today

In *Commissioner of Taxation v Jayasinghe*,[42] five justices sat. Four wrote one opinion and the other agreed 'with the orders proposed by the plurality'. The High Court's own 'Case Summary' refers to the appeal being allowed 'unanimously' and refers to the four judges the plurality. The word is part of the court's own language.

Other courts

Language is its own precedent, and this essay cannot end without a brief reference to the use by lower Australian courts of 'plurality'. In 2006, Tobias JA was the first member of the NSW Court of Appeal to so describe reasons written by more than one but not all High Court members.[43] The other two members of that court agreed with his Honour, so unlike the High Court, the first use in the Court of Appeal met with unanimous approval.

And in *Borzi Smythe Pty Limited v Campbell Holdings (NSW) Pty Ltd*,[44] the presiding judge referred to the plurality judgment of Gleeson CJ, Hayne and Heydon JJ in *Butcher v Lachlan Elder Realty Pty Ltd.* Five members

of the High Court had sat and McHugh and Kirby J had dissented, so – like many of the examples used here – the plurality judgment was also the judgment of the majority.

The word appears in the relevant database 417 times. It has not always been used in the sense we are discussing, but the use by Tobias JA was only the 10th time in date order. I infer that the Court of Appeal has picked up and run with a use introduced by the High Court in 1998.

What of the Court of Criminal Appeal? The first mention is in *R v Janceski*,[45] where Spigelman CJ referred to 'the observations of Harlan J for the plurality of the Supreme Court in Glidden Co v Zdanok…' In *Glidden*, Harlan J was joined by Brennan and Stewart JJ, Frankfurter J took no part in the decision, White took no part in the consideration or decision, Clark J joined by the chief justice concurred in the result, and Douglas and Black JJ dissented. The judgment delivered by Harlan J has been regarded by US commentators as a plurality opinion. The decision of the majority is fractured, in the sense that neither reasons can be regarded as a subset of the other in the sense of the Marks rule. In *DTS v R*,[46] *Beazley* JA referred to a plurality judgment of five members of the High Court in a 1990 decision. Justices Kirby and Hall agreed with her Honour. So, like the Court of Appeal and unlike the High Court, this first use in the Australian sense in the Court of Criminal Appeal was unanimous.

A fresh use of an old word

Readers will recall that by 1803, a plurality of votes was the greatest number regardless of whether it was a simple or absolute majority, but that by 1828, the US had redefined this so that the person receiving a plurality had more than any other but less than half of the whole. Two decades after *Lipohar*, what can we say?

- In Australia and in the US, a plurality opinion has more than one author. That is, each jurisdiction picks up the patent meaning.
- In Australia, a plurality opinion can be a majority opinion but has not been used to describe a unanimous opinion. In the US, a plurality opinion cannot be either.
- In Australia, a plurality opinion can and frequently does co-exist with a unanimous decision. In the US, they cannot. A synonym for the US word is 'no-clear-majority decisions',[47] although this may conflate the plurality opinion and the decision of which it forms part.
- In Australia, a plurality opinion can be authored by one-half of the bench. In the US, a plurality opinion cannot be authored by one-half of the bench.
- In Australia and in the US, a plurality opinion cannot dissent in the decision, ie the outcome of the appeal.

Maybe 'plurality opinion' and the like did start life as a US import. That does not mean they stayed that way. At a wider level, the import of a word is rarely, if ever, the full import of its meaning.

In *R v Keenan*,[48] the presiding judge referred to 'the reasoning of the majority in *Barlow*' which included 'the joint plurality reasons of Brennan CJ, Dawson and Toohey JJ'. This may be a bridge too far but illustrates that the US idea has not made much impact.

We must remember that the plurality is part of the bigger picture. One US state Supreme Court declined to follow its federal counterpart because they were 'reluctant to declare unconstitutional… statutes based upon a decision by less than a clear majority.' To which Blackmun J of the latter court observed the decision was 'a four-justice majority of a seven-justice shorthanded court'. But he dissented in his own case,[49] so we may never know.

END NOTES

1 The last word is the nom de plume of five clergymen. It comprises their initials. The group was opposed to the Anglican hierarchy. They had a champion in Milton, whose belief in the need for an intercessor between man and scripture was poetically absent. That phase of Anglican history – bear in mind, more than 200 years before Trollope – was intermeshed with the political crises of civil war and the protectorate, although like all church politics it had a healthy life of its own.
2 Thomson Reuters, p 195.
3 I found no reference in the index to a standard text of the time, *MacAdam & Pyke's Judicial Reasoning and the Doctrine of Precedent in Australia*, 1998, Butterworths.
4 383 US 413 (1966).
5 430 US 188 (1977).
6 *The Law of Judicial Precedent*, p 201.
7 Page 202.
8 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.
9 *Long v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1422, [40].
10 *Shaw v MIMA* [2003] HCA 72; 218 CLR 28; 203 ALR 143; 78 ALJR 203, [36].
11 *US v Duvall* 740 F3d 604 (2013).
12 (2008) 58 Emory LJ 207.
13 Laura Krugman Ray, 'Circumstance and Strategy: Jointly Authored Supreme Court Opinions' (2012) 12 *Nevada Law Journal* 727, 727.
14 See Steven Pinker's remarks in https://www.edge.org/conversation/daniel_l_everett-recursion-and-human-thought .
15 Barwick CJ in *New South Wales v Commonwealth* [1975] HCA 58; (1975) 135 CLR 337, 360-361.
16 [1984] AATA 309, [6].
17 *Black's Law Dictionary*.
18 *Lee v Commissioner of Patents* [1912] HCA 84; (1912) 15 CLR 161.
19 See e.g. *Martin v Scribal Pty Ltd* [1954] HCA 48; (1954) 92 CLR 17; *Sunbeam Corporation v Morphy-Richards (Aust) Pty Ltd* [1961] HCA 39; (1994) 180 CLR 98; *Welch Perrin & Co Pty Ltd v Worrel* [1961] HCA 91; (1961) 106 CLR 588; *Lucas Industries Ltd v Commissioner of Patents* [1977] HCA 27; (1977) 138 CLR 152. The reasons of Fullagar J in *Societe Des Usines Chimiques Rhone-Poulenc v Commissioner of Patents* [1958] HCA 27; (1958) 100 CLR 5 does not count. The use is a plurality of inventions, a use of the commissioner picked up by the judge. So too *Re British Nylon Spinners Ltd* [1963] HCA 28; (1963) 109 CLR 336.
20 [1941] HCA 19; (1941) 65 CLR 528.
21 *Firebelt Pty Ltd v Brambles Australia Ltd* [2002] HCA 21; (2002) 188 ALR 280; (2002) 76 ALJR 816, [20].
22 www.quora.com/When-a-claim-in-a-patent-application-uses-the-term-plurality-can-this-be-one-or-is-it-always-a-count-of-two-or-more.
23 ('Lego case') [1973] HCA 1; (1974) 130 CLR 461.
24 1998] HCA 13; 193 CLR 46; 151 ALR 740; 72 ALJR 560.
25 *Commonwealth v Huon Transport Pty Ltd* [1945] HCA 5; (1945) 70 CLR 293.
26 [1999] HCA 65; 200 CLR 485; 168 ALR 8; 74 ALJR 282.
27 Mr Justice Brandeis was joined by Hughes CJ and Black, Stone & Roberts JJ. Mr Justice Reed concurred in part. Mr Justice Butler dissented and McReynolds J concurred with him. Mr Justice Cardozo 'took no part in the consideration or decision of' the case. Justice Brandeis was described as speaking for the majority of the court by C Sherman Dye in 'Development of the Doctrine of *Erie Railroad v Tompkins*' (1940) 5(2) Missouri LR, 193, 194.
28 [2000] HCA 5; 199 CLR 135; 169 ALR 400; 74 ALJR 490, [41].
29 http://www.worldlii.org/us/cases/federal/USSC/1988/139.html.
30 *Rich v ASIC* [2004] HCA 42; 220 CLR 129; 209 ALR 271; 78 ALJR 1354, [26].
31 *Boteler v Allington* (1746) 26 ER 1061.
32 At 1063.
33 *Re Macnamara, Hewitt v Jeans* (1911) 104 LT 771, 773.
34 *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46; 80 ALJR 1672; 229 ALR 457, [254].
35 [1891] 2 Ch 269.
36 lawgeekdownunder.blogspot.com/2011/06/curious-case-of-plurality-in-high-court.html. .
37 2008] HCA 16.
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41 [2009] HCA 15.
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Damages in negligence for loss of expected superannuation benefits

Alexander Langshaw reports on *Amaca Pty Ltd v Latz [2018]* HCA 22

Introduction

The High Court has held, by majority, that the loss of expected superannuation benefits by reason of a reduced life expectancy is compensable by damages in negligence. The loss of benefits under the aged pension during the lost years is not.

Background

In 1976 or 1977, Mr Latz inhaled asbestos dust and fibre during the construction of his home and while cutting and installing asbestos fence sheets manufactured by James Hardie and Coy Pty Ltd, the successor to which is Amaca Pty Ltd (Amaca). In 2016,

after his retirement, Mr Latz was diagnosed with malignant mesothelioma. At that time, Mr Latz was receiving ongoing payment of two statutory benefits, namely a superannuation pension payable under the *Superannuation Act 1988* (SA) (super pension) and the aged pension payable under the *Social Security Act 1991* (Cth) (aged pension).

Procedural history

Mr Latz commenced personal injury proceedings in the District Court of South Australia alleging that his illness was the result of Amaca's negligence. The District Court found Amaca was liable to Mr Latz in negligence and that his life expectancy had been reduced by 17 years by reason of his disease (the 'lost years'): *Latz v Amaca Pty Ltd* [2017] SADC 56 at [21], [95]. Mr Latz, relevantly, sought damages for his expected loss of benefits under the super pension and aged pension for the lost years. Amaca submitted that damages were not payable in respect of the loss of such benefits and that any damages awarded needed to be reduced to account for, relevantly, the fact Mr Latz's spouse would be entitled to benefits under a reversionary pension after Mr Latz's death equivalent to two thirds of his super pension benefits: [2017] SADC 56 at [95]-[97].

The District Court awarded Mr Latz $500,000 in damages for his loss of his expected benefits under the super pension and aged pension for the lost years. The District Court held that Mr Latz would have received each of those pension payments for the rest of his life and that period would have included the lost years but for Amaca's negligence[2017] SADC 56 at [99], [117]. The court also declined to apply any discount to the amount of damages to account for the reversionary pension that would continue to be payable to Mr Latz's spouse after his death, given that pension was payable to a third party and was otherwise considered analogous to a life insurance benefit (which does not operate to reduce any damages award): [2017] SADC 56 at [112]-[115].

Amaca appealed to the Full Court of the Supreme Court of South Australia challenging the quantum of damages, repeating the arguments it had run below: *Amaca Pty Ltd v Latz* [2017] SASCFC 145 at [6].

The majority of the Full Court (Blue and Hinton JJ) saw no reason to distinguish between income from wages and income from pension benefits. Accordingly, the majority upheld the District Court's decision that Mr Latz's loss of both the super pension and aged pension was compensable damages in negligence: [2017] SASCFC 145 at [97]-[105], [125], [249]-[253]. However, the majority held that the value of the entitlement of Mr Latz's spouse to a reversionary pension ought to have been deducted from the quantum of this head of damages. The majority considered the District Court's analogy with insurance benefits to be inapt because that reversionary pension was, in effect, the continued payment to Mr Latz's spouse of the very same super benefits whose loss formed the basis of Mr Latz's damages claim: [2017] SASCFC 145 at [114], [116], [126], [261]-[262].

High Court's decision

Amaca was granted special leave to appeal to the High Court on the question of whether Mr Latz's loss of the super pension and aged pension during the lost years was a compensable head of damage in negligence. Mr Latz was granted special leave to cross-appeal on the question of whether any such damages were to be reduced by reference to his spouse's receipt of the reversionary pension after his death.

The High Court unanimously held that the aged pension was not remuneration or a capital asset which could be assessed as having any future value and was not linked to the exercise of any earning capacity. Mr Latz's loss of benefits under the aged pension during the lost years was not, therefore, compensable by damages in negligence: [2018] HCA 22, [74], [115].

The High Court, by majority (Bell, Gageler, Nettle, Gordon and Edelman JJ), held that Mr Latz's loss of benefits under the super pension for the lost years was, by contrast, compensable by damages in negligence: [2018] HCA 22 at [114]. The majority considered the benefits payable under the super pension were a subset of Mr Latz's loss of earning capacity because his entitlement to those benefits was, in effect, a capital asset with a present value and that was inextricably linked to Mr Latz's earning capacity. Mr Latz had therefore, by reason of his diminished life expectancy arising from Amaca's negligence, suffered an actual loss in the present value of that capital asset that was compensable by damages: [2018] HCA 22 at [94]-[97], [101]-[102], [109].

Importantly, the majority noted that persons still of working age were entitled to damages for loss of superannuation and their Honours considered it would have been unjust if Mr Latz had been denied the same result solely because his disease became manifest only after his retirement: [2018] HCA 22 at [105], [113].

The majority also held that damages for Mr Latz's loss of benefits under the super pension were to be reduced to account for the offsetting or collateral benefit comprised by his spouse's receipt of the reversionary pension. That was because the value of the relevant capital asset – Mr Latz's entitlement to receive super pension benefits – was directly affected by his spouse's entitlement to receive benefits under the reversionary pension: [2018] HCA 22 at [112].

Kiefel CJ and Keane J, in dissent, indicated that Mr Latz's loss of super pension benefits for the lost years was not a loss compensable by damages in negligence. Their Honours indicated that damages for loss of earning capacity required a direct connection between the injury and its effect upon the earning capacity of the victim. Their Honours considered that no such direct connection present with respect to Mr Latz's loss of benefits under the super pension: [2018] HCA 22 at [50].

The minority considered that extending this head of damage to encompass the loss of super pension benefits would open the way to the awarding of damages for the non-receipt of other passive income streams, a result their Honours indicated to be at odds with longstanding common law principle and to place a higher value on the enjoyment of life by the rich than the poor: [2018] HCA 22 at [51]-[52].

Given the conclusion reached by Kiefel CJ and Keane J regarding this head of damages, their Honours did not consider whether damages for the loss of benefits payable under the super pension were to be reduced by reason of the continued payment of benefits under the reversionary pension: [2018] HCA 22, [40].

The Queen v Bauer: an attempt to clarify the law surrounding the admission of tendency evidence

Nicholas Bentley reports on *The Queen v Dennis Bauer (a pseudonym)* [2018] HCA 40.

In the unanimous decision of *The Queen v Bauer* [2018] HCA 40, the High Court allowed a Crown appeal and overturned a decision of the Victorian Court of Appeal that quashed 18 counts of sexual offences. Significantly, the court sought to clarify some of the confusion surrounding the admission of tendency evidence in single complainant sexual offence cases.

Tendency evidence prior to Bauer

For over two decades, Australian courts have grappled with determining if evidence of uncharged offending is admissible as tendency evidence to prove the offences charged.

In *HML v The Queen* (2008) 235 CLR 334, six members of the High Court recognised that in a single complainant sexual offence case, a complainant's evidence of uncharged acts will often be of high probative value. The rule satisfied in *HML* was not whether the tendency evidence had significant probative value, but the more burdensome common law threshold that the tendency evidence of uncharged acts only supports a guilty inference and permits no other innocent explanation (see Hoch v The Queen (1988) 165 CLR 292 at 294-295 per Mason CJ, Wilson and Gaudron JJ, 302-303 per Brennan and Dawson JJ; which was confirmed in *Pfennig v The Queen* (1995) 182 CLR 461 at 481-482 per Mason CJ, Deane and Dawson JJ).

Nevertheless, in *IMM v The Queen* (2016) 257 CLR 300, the plurality of the High Court subsequently held that a complainant's evidence of a sole uncharged act that occurred some months after the last charged offence did not have significant probative value. Because the principal issue was the complainant's credibility, the plurality held that her evidence of the uncharged act was rationally incapable of adding significantly to the probability that the complainant was telling the truth about the charged acts. Instead, the Court held that the requisite degree of probative value would be more likely to be met with evidence from an independent source or where the complainant's evidence has some 'special feature' (at [62] – [63]).

Subsequently, in *Hughes v The Queen* (2017) 92 ALJR 52, a majority of the High Court held that a tendency to act in a particular way may be identified with sufficient particularity to have significant probative value, notwithstanding the absence of similarity in the acts which evidence it (at [37]). This was in the context of whether evidence of sexual offences and uncharged acts were admissible as tendency evidence in proof of sexual offences alleged to have been committed against other complainants. Although the acts alleged in *Hughes* were not similar, the evidence showed (1) the accused's tendency to engage opportunistically in sexual activity with underage girls despite a high risk of detection, and (2) that this tendency made more likely the elements of the offences charged (at [62] – [64]).

The facts and rulings of the trial judge

From 1985 until 1997, the complainant ('RC') and her younger half-sister had been placed in the care of two foster parents, Dennis Bauer (a pseudonym) and his then wife. The Crown alleged that Bauer committed various sexual offences against RC over an 11-year period from January 1988 to December 1998, when RC was between four and 15 years old.

In 2016, after several retrials before the Country Court of Victoria, Bauer was found guilty and convicted of 18 charges of sexual offences committed against RC over the 11-year period. A sentence of nine years and seven months' imprisonment with a non-parole period of seven years was imposed.

Three important rulings at the trial were the subject of appeal. First, pursuant to s 380 of the *Criminal Procedure Act 2009* (Vic), the trial judge allowed the prosecution to tender a recording of RC's evidence from the most recent prior trial because RC had a strong preference not to give evidence again ('previous recording'). Second, her Honour permitted the prosecution to adduce tendency evidence pursuant to s 97 of the *Evidence Act 2008* (Vic) that Bauer had a sexual interest in RC and a willingness to act upon it. The evidence was the acts comprising of the 18 charges and uncharged acts concerning several alleged interactions between Bauer and RC ('tendency evidence'). Finally, the trial judge ruled that hearsay evidence relied on by the Crown was admissible pursuant to s 66 of the Evidence Act. In particular, her Honour allowed the Crown to call evidence that RC had disclosed to a school friend that she had been sexually assaulted by Bauer, despite the friend asking RC leading questions at the time and despite the friend's limited independent recollection at trial ('complaint evidence'). Her Honour rejected the respondent's objections that (1) the matters referred in RC's conversation with her friend would not have been fresh in RC's memory (as required by s 66(2)(b) of the Evidence Act) and (2) the complaint evidence should be excluded under s 137 of the Evidence Act because it was so 'vague' that its probative value was significantly outweighed by the prejudice it would cause Bauer.

The Victorian Court of Appeal decision

Bauer appealed against conviction to the Court of Appeal of the Supreme Court of Victoria: *Dennis Bauer (a pseudonym) (No 2) v The Queen* [2017] VSCA 176. Bauer alleged that the trial judge had erred in admitting the previous recording, the tendency evidence and the complaint evidence. The Court of Appeal (comprising of Priest, Kyrou and Kaye

JJA) addressed each of the trial judge's rulings in turn.

First, the Court of Appeal held that as it had not been shown that RC was 'unwilling' to give evidence within the meaning of s 381(1)(c) of the Criminal Procedure Act, a condition of admissibility under that subsection had not been established. In their Honours' view, the statement that RC had a 'preference' to not give evidence again did not mean that she was 'unwilling' to do so.

Second, the Court of Appeal held that the tendency evidence should not have been admitted as it did not have significant probative value as required by s 97 of the Evidence Act. The court cited *IMM* and *Hughes*, and concluded that the evidence of RC and her half-sister was devoid of any 'special' or 'unusual features' connecting the evidence to give it significant probative value (at [81] – [83]). The exclusion of the tendency evidence meant that one of the charges, which was based solely on the half-sister's evidence, was not cross-admissible in relation to the other charges. The court held that the failure to hear this charge separately had been productive of unfairness to Bauer.

Finally, the Court of Appeal held that the complaint evidence was not admissible under s 66 of the Evidence Act because there was no evidence that the asserted fact was 'fresh in the memory' of RC at the time she made the complaint to her friend (at [112]). In the alternative, their Honours said that the probative value of the complaint was so slight as not to outweigh the risk of unfair prejudice and therefore should have been excluded under s 137 of the Evidence Act (at [113]).

The Court of Appeal held that the admission of the tendency evidence and the complaint evidence had caused a substantial miscarriage of justice to Bauer (at [83] and [114]). The court quashed the convictions and ordered a new trial. The Crown subsequently appealed.

The High Court decision

In a unanimous full court judgment, the High Court allowed the Crown's appeal and set aside the orders made by the Court of Appeal.

First, the High Court held that the Court of Appeal incorrectly applied s 381(1)(c) of the Criminal Procedure Act when assessing the admissibility of RC's previous recording. The High Court explained that the operation of s 381(1) was not confined to complainants who refuse to give fresh evidence. Rather, parliament's choice of the term 'willingness' (rather than refusal) signifies that the question is one of degree (at [41] – [42]). The court held that the trial judge had not erred in finding that it was in the interests of justice to admit the recording and there was no unfairness caused to the defendant.

In relation to the tendency evidence, the High Court acknowledged that previous decisions had created confusion as to when tendency evidence will be admissible (at 47]). To address this, the court explained that 'the court has resolved to put aside differences of opinion and speak with one voice on the subject' (at [47]). In particular, the court held that 'henceforth', evidence of uncharged acts of the accused against the complainant 'may be admissible as tendency evidence' even if they lack any 'special' feature of the kind discussed in earlier cases (at [48]).

In particular, the court held that 'henceforth', evidence of uncharged acts of the accused against the complainant 'may be admissible as tendency evidence' even if they lack any 'special' feature of the kind discussed in earlier cases (at [48]).

The High Court explained that the reference in *IMM* to 'special features' of a complainant's account of an uncharged act should be understood as 'limited' to cases in which there are multiple offences against a single complainant and the prosecution seeks to 'adduce evidence from the complainant of a single relatively remote and innocuous uncharged act as support for his or her evidence of the charged acts' (at [57]).

Accordingly, in a single complainant sexual offence case, there is 'ordinarily no need for any particular feature of the offending to render evidence of one offence significantly probative of the other' (at [60]). In contrast, where there are multiple complainants, there 'must ordinarily be some feature of or about the offending which links the two together', and, absent such a feature, evidence that the accused has committed sexual offences against one complainant is ordinarily not significantly probative of the accused having committed an offence against another complainant (at [58]).

As to the standard of review, the High Court held that it was 'for the [appeal] court itself to determine whether evidence is of significant probative value, as opposed to deciding whether it was open to the trial judge to conclude that it was' (at [61]). In this respect, the court departed from decisions of the NSW Court of Criminal Appeal, which had held that it was necessary for the appellant to demonstrate *House v The King* error.

The High Court also observed that, 'ordinarily, proof of the accused's tendency to act in a particular way will not be an indispensable intermediate step in reasoning to guilt' (at [80]), and held that, contrary to the practice which has operated for some time in New South Wales, trial judges 'should not ordinarily direct a jury that, before they may act on evidence of uncharged acts, they must be satisfied of the proof of the uncharged act beyond reasonable doubt' (at [86]).

The High Court also held that any risks of collusion or contamination are issues of credibility and reliability, rather than probative value, except where the risks are so great that it would not be open to the jury, acting rationally, to accept the evidence (at [69]). The court was not convinced that any of the tendency evidence was unfairly prejudicial for it to be excluded pursuant to ss 101, 135 or 137 of the Evidence Act, and agreed that there was no basis for severing any of the charges (at [73] – [78] and [88]).

Finally, the High Court determined that RC's representations to her friend were 'fresh in the memory' of RC at the time she made them, and that the complaint evidence should have been admitted. The court reiterated that s 66 of the Evidence Act had been amended in response to *Graham v The Queen* (1998) 195 CLR 606 at 608 [4], to ensure that the 'fresh in memory' requirement is not confined to the time which elapses between the occurrence of the relevant event and the making of the representation about that event. It is well accepted that the nature of sexual abuse is such that it may remain fresh in the memory of a victim for many years (see, for example, R v XY (2010) 79 NSWLR 629 at 646-648 [91]-[92], [98]-[99] per Whealy J (Campbell JA and Simpson J agreeing at 630 [1], [2]).

In assessing the evidence, the High Court agreed that the facts were 'fresh in the memory' of RC at the time she made the complaint to her friend given (1) the nature of the sexual offences, (2) the fact that they were repeated several times over a number of years, (3) that the acts continued up to less than a year before she made the specific complaints, and (4) RC's highly emotional state at the time of the conversation (at [92]). In applying s 137 of the Evidence Act, the High Court concluded that neither the leading questions from RC's friend nor her lack of independent recollection as to the precise words used by RC at the trial was so great as to merit exclusion on the basis of prejudicial effect (at [99] – [100]).

A matter of aggravation: recent developments in damages awards in defamation

By Lyndelle Barnett

As three recent high profile proceedings demonstrate, the construction now placed upon section 35 of the Defamation Act, which imposes a maximum amount, or cap, on damages for non-economic loss in defamation proceedings has led to an increased focus on demonstrating that the circumstances justify an award of aggravated damages.

When national uniform defamation legislation was introduced in 2005 *(being the Defamation Act 2005* (NSW) in New South Wales) it provided for a maximum damages amount for non-economic loss that may be awarded in defamation proceedings. The rationale for the maximum damages amount was explained in the Second Reading Speech for the *Defamation Bill 2005* (NSW) as follows:

> Recent changes to New South Wales civil liability law have imposed both thresholds and caps on awards of general damages in personal injury cases. In order to be eligible for the maximum award of damages for non-economic loss, which currently stands at $400,000, it is likely that a plaintiff would need to show that they have been rendered quadriplegic or severely brain damaged and will be highly dependent on the care of others for the rest of their life. By way of contrast, in the recent case of Sleeman v Nationwide News Ltd, 2004 NSWSC 954, a journalist from the *Sydney Morning Herald* was awarded $400,000 in damages basically because an article in *The Australian* conveyed the impression that he was a dishonest journalist.
>
> While I have no doubt that false and defamatory statements are harmful, the fact is that reputations may be restored and injured feelings may pass after a time. The pain and suffering associated with an affliction like quadriplegia, on the other hand, will last a lifetime. The bill ensures that this glaring discrepancy in the way damages are awarded is addressed.

The operative provision of the Defamation Act, section 35, relevantly provides as follows:

(1) Unless the court orders otherwise under subsection (2), the maximum amount of damages for non-economic loss that may be awarded in defamation proceedings is $250,000 or any other amount adjusted in accordance with this section from time to time (the maximum damages amount) that is applicable at the time damages are awarded.

(2) A court may order a defendant in defamation proceedings to pay damages for non-economic loss that exceed the maximum damages amount applicable at the time the order is made if, and only if, the court is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages.

The maximum damages amount is currently $398,500.

General damages exceeding the maximum damages amount have been awarded in three recent cases discussed in this article: *Wilson v Bauer Media Pty Ltd, Rayney v The State of Western Australia* and *Wagner & Ors v Harbour Radio Pty Limited & Ors.*

Wilson v Bauer Media Pty Ltd

The actress Rebel Wilson brought proceedings against Bauer Media in relation to the publication of an article in *Woman's Day* magazine and seven articles published on websites controlled by Bauer Media. The articles were found to have conveyed defamatory meanings to the effect that Ms Wilson was a serial liar, had lied about many aspects of her private life and was so untrustworthy that one could not rely upon what she said about herself without corroboration. All defences relied upon by Bauer Media failed.

At first instance (*Wilson v Bauer Media Pty Ltd* [2017] VSC 521), Dixon J construed section 35 of the *Defamation Act 2005* (Vic) to the effect that the maximum damages amount for non-economic loss had no application in cases where the court found that the circumstances of the publication were such as to warrant an award of aggravated damages. His Honour awarded Ms Wilson $650,000 for non-economic loss (as well as $3,917,474 for special damages and $182,448.61 in interest).

The Victorian Court of Appeal, constituted by Tate, Beach and Ashley JJA (*Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154), agreed with Dixon J's construction of section 35.

The court began its analysis of section 35 by considering whether section 35(1) fixed the top end of a range, or rather whether damages were to be assessed at large with section 35(1) applying a cap ([182]-[215]). Bauer Media had contended that the maximum damages amount fixed the upper limit of a range or scale reflecting the most serious cases, with less serious cases taking their place within the scale. Bauer submitted that this construction would operate to ensure consistency of awards in defamation proceedings across jurisdictions. Support for Bauer Media's construction was found in a number of first instance decisions of the New South Wales Supreme Court commencing with *Attrill v Christie* [2007] NSWSC 1386 per Bell J.

More recent judgments in Victoria (*Cripps v Vakras* [2014] VSC 279 and *Sheales v The Age Co Pty Ltd* [2017] VSC 380), New South Wales (*Carolan v Fairfax Media Publications Pty Ltd (No 6)* [2016] NSWSC 1091), South Australia (*Lesses v Maras (No 2)* [2017] SASCFC 137) and Western Australian *(Rayney v Western Australia (No 9)* [2017] WASC 367) had held that the maximum damages amount did not fix the upper limit of a range or scale but rather operated as a cap. The Victorian Court of Appeal agreed, stating at [209]:

> In our view, the combination of s 34 and s 35(1) does not create a range or scale with respect to the quantum of damages to be awarded for non-economic loss. In this respect, it is significant, as the

> plaintiff submitted, that s 35(1) specifies the maximum damages amount for individual defamation 'proceedings' rather than for individual defamatory matter, or for individual imputations, or for separate causes of action. If s 34 and s 35(1) create a range to govern the award of damages for non-economic loss it would be necessary for comparisons to be confidently drawn between defamation proceedings to identify where one proceeding sat relative to another with respect to the seriousness of the imputations and the level of harm suffered. However, the Legislature's choice of 'proceedings' as the reference point rather than imputations or causes of action has the consequence that the ability to draw comparisons is significantly impaired.

The court also considered (at [212]) that treating section 35(1) as fixing the upper limit of a range may artificially deflate awards made for non-economic loss at the lower end of seriousness of defamation with the consequence that a principal purpose of such damages, namely, vindication of reputation, would not be met.

The consequence of the court's rejection of Bauer Media's contention that section 35(1) fixed the upper limit of the range was that the court was satisfied that damages for non-economic loss were to be assessed at large. By application of section 35(2), if the court was not satisfied that the circumstances of publication warranted an award of aggravated damages, damages for non-economic loss would be capped at the maximum damages amount (assuming they were assessed to exceed the amount), but if it was so satisfied, damages would be awarded in the full amount assessed. The court concluded at [249] as follows:

> We accept that when a court is satisfied that an award of aggravated damages is appropriate the court is entitled to make an order for damages for non-economic loss that exceeds the statutory cap in respect of both pure compensatory damages and aggravated compensatory damages. In other words, the statutory cap does not then constrain the court's assessment of damages for non-economic loss; when an award of aggravated damages is warranted, the statutory cap is inapplicable.

The court agreed with the decision of Dixon J that the circumstances of publication in that case warranted an award of aggravated damages, but re-assessed the damages award and reduced it to $600,000 for non-economic loss, and set aside the award of special damages.

Rayney v The State of Western Australia

Rayney v Western Australia (No 9) [2017] WASC 367 concerned a claim by Lloyd Rayney, a barrister who had previously held senior positions in the Office of the Australian Government Solicitor and the Office of the Director of Public Prosecutions for Western Australian. Mr Rayney sued the State of Western Australia over four press conferences conducted by Detective Senior Sergeant Jack Lee during the course of an investigation into the murder of Mr Rayney's wife. Chaney J found that the last of the press conferences conveyed an imputation that the plaintiff murdered his wife, that the defence of qualified privilege failed and that the circumstances of publication were such as to warrant an award of aggravated damages.

Rayney was decided after Dixon J's judgment in *Wilson*, but before the decision of the Victorian Court of Appeal. Chaney J followed Dixon J in *Wilson* and held that the maximum damages amount was inapplicable. Mr Rayney was awarded $600,000 for non-economic loss.

Wagner & Ors v Harbour Radio Pty Limited & Ors

Denis Wagner, John Wagner, Neill Wagner and Joe Wagner are brothers who have built a highly successful business. They each brought proceedings against Harbour Radio Pty Limited, Alan Jones, Radio 4BC Brisbane Pty Limited and Nick Cater in relation to the publication of 32 publications alleged to be defamatory of them. In his judgment (*Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201) Flanagan J found that 29 of the matters complained of conveyed 80 imputations defamatory of them including imputations to the effect that each of the plaintiffs caused the deaths of ten adults and two children in the Grantham floods by the manner in which they constructed their quarry, and then covered up their involvement. All defences relied upon failed.

The Victorian Court of Appeal's decision in *Wilson* was handed down of the final day of the trial. Flanagan J followed *Wilson* in relation to the construction of section 35, and having found that the circumstances of publication warranted an award of aggravated damages, awarded each plaintiff $850,000 in damages for non-economic loss, plus interest.

The damages awards granted in the three decisions discussed in this article represent a significant increase in the awards granted in earlier cases decided under the Defamation Act. In light of the construction of section 35 adopted in the decisions discussed in this article it is likely that there will now be an increased focus in defamation litigation on matters giving rise to a claim for aggravated damages.

Validity of a 'holding' DOCA

Bernice Ng reports on
Mighty River International Limited v Hughes and anor (as deed administrators of Mesa Minerals Ltd) [2018] HCA 38

Introduction

In *Mighty River International Limited v Hughes and anor (as deed administrators of Mesa Minerals Ltd*) [2018] HCA 38, the High Court (Kiefel CJ and Edelman J, Gageler J agreeing; Nettle and Gordon JJ dissenting) considered the validity of a deed of company arrangement (DOCA) commonly known as a 'holding' DOCA.

The DOCA provided for a moratorium on creditors' claims, contemplated further investigations and a report to creditors concerning possible variations to the deed within six months, and provided that, subject to variation of the DOCA, there would be no property available for distribution to creditors. It was held to be a valid DOCA under Part 5.3A of the *Corporations Act 2001* (Cth) (Act).

The plurality disapproved of the term 'holding' DOCA because it did not appear in the Act and served to obscure proper analysis of the terms of a DOCA in determining its validity (at [28]).

Background Facts

Mesa Minerals Limited (subject to deed of company arrangement) (Mesa) is a listed mining company. Mighty River International Limited (Mighty River) was a shareholder and a creditor of Mesa.

The directors of Mesa resolved to appoint voluntary administrators (Administrators) ([2017] WASC 69, [11]). The Administrators subsequently issued a report to creditors (the s 439A Report) (at [18]). In that report, the Administrators opined that it was not in the interests of creditors for the company to be wound up or for the administration to end. They expressed the view that it was in the interests of creditors to resolve that Mesa execute a DOCA which:

- did not exclude the possibility of winding up Mesa in the future if that were ultimately determined to be in creditors' interests; and
- allowed the Administrators to explore a restructure and/or a recapitalisation of Mesa which may have provided a more beneficial outcome for creditors than an immediate winding up ([2017] WASC 69, [78]).

On 13 October 2016, the Administrators issued a supplementary report to creditors and repeated their earlier opinions (at [19]).

At the second meeting of creditors, Mesa's creditors resolved that Mesa enter into the DOCA proposed in the s 439A Report and the DOCA was subsequently executed (Mesa DOCA) (at [20]).

Mighty River's challenge to the Mesa DOCA

At first instance, Master Sanderson in the Supreme Court of Western Australia declared that the Mesa DOCA was not void. On Mighty River's appeal, the Supreme Court of Western Australia, Court of Appeal (Buss P, Murphy and Beech JJA) also held that the Mesa DOCA was valid.

In the High Court, Mighty River challenged the Mesa DOCA on three grounds:

(i) the Mesa DOCA was contrary to the object of Part 5.3A of the Act, most particularly by circumventing the requirement in s 439A(6) of the Act for a Court order extending the period during which the second creditors' meeting must be convened;

(ii) the Mesa DOCA did not identify the property of Mesa available to creditors for distribution, contrary to s 444A(4)(b) of the Act; and

(iii) the Mesa DOCA was void because the administrators had failed to form the opinions required by s 438A(b), and at the relevant time, s 439A(4) of the Act.

The Plurality (Kiefel CJ and Edelman J, Gageler J agreeing)

The plurality held that the Mesa DOCA was a properly constituted deed of company arrangement under Part 5.3A of the Act and fulfilled the formal requirements of Part 5.3A of the Act (at [31]-33]).

The plurality also found that an otherwise compliant instrument that becomes a DOCA that creates and confers genuine rights and duties can incidentally extend time for an administrator's investigations pending a subsequent variation to it (at [34]).

With regards to the creditors' moratorium on their claims and the Deed itself, the plurality held that the creditors' moratorium was not contrary to the object of Part 5.3A of the Act for three reasons. *First*, the Mesa DOCA maximised the chance of Mesa's

survival or otherwise provided a better return to creditors than would result from its immediate winding up (at [35]). *Secondly,* prior to the introduction of Part 5.3A of the Act, historically, moratorium-only schemes of arrangement were valid. It followed that a DOCA (which is intended to be a more flexible device for managing a company's affairs) in similar terms was also permissible (at [36]). *Thirdly*, the objective of protecting creditors and providing a prescribed period of time within which the administrator is to convene a meeting of creditors to make decisions about the affairs of a company is not undermined if creditors choose to extend a moratorium beyond the period that would otherwise have applied (at [37]).

On the question of whether there was a requirement for a DOCA to provide for the distribution of company property to creditors, the plurality preferred the respondents' construction of s 444A(4)(b) of the Act, namely that, understood in the light of its context and purpose, the subsection required a DOCA to specify the property, *if any*, to be available to pay creditors' claims. The intended flexibility of DOCAs would be undermined if a DOCA was required to provide for the distribution of some property of the company (even of nominal value) (at [41] – [42], [45]). On this point, the minority agreed (at [95] – [97]).

The plurality also did not accept Mighty River's submission that the Administrators had failed to comply with ss 438A(b) and 439A(4) because they failed to form the opinions required by those provisions. It was clear from the s 439A Report, which included substantial reasoning and a description of the research and investigations, that the Administrators had formed the requisite opinions (at [47] – [56]).

Gageler J made additional observations, at the level of principle, of his rejection of the argument that the Mesa DOCA was non-compliant with the procedural requirements in Part 5.3A. His Honour opined that fundamental to the scheme of Part 5.3A is the policy that creditors themselves were to decide what was in their own best interests as soon as practicable. The scheme set out in Part 5.3A of the Act works by empowering creditors, deciding by majority, to determine what is in their best interests and keeping the Court out of the process of making and administering the DOCA, unless an application for intervention is made and a ground for intervention established. Further, s 445G(2) of the Act would have no utility if actual compliance with the procedural provisions in Part 5.3A were necessary for the existence of a DOCA (at [60]-[63], [66]).

The minority (Nettle and Gordon JJ)

The minority held that the Mesa DOCA was not a DOCA within the meaning of Part 5.3A because it did no more than purport to indefinitely extend the convening period under ss 439A(6) or 447A(1) (at [82]). The Mesa DOCA deferred to a later date the execution of a DOCA or the winding up of Mesa and did not provide for an arrangement alternative to liquidation or the whole or partial payment, satisfaction or compromise of creditors' claims against Mesa (at [83]).

The minority rejected the submission that the Mesa DOCA was like a simple moratorium consistent with Part 5.3A, because the moratorium contemplated under the Mesa DOCA was not an alternative to liquidation calculated to allow Mesa to trade out of financial difficulties or otherwise provide for the satisfaction in whole or in part outstanding debts or claims (at [85]).

The minority also stated that the Administrators' opinion in the s 439A Report to enter into the proposed DOCA was not an opinion that complied with s 439A(4)(b) (now r 75-225(3) of the *Insolvency Practice Rules (Corporations)*) because the opinion was not an opinion that would have enabled the creditors of Mesa to choose between Mesa executing a DOCA, being wound up or the administration ending (at [91]).

Liability for knowingly assisting in a breach of fiduciary duty

David Smith reports on Ancient Order of Foresters in *Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* [2018] HCA 43

Introduction

The High Court has considered and, by majority, confirmed the principles applicable to causation and quantification where an account of profits is ordered against a knowing assistant to a fraudulent breach of a fiduciary duty. The court considered an account of profits could include anticipated future profits.

Facts

In 2010, Lifeplan Australia Friendly Society Ltd (Lifeplan) had a 70 per cent share of the 'funeral products' market in Australia. The funeral products involved a customer making payments to Lifeplan which were managed in a fund for a fee. A guaranteed sum would then be paid out upon the customer's death to meet the expenses of their funeral. Ancient Order of Foresters in Victoria Friendly Society Ltd (Foresters) was also involved in the funeral products business. It had a much smaller market share and its business was not very profitable, if it was profitable at all.

Messrs Woff and Corby were senior employees in Lifeplan's funeral products business. Woff was responsible for creating and maintaining relationships with funeral directors and Corby reported to Woff.

While still employed at Lifeplan, Woff and Corby developed a proposal to capture as many of Lifeplan's clients as quickly as possible for Foresters. This was formalised in a comprehensive five-year business concept plan (BCP) which they presented to Foresters. The BCP was prepared by the 'wholesale plundering' of confidential information and business records from Lifeplan (as so described by the Full Federal Court; (2017) 250 FCR 1 at [8]), and this would have been apparent to any honest and reasonable person.

"I'm no attorney, but that's a material breach if I've ever seen one."

Foresters' board approved the BCP and its new funeral products business flourished at Lifeplan's expense. From 2010 to 2012, Foresters' annual 'inflows' grew from $1.6 million to $24 million and Lifeplan's inflows shrank from $68 million to $45 million.

Appellant's claim

The primary judge (Besanko J; *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384; [2016] FCA 248) held that, as employees, Woff and Corby owed fiduciary duties to Lifeplan which they breached and ordered an account of profits against Woff and Corby. Further, and relevantly, his Honour held that Foresters had knowingly assisted Woff and Corby in breaches of their fiduciary duties to Lifeplan where Foresters was aware of circumstances which would indicate to any honest and reasonable person that Woff and Corby had used Lifeplan's confidential information to prepare the BCP, solicited funeral directors' business while still employed by Lifeplan and prepared rules and disclosure documents for Foresters' funeral products business while still employed by Lifeplan.

Besanko J found that Foresters would not have proceeded with an expansion of its funeral products business without the BCP. However, his Honour refused to order an account of profits against Foresters on the basis that the confidential information was not in itself used to generate profits and there was nothing to stop Woff and Corby from approaching funeral directors once they left Lifeplan.

The Full Court of the Federal Court (*Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1; [2017] FCAFC 74; Allsop CJ, Middleton and Davies JJ) considered that Besanko J had taken an unduly narrow approach to consideration of whether to order an account of profits against Foresters. The Full Court held that Foresters would not have made the profits it did but for the breaches of duty by Woff and Corby. The Full Court ordered Foresters to account for profits made and projected to be made on contracts entered into from February 2011 to June 2015. The Full Court considered that this '…sets the account within the framework of the five-year business plan, with a modest deduction of six months' to factor in the capital, skill, expertise and risk involved in Foresters establishing a new business ((2017) 250 FCR 1 at [88]).

Appeal to the High Court

It was not in issue before the High Court that Foresters was liable to account. Relevantly, there were two issues before the High Court, namely, (i) the extent of the causal connection between the account ordered against Foresters and the conduct that constituted its knowing assistance in breaches of duty and (ii) the quantification of the account.

By majority (Kiefel CJ, Keane and Edelman JJ in a joint judgment and Gageler J), the High Court held that Foresters must account for the full value of its funeral products business. Nettle J would not have disturbed the orders of the Full Court.

On the question of causation, Foresters argued that it should only be liable to account for profits that were the direct result of the particular acts by which it knowingly assisted Woff and Corby in their breaches of fiduciary duty. In a joint judgment, Kiefel CJ, Keane and Edelman JJ disagreed. Their Honours referred with approval with the decision of Gibbs J in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 397 where his Honour said "person who knowingly participates in a breach of fiduciary duty is liable to account to the person to whom the duty was owed for any benefit he has received as a result of such participation'. Their Honours held that it was sufficient to show that the profit would not have been made 'but for' the dishonest wrongdoing (at [9]). The dishonest wrongdoing by Foresters resulted in the capture of business connections essential to Lifeplan's funeral products business and so Foresters was liable to account for those profits. It was irrelevant that Foresters could show that the profits might have been made honestly (at [9]).

Gageler J agreed but added (at [88]) that where a breach of fiduciary obligation is dishonest and fraudulent (as will be the case where one is dealing with knowing assistance), there is a sufficient causal connection so long as the breach '…played a material part in contributing to the benefit or gain of the fiduciary or knowing participant even in circumstances where it cannot be concluded that the benefit or gain would not have been obtained but for the breach'.

As to quantification, all members of the court stated, consistently with *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 561-561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ), that once causation is established, the onus is on the defendant to show that he or she should not account for the full value of the benefit obtained (joint judgment at [13]; Gageler J at [91]; Nettle J at [186]).

Kiefel CJ, Keane and Edelman JJ said that the defendant can demonstrate that in two ways: (i) by proving an entitlement to an allowance for costs, labour and skill; or (ii) 'by demonstrating that the benefit or advantage is beyond the scope of the liability for which the wrongdoer should account' (at [15]). The second of these was pursued by Foresters before the High Court. Their Honours observed that there is no precise test for determining the issue and all the circumstances must be considered (at [16]).

Gageler J's formulation of how a defendant can show that he or she should not account for the full value of the benefit obtained was similar to that of the joint judgment. His Honour said that the defendant must show either (i) it is 'practically just' that the advantage be apportioned or some allowance be made, or (ii) there is some other reason why there would be a windfall to the plaintiff that would fail to vindicate the purposes for the imposition of the fiduciary duty (at [92]).

The majority held that the advantage to Foresters was not limited to the five-year plan set out in the BCP. The advantage was the business connections and that benefit would be enjoyed for as long as those business connections remained with the business (joint judgment at [16]; Gageler J at [119]). Foresters did not demonstrate that any of its increased profitability was generated by matters other than the business connections appropriated from Lifeplan. Accordingly, the majority held that it should account for the full value of the business (joint judgment at [16]; Gageler J at [119]). Kiefel CJ, Keane and Edelman JJ also considered it pertinent that the profits were made from deliberate and dishonest conduct and were the very profits that were sought to be achieved (at [16]).

Finally, there was a question whether an account of profits could be ordered in respect of anticipated future profits. Kiefel CJ, Keane and Edelman JJ held that there was no justification in principle or in authority to limit an account of profits to realised profits. Their Honours considered that unrealised profits were still profits (at [24]; see likewise Nettle J at [203]). Gageler J considered that this argument by Foresters was misguided because the discount rate applied to projected cash flows took into account the risk assumed by Foresters in carrying on the business (at [111]).

Accordingly, Foresters was required to account for the full value of the business connections appropriated by it from its participation in the disloyalty of Woff and Corby.

Nettle J, in dissent, held that the test of causation is whether the breach of fiduciary duty has 'materially contributed' to the profit the subject of the account (at [179] and [191]) and observed that, ultimately, quantification of the account involves a 'judicial estimation of the available indications' rather than mathematical precision and is a matter on which reasonable minds may differ (at [197]). His Honour considered that it was open to the Full Court to order an account based on the net present value of Foresters' funeral product business after five years with a deduction of six months. The BCP was a five-year plan and Foresters could not have operated the business and derived profits from the BCP to a significant extent after that period. Nettle J also said that Woff and Corby's personal skills were largely responsible for the growth in Foresters' business and that it would not have taken them long lawfully to solicit clients they had unlawfully solicited before leaving Lifeplan (at [188]).

Can a non-material error be jurisdictional?

Joe Edwards reports on *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34

What is a jurisdictional error? The High Court went once more unto the breach in *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34, exploring the concepts of 'jurisdictional' and 'non-jurisdictional' error, and offering an interestingly 'modern' take on the old distinction.

The facts

Mr Sorwar Hossain (the appellant), a citizen of Bangladesh, arrived in Australia in 2003 on a student visa. When this visa expired in 2005, he remained in Australia as an unlawful non-citizen (several applications for a protection visa were unsuccessful).

In 2010, the appellant met a woman who became his de facto partner, and in 2015, he applied for a partner visa. A delegate of the Minister refused this application and the appellant then sought merits review in the Administrative Appeals Tribunal (AAT).

The AAT affirmed the delegate's decision on the basis that two criteria prescribed by the *Migration Regulations 1994* (Cth) for the grant of a partner visa had not been met:

- The first criterion required an application for a partner visa to be made within 28 days of the applicant ceasing to hold a previous visa, unless the decision-maker was satisfied that there were 'compelling reasons' for not applying the 28-day requirement (the timing criterion). The AAT found that the timing criterion was not met because the appellant had not applied for a partner visa within 28 days of him ceasing to hold a previous visa (i.e., his student visa) and there were no compelling reasons, as at the time that he applied for the partner visa, for not applying the 28-day requirement.
- The second criterion required an applicant for a partner visa not to have 'outstanding debts to the Commonwealth', unless the decision-maker was satisfied that 'appropriate arrangements' had been made for payment (public interest criterion). The AAT found that the public interest criterion was not met because the appellant had outstanding debts to the Commonwealth related to his various protection visa applications (which he said he intended to pay but in fact had made no arrangements to pay).

Federal Circuit Court

The appellant sought judicial review of the AAT's decision in the Federal Circuit Court. By this time, two matters were common ground. The first was that the AAT had made an error of law in relation to the timing criterion by addressing the question of whether there were compelling reasons for not applying the 28-day requirement as at the time the appellant applied for a partner visa, rather than as at the time of its own decision. The second was that the appellant, shortly after the AAT's decision, had paid his outstanding debts to the Commonwealth.

The Minister argued that the AAT's error in relation to the timing criterion was not a jurisdictional error, because the AAT's failure to be satisfied that the public interest criterion was met provided a separate and independent basis on which the AAT was bound to affirm the delegate's decision. The Federal Circuit Court rejected the Minister's argument on the basis that it involved 'unbundling' the AAT's reasons for decision into 'impeachable' and 'unimpeachable' parts. The Federal Circuit Court also held that there was no discretionary reason to withhold relief because the appellant had, since the AAT's decision, settled his debts to the Commonwealth, and so the public interest criterion would no longer present a barrier to the grant of a partner visa. The Federal Circuit Court quashed the AAT's decision and remitted the appellant's application for review to the AAT for determination according to law.

Full Court of the Federal Court

The Minister appealed to the Full Court of the Federal Court, repeating essentially the same argument he made before the Federal Circuit Court. By a 2:1 majority, the Full Court allowed the appeal (Flick and Farrell JJ; Mortimer J dissenting). The majority justices accepted that the AAT's error in relation to the timing criterion was 'jurisdictional'. However, their Honours nevertheless concluded that the AAT 'retained jurisdiction or authority' to affirm the delegate's decision because of 'the separate and discrete point going to [the public interest criterion]'.

The High Court

The appellant appealed to the High Court, which unanimously dismissed the appeal, although for reasons quite different to those adopted by the majority of the Full Court of the Federal Court. Chief Justice Kiefel and Gageler and Keane JJ delivered joint reasons; Edelman J delivered separate reasons, with which Nettle J substantially agreed.

Kiefel CJ, Gageler and Keane JJ

The plurality justices began their reasons with a discussion of the concepts of 'jurisdiction', 'jurisdictional error' and 'non-jurisdictional error' (at [17]ff). Their Honours noted that the concepts were difficult and apt to be misunderstood. However, their Honours noted that the concepts could not be avoided altogether because they describe the 'constitutionally entrenched minimum content' of the jurisdiction to review both State and Commonwealth executive and judicial power (at [20]-[22]). Their Honours also doubted that an attempt to reframe the distinction between 'jurisdictional' and 'non-jurisdictional' errors in 'entirely new language' would be helpful, especially once proper account were taken of the fact that 'jurisdictional error' is not a 'metaphysical' term, but rather a 'functional' one that expresses the gravity of the legal error at issue (at [22]; see also [18]-[19] and [25]).

However, the plurality justices nonetheless found that the 'traditional distinction' could be expressed 'in more modern language' (at [23]-[24]; citations omitted):

> Jurisdiction, in the most generic sense in which it has come to be used in this field of discourse, refers to the scope of the authority that is conferred on a repository. In its application to judicial review of administrative action the taking of which is authorised by statute, it refers to the scope of the authority which a statute confers on a decision-maker to make a decision of a kind to which the statute then attaches legal consequences. It encompasses in that application all of the preconditions which the statute requires to exist in

> order for the decision-maker to embark on the decision-making process. It also encompasses all of the conditions which the statute expressly or impliedly requires to be observed in or in relation to the decision-making process in order for the decision-maker to make a decision of that kind. A decision made within jurisdiction is a decision which sufficiently complies with those statutory preconditions and conditions to have 'such force and effect as is given to it by the law pursuant to which it was made'.
>
> Jurisdictional error, in the most generic sense in which it has come to be used to describe an error in a statutory decision-making process, correspondingly refers to a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it. To describe a decision as 'involving jurisdictional error' is to describe that decision as having been made outside jurisdiction. A decision made outside jurisdiction is not necessarily to be regarded as a 'nullity', in that it remains a decision in fact which may yet have some status in law. But a decision made outside jurisdiction is a decision in fact which is properly to be regarded for the purposes of the law pursuant to which it was purported to be made as 'no decision at all'. To that extent, in traditional parlance, the decision is 'invalid' or 'void'.

Their Honours' reference to a failure to comply with statutory preconditions or conditions '*to an extent which results in a decision … lacking characteristics necessary for it to be given force and effect by the statute*' is important, for it picks up their earlier discussion of jurisdictional error as 'an expression not simply of the existence of error but of the gravity of that error' (at [25]; emphasis in the original).

How grave, or of what 'magnitude', does non-compliance with statutory preconditions or conditions need to be before the resulting decision may be said to be one affected by jurisdictional error? Their Honours held that this question inevitably turns on the construction of the statute under consideration, read against the backdrop of common law principles (at [27]-[28]). However, ordinarily, a statute is 'to be interpreted as incorporating a threshold of materiality' (at [29]); that is, non-compliance with a statutory pre-condition or condition must be 'material' before it may be said to take a decision outside jurisdiction. Non-compliance with a statutory pre-condition or condition 'cannot be material', at least ordinarily, unless compliance 'could have resulted in the making of a different decision' (at [30]-[31]).

Applying this formulation of jurisdictional error to the facts of the case, their Honours held that the AAT, in reviewing the delegate's decision, was required to form its own view as to whether to grant a partner visa to the appellant, and that the AAT was required to do so on the basis of 'a correct understanding and application of the applicable law', including the criteria prescribed by the Migration Regulations (at [34]). By 'misconstruing and misapplying' the timing criterion, the AAT failed to do this; it failed to comply with an obligation that conditioned the exercise of its statutory power (at [35]).

However, as their Honours continued, this failure 'could have made no difference to the decision which the [AAT] in fact made to affirm the decision of the delegate … because the [AAT] was not satisfied that the public interest criterion was met, and, on the findings which the [AAT] made, the [AAT] could not reasonably have been satisfied that the public interest criterion was met' (at [35]). In other words, the AAT's error in relation to the timing criterion, while an error of law, was non-material: it made no difference to the outcome. It followed, in their Honours view, that the AAT's error 'did not rise to the level of a jurisdictional error' (at [37]).

How grave, or of what 'magnitude', does non-compliance with statutory preconditions or conditions need to be before the resulting decision may be said to be one affected by jurisdictional error?

Edelman J

Like the plurality justices, Edelman J engaged with some of the conceptual debates about the distinction between 'jurisdictional' and 'non-jurisdictional errors' (at [60] ff), although, it must be said, his Honour exhibited somewhat less enthusiasm than did the plurality justices for any attempt to 'modernise' the language used to understand the distinction (e.g., at [62]). Ultimately, however, his Honour's reasons focussed on the High Court's classic pronouncements on the meaning of the concept of 'jurisdictional error', including both *Craig v South Australia* (1995) 184 CLR 163 and *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 (Kirk) (at [66]ff). On the basis of these decisions, his Honour concluded that 'jurisdictional error requires materiality' (at [66]). Moreover, while 'the issue will always be one of construction of the express or implied terms of the statute, an error will not usually be material, in this sense of affecting the exercise of power, unless there is a possibility that it could have changed the result of the exercise of power. In other words, materiality will generally require the error to deprive a person of the possibility of a successful outcome' (at [72]).

On the facts of the case, Edelman J concluded that the statutory context required 'the usual implication that an immaterial error will not invalidate a decision' (at [76]). The question then became whether the AAT's error in relation to the timing criterion was 'material' or not (at [76]). His Honour answered that question in the negative: the AAT's error 'did not deprive the appellant of the possibility of a successful outcome' because the AAT was required, in any event, to affirm the delegate's decision on the basis of the public interest criterion (at [79]). Thus, the error was 'immaterial' and, it followed, 'not a jurisdictional error' (at [79]).

Nettle J

Justice Nettle agreed substantially with Edelman J's reasons (at [39]), but with an important caveat (at [40]; one which Edelman J also noted in passing at [72]). According to Nettle J, materiality is not invariably an essential requirement before an error may be characterised as 'jurisdictional'. His Honour gave two examples. First, 'where respect for the dignity of the individual may mean that a denial of procedural fairness should be regarded as a jurisdictional error regardless of the effect it may have had on the result reached by the decision maker' (at [40]). And secondly, 'where a decision maker is required to make a decision by reference to a single specified criterion and, in error, addresses himself or herself to the wrong criterion' (at [40]).

Conclusion

The High Court's decision confirms the common sense proposition that an error should not ordinarily be regarded as a jurisdictional error (and so as 'no decision at all') unless it is an error that actually 'matters'. As the plurality justices observed, decision-making is, after all, 'a function of the real world' (at [28]). However, the broader significance of the decision is likely to lie in the plurality justices' efforts, familiar since at least Kirk, to take some of the mystery out of the concept of 'jurisdictional error'.

Reasonableness is not in the eye of the beholder: appeals from judicial review applications

Alicia Lyons reports on

Minister for Immigration and Border Protection v SZVFW (2018) 92 ALJR 713; [2018] HCA 30

Introduction

In *Minister for Immigration and Border Protection v SZVFW* (2018) 92 ALJR 713; [2018] HCA 3, the High Court held that not every decision about which reasonable minds may differ is entitled to deference from an appellate court. The question of whether the decision of an administrative decision-maker was 'reasonable', like the question of whether certain conduct is 'unconscionable', is a legal question to which there is only one correct answer. Accordingly, on appeal from a judicial review application, an appellate court is required to 'step into the shoes' of the primary judge and ask and answer that question for itself. Applying that approach, in *SZVFW*, the High Court held that the decision of the Refugee Review Tribunal (tribunal) to affirm the delegate's decision refusing the respondents' visas was reasonable.

Background

At the relevant time, s 426A(1) of the *Migration Act 1958* (Cth) (Act) provided that, if an applicant for a visa was invited under s 425 of the Act to appear before the tribunal but did not appear at the designated place and time, the tribunal may make a decision on the review without taking any further action to allow or enable the applicant to appear before it. Sub-section (2) provided that s 426A did not prevent the tribunal from rescheduling the applicant's appearance before it, or from delaying its decision in order to enable the applicant's appearance before it to be rescheduled. Section 426A has since been amended, but not so as to change the continued relevance and applicability of the High Court's reasoning in SZVFW.

The respondents applied for protection visas. They gave their residential and postal address in the application. The respondents failed to attend their interview with the delegate of the minister. In their absence, the delegate refused to grant their visas.

The respondents applied to the tribunal for a review of the decision. Again, they specified their address in the application. The tribunal sent a letter to that address, acknowledging receipt of their application and inviting them to provide material or written arguments as soon as possible. The respondents did not respond. Three months later, the tribunal sent another letter to the respondents' address, inviting them to appear before it on a given date and saying that, if they did not so do, the tribunal 'may make a decision without taking any further action to allow or enable you to appear before it'. The respondents did not respond to the letter and did not attend the hearing. The tribunal made a decision under s 426A(1) affirming the delegate's decision without taking any further action to enable the respondents to appear before it.

Whether or not the tribunal's decision was legally unreasonable was a question of law and 'to every question of law, there can only be one right answer'

The reasoning below

The respondents appealed to the Federal Circuit Court. The judge held that the tribunal's decision to affirm the denial of the respondents' visa without giving them a further chance to appear was legally unreasonable and so beyond power: *SZVFW v Minister for Immigration and Border Protection* (2016) 311 FLR 459 at [82]. Her Honour reasoned that the tribunal could not have been satisfied that the letter inviting the respondents to attend the hearing had been received by them; the attendance of the hearing was important to them; and the tribunal could have attempted some further communication without difficulty. In those circumstances, the tribunal should have taken some other action before proceeding to make its decision.

The minister appealed to the Federal Court. A Full Court was constituted to hear the appeal.

The Full Court held that it was not its task to 'step into the shoes of the primary judge' and determine for itself whether the tribunal's exercise of the discretion under s 426A was unreasonable. The decision that the tribunal's exercise of discretion was unreasonable was 'fundamentally a decision which turned on [the primary judge's] evaluative judgment'. As such, to overturn that decision, the minister had to establish an appealable error of fact or law, akin to that required in appeals from discretionary judgments: *Minister for Immigration and Border Protection v SZVFW* (2017) 248 FCR 1 at [43]-[44]. Adopting that approach, the Full Court deferred to the primary judge's decision and concluded that no appealable error had been identified in her Honour's reasons (at [48]-[57]).

The High Court

There were two questions before the High Court:

- Was the role of the appellate court to step into the shoes of the primary judge and decide for itself whether the tribunal's decision was unreasonable, or was decision of the primary judge to be afforded the deference given to discretionary decisions?

- If the former was correct, was the tribunal's decision legally unreasonable?

The High Court allowed the appeal. The court unanimously held that the appellate court's role was to decide for itself whether the tribunal's decision was unreasonable

and, following that approach here, the tribunal's decision was not unreasonable. Each of the five justices (except Nettle and Gordon JJ) gave separate reasons, but their reasons were broadly similar.

As to the first question, the High Court held that not every decision that involves an evaluative exercise about which reasonable minds may differ is, or is akin to, a discretionary decision and thus entitled to, the deference afforded by appellate courts to such decisions (at [46]-[49] per Gageler J; [85] per Nettle and Gordon JJ; and [147] per Edelman J.) Specifically, here, whether or not the tribunal's decision was legally unreasonable was a question of law and 'to every question of law, there can only be one right answer' (at [127] per Edelman J; see also [54], [56] per Gageler J, [76] per Nettle and Gordon JJ; and [150]-[155] per Edelman J). Accordingly, the primary judge's decision was not entitled to deference – the Full Court was obliged to put itself in the shoes of the primary judge and decide for itself whether the tribunal's decision was unreasonable (at [18] per Kiefel CJ; [20], [25]-[28], [55]-[56] per Gageler J; [117], per Nettle and Gordon JJ; and [130] per Edelman J).

As to the second question, the court held that the tribunal's decision to affirm the delegate's decision without taking any further action to enable the respondents to appear was reasonable (at [8]-[9] per Kiefel CJ; [28] per Gageler J; at [117] per Nettle and Gordon JJ; and [130] per Edelman J). The test for legal unreasonableness is stringent (at [10]-[11] per Kiefel CJ; [52] per Gageler J; [135], [140] per Edelman J). That test was not met here. Among other things, the justices noted that the tribunal was specifically empowered to take the course it did by s 426A; the preconditions of that section had been fulfilled (or at least no submission to the contrary was made on appeal); the tribunal was obliged by s 420 of the Act to carry out its functions in a way that was 'fair, just, economical, informal and quick'; and there was reason to believe that providing the respondents with a further opportunity to appear would be futile as they had not taken the opportunity to appear before the minister's delegate (at [7]-[9], [13] per Kiefel CJ; at [64]-[70] per Gageler J; [96]-[97], [118]-[123], per Nettle and Gordon JJ; and [141] per Edelman J). Indeed, Gageler J said the tribunal would 'ordinarily be acting reasonably' in deciding to exercise the discretion under s 426A(1) to proceed to make a decision on the merits of an application for review without making any further attempt to make contact with the applicant (at [69]).

Implications of decision

The case of *SZVFW* is a useful reminder of the test of legal unreasonableness for judicial review and the metes and bounds of appellate intervention. It makes clear the distinction between the roles of the decision-maker, primary judge and appellate court. The decision-maker, in the exercise of a statutorily conferred discretion, must exercise it reasonably. The primary judge, on judicial review, must ask itself the legal question 'was the decision of the administrative decision-maker reasonable?' and, in doing so, pay due deference to the fact that the administrative decision-maker is exercising a discretion. However, the primary judge is not itself exercising a discretion and therefore attracts no special deference from an appellate court. Like the primary judge, the appellate court is obliged to ask, and answer, the legal question – and, no matter how complicated that question is, there is only one correct answer.

Prohibition of same-sex sexual conduct struck down in India

Douglas McDonald-Norman reports on *Navtej Singh Johar v Union of India WP (Crl) No 76* of 2016

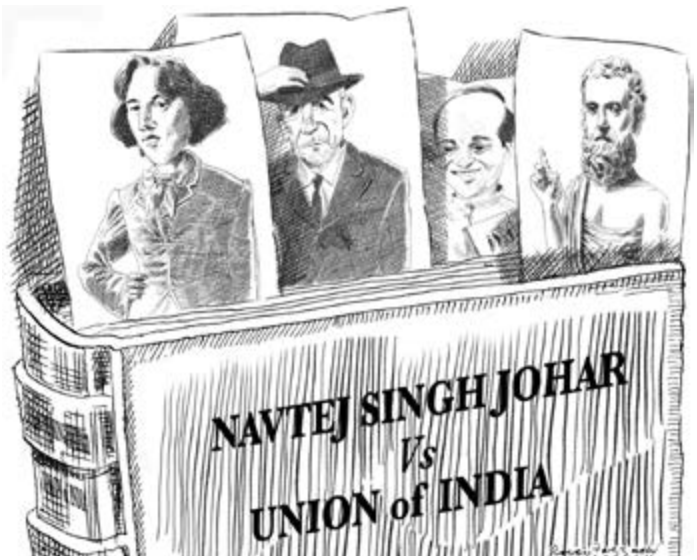
In *Navtej Singh Johar v Union of India*, the Supreme Court of India (India's highest court) declared that to the extent that a provision of the *Indian Penal Code* criminalises consensual sexual acts between adults in private, it violates four articles of the *Constitution of India* ('the *Constitution*'). The provision in question was section 377 of the *Indian Penal Code* ('section 377') which criminalises 'carnal intercourse against the order of nature'. Section 377 has been widely understood as a prohibition of same-sex sexual conduct.

In order to understand the significance of this decision, some background on the judicial treatment of section 377 is necessary. The section was enacted by the British colonial regime in India and hence predates the 1950 commencement of the *Constitution*. One of the judgments in *Navtej Singh Johar* referred to its enactment as follows: 'A hundred and fifty-eight years ago, a colonial legislature made it criminal, even for consenting adults of the same gender, to find fulfilment in love. The law deprived them of the simple right as human beings to live, love and partner as nature made them.' (Chandrachud J at [2]).

Section 377 has been highly controversial. The *Constitution* guarantees equality before the law and equal protection of the laws (article 14), prohibits discrimination on specified grounds (article 15) and protects rights to freedom of expression (article 19(1)(a)) and to life and liberty more broadly (article 21). In recent decades, India's Supreme Courts and state High Courts have often interpret-

ed these rights in expansive terms. The right to life and liberty, in particular, has been interpreted to protect rights to human dignity (*Maneka Gandhi v Union of India* AIR 1978 SC 597), personal autonomy (*Anuj Garg v Hotel Association of India* (2008) 3 SCC 1) and privacy (*Puttaswamy v Union of India* (2017) 10 SCC 1). The apparent contradiction between this progressive constitutional regime and the repressive character of section 377 has prompted decades of litigation and constitutional challenge.

In *Naz Foundation v Government of NCT of Delhi* (2009) 111 DRJ 1, the Delhi High Court found section 377 to be inconsistent with articles 14, 15 and 21 of the Constitution. This decision was overturned on appeal to the Supreme Court, in the much-criticised judgment *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1 ('*Koushal*'). *Koushal* invited controversy and condemnation both for the result reached (the continued criminalisation of same-sex sexual conduct) and for its reasoning. *Koushal*'s explanation of its findings is cursory, partial and troubling; the decision observes, for example, that 'a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders', and employs this in favour of the constitutionality of section 377 – an apparent justification for discrimination based on the size of the targeted group.



After *Koushal*, a coalition of civil society groups again sought a declaration from the Supreme Court of India that section 377 was unconstitutional. (No prosecution under the section was required to prompt these proceedings – an artefact of India's unusually expansive rules on standing.) These proceedings were heard by a five-judge bench of the court. In their resulting decision, the court determined that *Koushal* was incorrectly decided.

The decision in *Navtej Singh Johar* is expansive. It extends to nearly 500 pages in length (across four separate judgments). Its language is often florid and allusive – the first sentence of the first judgment (that of Misra CJI and Khanwilkar J) quotes Goethe and Schopenhauer. If *Koushal* was terse, rigid and unconsidered, *Navtej Singh Johar* is discursive, passionate and extensively researched. Citations include Aristotle, Oscar Wilde, Leonard Cohen, the Hart-Devlin debate, Michel Foucault's *Discipline and Punish* and Vikram Seth; cases cited include decisions from the United States, South Africa, Fiji, Belize, Trinidad and Tobago and the UN Human Rights Committee (in *Toonen v Australia*). The fact that the four judgments make little reference to one another makes it difficult to identify common ground between the judges except in general terms.

The court in *Navtej Singh Johar* considered at length the purportedly *transformative* character of the *Constitution* – the notion that 'the ultimate goal of our magnificent Constitution is to make right the upheaval which existed in the Indian society before the adopting the Constitution' (Misra CJ and Khanwilkar J at [95]). This aspiration operates in concert with the identification of 'constitutional morality' underpinning (and expressed within) the *Constitution*, characterised by a commitment to liberty, equality and fraternity (Chandrachud J at [143]-[144]). The court explicitly differentiated this 'constitutional morality' from any prevailing societal morality (Misra CJ and Khanwilkar J at [119]-[122], Nariman J at [80] and Chandrachud J at [144]), or from the 'Victorian morality' responsible for section 377 (Nariman J at [78]). Instead, the court emphasised the Constitution's protection of fundamental rights against 'the disdain of majorities, whether legislative or popular' (Misra CJ and Khanwilkar J at [161]; see also Chandrachud J at [142]). This consideration of constitutional purpose and objectives informs the broad characterisation of constitutional rights in *Navtej Singh Johar*.

In respect of article 14 of the *Constitution* (the right to equality), the court reiterated that any constitutionally-valid act of unequal treatment must both amount to a reasonable classification based on intelligible differentia and have a rational nexus with the legitimate constitutional object sought to be achieved. Every judge in *Navtej Singh Johar* found that section 377 did not satisfy this test. As Chandrachud J explained, section 377 amounts to an impermissible and arbitrary act of 'classification' between 'ordinary intercourse' and 'intercourse against the order of nature', given that no 'intelligible differentia' could be found (in respect of 'indeterminate terms' like 'natural' and 'unnatural') to justify the distinction beyond mere moral distaste (Chandrachud J at [29]-[30]).

The court also found section 377 to be inconsistent with article 15 of the *Constitution* (prohibiting discrimination, including on the basis of sex). Notably, Chandrachud J's reasoning in this regard drew upon the court's prior recognition in *Anuj Garg v Hotel Association of India* (2008) 3 SCC 1 that article 15 prohibits policies or laws based upon stereotypical gender roles arising from traditional cultural norms. Chandrachud J recognised (at [46]) that section 377 both draws and upon and reinforces such stereotypes: 'Statutes like Section 377 give people ammunition to say 'this is what a man is' by giving them a law which says 'this is what a man is not'.' To the extent that section 377 penalises relationships which defy 'the male/female divide' (Chandrachud at [47]), 'leads to the perpetuation of a culture of silence and stigmatisation' (at [52]) and thereby lends support to such traditional cultural notions, Chandrachud J found the section to be invalid.

In respect of article 19(1)(a) of the *Constitution* (the right to freedom of expression), the court found that the right to freedom of expression includes broader implicit rights to the expression of personal identity, including 'the right to choose a sexual partner' (Misra CJ and Khanwilkar J at [241]-[247]). To the extent that section 377 requires concealment and prevents expression of a person's sexual orientation, the section impermissibly restricts freedom of expression (Malhotra J at [17]). The court also found section 377 to be inconsistent with article 21 of the *Constitution* (the right to life and liberty), insofar as the section conflicts with that article's broader implicit guarantees of rights to dignity, privacy and individual autonomy.

No single judgment of any court can by itself overturn endemic social stigma and homophobia. But nor should the broader cultural significance of law and legal processes be overlooked. Section 377 gave legal force and validation to discriminatory attitudes, and in doing so helped to perpetuate those attitudes. The decisive repudiation of section 377 by the Supreme Court is an encouraging and inspiring spur towards the rejection of the values for which that section stood.

Author's note: Paragraph references are to individual judgments. Each judge's separate decision begins with a new paragraph [1].

Procedural fairness in probate proceedings

Amy Campbell reports on *Nobarani v Mariconte* [2018] HCA 36

The High Court held unanimously that a denial of procedural fairness sufficient to warrant a new trial had occurred in probate proceedings. A substantial wrong or miscarriage arose when the nature of a hearing was changed on short notice to include related proceedings to which a self-represented litigant had not previously been a party and in respect of which he had not taken any steps.

Background

The appellant claimed an interest in challenging a handwritten will made in 2013. The appellant had been the beneficiary of some personal property and jewellery in a previous will made in 2004. The appellant filed two caveats against a grant of probate without notice to the respondent. The respondent brought a motion seeking orders that the caveats cease to be in force. The respondent also brought proceedings seeking a grant of probate. The appellant was not a party to the probate proceedings, and although he was served with the statement of claim and filed an appearance, he was not directed to take any steps in the probate proceedings.

Three clear business days before the trial which the appellant had been told would be confined to the respondent's motion that the caveats cease to be in force, the appellant was told the trial would be of the claim for probate. The appellant, who was unrepresented, was given one clear business day to file and serve a defence and serve any supplementary evidence upon which he wished to rely in addition to the affidavits he filed in the caveat motion. The trial judge was not informed that the appellant was not a party to the probate proceedings or that the appellant's affidavits had been filed only in connection with the caveat motion.

At the trial, the appellant was joined as a party to the claim and a cost order sought against him. His defence was in disarray. His applications for adjournments were refused. The trial judge gave an oral judgment granting probate and made a costs order against the appellant: *Mariconte v Nobarani* [2015] NSWSC 667.

The appellant appealed to the Court of Appeal, arguing there had been a lack of procedural fairness: *Nobarani v Mariconte* (No 2) [2017] NSWCA 124. Ward JA dismissed the appeal, concluding that although the appellant had been denied procedural fairness, that denial did not deprive him of the possibility of a successful outcome. Emmett AJA dismissed the appeal on the basis that the appellant did not have an interest in challenging the will made in 2013. Simpson JA dissented. Her Honour concluded that the appellant had been denied procedural fairness and that the denial was a substantial miscarriage of justice warranting a new trial.

The High Court's decision

The court, comprising Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ, delivered a joint judgment unanimously allowing the appeal. Their Honours held that there had been a material denial of procedural fairness and that the appellant did have sufficient interest to challenge the will made in 2013.

The court observed that it had the power to order a new trial on appeal pursuant to sections 75A(10) and 101 of the *Supreme Court Act* 1970 (NSW) (at [36]). To do so on the basis of a denial of procedural fairness required it, pursuant to rule 51.53 of the *Uniform Civil Procedure Rules 2005* (NSW), to be satisfied that some substantial wrong or miscarriage had been thereby occasioned (at [37]-[39]).

Denial of procedural fairness amounted to a 'substantial wrong or miscarriage' in the sense that the appellant was denied the possibility of a successful outcome.

The court stated that the requirement of a 'substantial wrong or miscarriage' is that 'the error must usually be material in the sense that it must deprive the party of the possibility of a successful outcome' (at [38], [39]). Once that has been established, a new trial will be ordered unless the other party can show reason for the exercise of discretion not to order a new trial (at [39]). One reason that might be sufficient for that purpose is 'where no useful result could ensue because a properly conducted trial will not make a difference' (at [39]).

The court considered that there was a denial of procedural fairness to the appellant from the consequences, and effect, of altering the hearing on short notice from a hearing of the caveat motion to a trial of the grant of probate (at [40], [44]).

In reaching that conclusion, the court had regard to the fact that the appellant had little appreciation of court procedure or rules of evidence, his grasp of English was not strong, and he only had three days to: consider the statement of claim to proceedings to which he had not been joined; prepare and serve a defence; issue subpoenas; locate witnesses; and obtain supplementary evidence (at [43]). The court also observed that the abbreviated timetable had consequential effects, for example, the appellant did not give notice to cross-examine a key witness and was not able to locate another key witness, and the primary judge refused to consider an affidavit filed in the caveat proceedings where it was not read and the witness was not before the court (at [44]). The court considered that all of these matters in combination were 'manifestations of the material denial of procedural fairness to the appellant' (at [44]).

The court held that the denial of procedural fairness amounted to a 'substantial wrong or miscarriage' in the sense that the appellant was denied the possibility of a successful outcome, observing that while the evidence from the respondent was strong, a grant of probate was not inevitable (at [46]). The court stated that it would be 'rare' that a submission that a properly conducted trial could not make a difference to the outcome would succeed (at [48]). In the circumstances before the court, the submission failed because it assumed the court should attempt an assessment of prospects by conducting a hypothetical trial, which required (among other things) speculation about evidence that might be called (but was not called) and potential cross-examination (at [48]).

The court also concluded that the appellant had sufficient interest in the will to challenge it, as the appellant was a person who had a right that would be affected by the grant of probate, given he was a legatee under the will made in 2004. The court considered the respondent's submission that the personal property and jewellery left to the appellant in that will was too insubstantial to found such an interest factually erroneous (as it was based only on a lack of reference to the items in an inventory) and legally erroneous (by suggesting rights of low monetary value cannot amount to a legal interest) (at [49]).

Accordingly, the court allowed appeal with costs and ordered a new trial.

No relaxation of the doctrine of part performance

David Smith reports on *Pipikos v Trayans* [2018] HCA 39

Introduction

The High Court considered a written agreement in relation to land that did not accord with statutory requirements.
The court confirmed that where an agreement in relation to land does not satisfy statutory writing requirements, a decree of specific performance based on part performance will be made only where there are acts of part performance that are unequivocally, and in their own nature, referable to the alleged agreement. In so doing, the High Court declined to relax the requirement of 'unequivocal referability' established by Lord Selborne in Maddison v Alderson (1883) 8 App Cas 467.

Facts

In 2002, the respondent (Trayans) and her then husband (George) bought a property in South Australia (Clark Road property). Trayans became the sole registered owner.

In July 2004 another property in South Australia was purchased (Penfield Road property). This property was registered as being owned in two half shares: the appellant (Pipikos) and his wife as owners of one half share as joint tenants and Trayans and her husband George as owners of the other half share as joint tenants. Pipikos and George are brothers. Trayans and George continued to live at the Clark Road property.

Pipikos alleged that when he and his wife were considering purchasing the Penfield Road property, Trayans and George wished to take a half interest in the property but did not have available funds. Pipikos said that he and his brother George agreed that George's wife Trayans would sell a half interest in the Clark Road property to Pipikos in return for Trayans and George taking a half interest in the Penfield Road property.

On 3 August 2009, at Pipikos' request, Trayans signed a handwritten note agreeing that Pipikos was 'the owner of half of the [Clark Road property] … via an agreement between George ... and [Pipikos] of the purchase of the [Penfield Road property]".

Appellant's claim

Section 26 of the *Law of Property Act 1936* (SA) (Act) provides:

> (1) No action shall be brought upon any contract for the sale or other disposition of land or of any interest in land, unless an agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by, the party to be charged.
>
> (2) This section does not affect the law relating to part performance.

This is a modern iteration of s 4 of the *Statute of Frauds* 1677. The equivalent provision in NSW is s 54A of the *Conveyancing Act 1919* (NSW).

The note made on 3 August 2009 did not satisfy the requirements of s 26(1) of the Act. However, it was relied on as evidence of the agreement the appellant said was made in July 2004. The appellant claimed that the doctrine of part performance entitled him to a decree of specific performance requiring the respondent to convey him a half interest in the Clark Road property.
The following acts of part performance were relied on by the appellant (at [24]):

> The payment by the appellant of the deposit and the balance of the purchase price for the Penfield Road property;
>
> The payment by the appellant of $7,500 to $8,000 to the respondent's husband.
>
> The payment by the appellant of $2,500 towards the mortgage of the Clark Road property in December 2009; and
>
> The appellant's attempts to document or enforce the agreement by the signed note dated 3 August 2009, the lodging of a caveat and the commencement of the proceedings.

The trial judge concluded that no contract in the terms asserted by the appellant was binding on the respondent and held further that the acts said by the appellant to constitute part performance were not unequivocally referable to a contract of the kind asserted by him: *Pipikos v Trayans* [2015] SADC 149.

The Full Court overturned the trial judge's conclusion that the alleged agreement had not been established, but held that the requirements of the doctrine of part performance were not satisfied and, therefore, dismissed the appellant's appeal: *Pipikos v Trayans* (2016) 126 SASR 436.

Appeal to the High Court

The appellant's further appeal to the High Court was dismissed.

The primary judgment was given by Kiefel CJ, Bell, Gageler and Keane JJ. Their Honours referred (at [3]) to the test for whether a contract for the disposition of land, or an interest in land, has been partly performed as that formulated by Lord Selborne in *Maddison v Alderson* at 497, namely that 'the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged'.

The appellant conceded in oral argument

that the acts set out above which were relied upon to support the part performance were insufficient to satisfy the requirement of 'unequivocal referability' (at [77]).

The appellant however urged the adoption of a more relaxed approach, akin to the approach taken in the context of equitable estoppel. On the appellant's argument, the question a court must ask is whether a contracting party has knowingly been induced or allowed by the counterparty to alter his or her position on the faith of the contract (at [5]). That proposition was rejected.

The appellant argued that Lord Selborne's unequivocal referability test could be traced to repealed rules of Chancery procedure which were in fact concerned with acceptable evidence of the parol contract in place of the writing required by the *Statute of Frauds* (at [46]). It followed that the test developed from requirements concerning proof of the contract rather than enforcement of the equities and was therefore ill-founded, it being accepted by both parties that the doctrine is properly understood as concerned with enforcing the equities arising from partial performance.

Kiefel CJ, Bell, Gageler and Keane JJ rejected this submission, holding that the unequivocal referability requirement 'is not concerned with proof of the particular contract in question, but with dealings between the parties which in their nature establish that the parties are in the midst of an uncompleted contract' (at [50]). Unequivocal referability is required because the equity to have the transaction completed arises where acts are proved that are consistent only with partial performance of a transaction of the same nature as that which the plaintiff seeks to have performed (at [54]).

The appellant invited the High Court to subsume part performance within the development of equitable estoppel on the basis that equity's desire to prevent unconscientious conduct is the common root of both equitable estoppel and part performance. Kiefel CJ, Bell, Gageler and Keane JJ held that although there might be a common root, part performance and equitable estoppel were different and do not 'cover the same ground' (at [58]).

Unequivocal referability is required because the equity to have the transaction completed arises where acts are proved that are consistent only with partial performance of a transaction of the same nature as that which the plaintiff seeks to have performed (at [54]).

Their Honours also said that the nature of the equity enforced by part performance is different from that enforced by equitable estoppel. Unlike equitable estoppel, part performance does not involve an analysis of the extent to which the defendant's attempt to resile from completion of the transaction would result in detriment to the plaintiff, and the relief granted does not need to be tailored to prevent the detriment to the plaintiff (at [61]).

Their Honours concluded on this issue that the equity of the plaintiff in cases of part performance has been regarded as sufficiently strong, without more, to support an order for specific performance. Lord Selborne's requirement that acts of part performance be unequivocally referable to a contract of the kind asserted by the plaintiff should be understood as being necessary to give rise to this peculiarly strong equity (at [65]).

Kiefel CJ, Bell, Gageler and Keane JJ also considered *Steadman v Steadman* [1976] AC 536, noting that to the extent the disparate judgments in *Steadman* signalled a broadening of the doctrine of part performance before its abolition in the United Kingdom, *Steadman* was not a basis for departing from *Maddison v Alderson* (at [66]).

Nettle and Gordon JJ delivered a concurring judgment in which their Honours made additional remarks.

Edelman J agreed in the result but for different reasons. His Honour held that courts do not enforce the equities arising from acts of part performance. The courts enforce the contract itself. His Honour said that part performance is derived from the doctrine of 'equity of the statute' which permitted the imposition of an 'external morality' despite the terms of the statute (at [125]). In His Honour's view, part performance involves 'the imposition of a moral principle despite the terms of the statute' (at [125]). His Honour held that the doctrine of equity of the statute had fallen into disfavour (at [155]) and it followed that part performance should not be extended by the formulation of a more relaxed test.

Trial of the 'Nauru 19'

Michael Swanson reports on *R v Batsiua* [2018] NRSC 46

Introduction

A series of criminal charges were brought by the Republic of Nauru against Mr Batsiua and others (known as the 'Nauru 19') for conduct relating to a protest outside of the Nauruan Parliament on 16 June 2015. Mr Batsiua and two other members of the Nauru 19 were former members of the Nauruan Parliament. The charges included Unlawful Assembly, Riot and Disturbing the Legislature which are all crimes under the *Criminal Code,* 1899 of Nauru. Most of the defendants pleaded not guilty and argued that they had engaged in peaceful protest, which is protected by the Constitution of Nauru.

On 13 September 2018, the Supreme Court of Nauru, constituted by Justice Geoff Muecke, granted a permanent stay of the proceedings against the defendants, on the basis that the court was satisfied that the defendants could not receive a fair trial. Justice Muecke is a retired chief judge of the District Court of South Australia appointed to the Supreme Court of Nauru in March 2018.

The defendants were unable to obtain local legal representations in the dispute. After a series of attempts to seek representation from various Australian legal practitioners, Mr Christian Hearn, solicitor, and Ms Felicity Graham, Mr Mark Higgins, Mr Stephen Lawrence and Mr Neal Funnell of the NSW bar were retained as legal representatives for the defendants.

The legal framework

The question before the court was not one which had previously been considered by a court in the Nauruan legal system.

Muecke J observed (at [457]) that in considering whether the court should exercise its discretion to order a permanent stay, the court is required to balance a number of factors, unique to each proceedings, and have regards to the interests of the defendants, the alleged victims; and the community generally.

At [459] – [461] his Honour considered *Jago v District Court (NSW)* (1989) 168 CLR 23 (per Mason CJ) and *Carroll v R* (2002) 213 CLR 635 (per Gaudron and Gummow JJ) as well as the jurisdiction to prevent abuse of executive power, concluding that the power of the court to order a stay may not always be discretionary; in some circumstances it is mandatory.

Muecke J considered at [49] all aspects of the history of the dispute, including proceedings which had been before a variety of courts and actions of the parties, were relevant to a consideration of the application. A substantial portion of the judgment, some 315 out of 500 paragraphs, recounts and considers the history of the dispute.

Order for payment of

Former members of parliament, Mathew Batsiua and Squire Jeremiah outside court after obtaining a permanent stay of their criminal proceedings.

defendants' legal fees

In a judgment delivered on 21 June 2018 Muecke J ordered that the Republic of Nauru pay into the Supreme Court an amount of $224,000 to pay for the costs of the defendants' legal representation.

The Republic of Nauru did not pay those fees as ordered and raised a number of arguments as to why it could not or would not comply with that order. At one point the secretary of justice, in a letter, asserted that the Government of Nauru was not bound by the order as it was not a party to the proceedings.

The Secretary further wrote that there was no allocation of money pursuant to the *Treasury Fund Protection Act 2004*. The only possible avenue was the amount of $3,000 which was contemplated in an amendment to the *Criminal Procedure Act 1972*, which Muecke J had previously found unconstitutional.

Both the secretary and the director of public prosecutions attempted to draw a distinction between the Republic of Nauru, the Executive or Government of Nauru, the DPP and the legislature of Nauru as justification for why the order would not be complied with, summarised at [433].

Ultimately Muecke J found at [450] that the submissions by the Republic of Nauru as to who, or what, does or does not constitute the Republic of Nauru were at best disingenuous. His Honour found that at worst, they were a conscious and deliberate assertion that no lawyer could honestly believe. His Honour's order of 21 June 2018 bound the Republic of Nauru, and his Honour found that the Executive, as the branch responsible for the republic's finances, must ensure that the republic comply with the order.

His Honour found at [453] that the minister for justice understood and knew that it was the Government of Nauru that must pay the money to comply with the orders of 21 June 2018.

The orders of 21 June 2018 had not, at the time of that judgment, been complied with.

Findings of Fact

His Honour made a number of factual findings which were relevant to the conclusion that the defendants could not receive a fair trial, including:

- that the Nauruan government had acted in a manner contrary to the Rule of Law in Nauru (at [370], [375], [378] and [385]);
- that shortly after the defendants had been charged, the then Public Defender refused to represent them. The minister for justice had further made it clear to that those on Nauru who could have provided legal representation to the defendants were not to do so (at [367] to [370]);

Legal team for the Nauru 19 (L-R): Felicity Graham, Christian Hearn, Stephen Lawrence, Bret Walker SC, Mark Higgins and Neal Funnell outside the High Court of Australia, following the successful appeal by three members of the Nauru 19.

Members of the Nauru 19 anti-government protestors awaiting the decision of the Supreme Court.

- that the Nauruan Government had imposed a 'blacklist' on the defendants which prevented them from obtaining employment or receiving income from other sources, including rent from properties owned (at [371] to [375]);
- that prior to September 2016, when Mr Hearn first arrived in Nauru, almost all of the defendants had yet to receive any legal advice concerning the nature of the allegations that had been put against them and the evidence that had been collected (at [377);
- that the minister for justice was consciously and deliberately seeking to influence the Nauruan Courts. This included, as discussed earlier in his Honour's judgment, reference to a Magistrate's employment contract being considered in the near future (at [384]);.
- that the latest brief of evidence was not completed and disclosed to the defendants' legal team until September 2017 (at [388]);
- that the Nauruan Government, through its various bodies, fought in the Nauruan courts against the admission of Australian legal practitioners engaged to represent the defendants. The minister for justice further resisted, and refused to process, the visas of some of those same legal practitioners (at [379]). This was in comparison to what Muecke J described at [397] as 'a quite different approach [of the minister for justice] to getting Australians into Nauru when they were coming to act for the republic, than he had to getting Australians into Nauru who the defendants wished to act for them';
- that the two-year delay in the case coming to trial was caused by the republic and its 'prosecutorial, administrative and executive representatives in the courts of Nauru'; noting in particular, at [412], that for the majority of this time the defendants were unrepresented;
- that further delay was caused by accusations of contempt of court by the republic, on several occasions, against the legal representatives of the defendants. These accusations included threats of proceedings being brought against those legal practitioners, and seeking personal costs orders against them (at [416]);
- On 5 June 2018 the minister for justice, with knowledge of these proceedings, introduced legislation for the express purpose of frustrating a motion which had been argued before the courts and for which judgment was reserved (at [427]).

Muecke J concluded at [462] to [463] that, in consideration of the above and other findings of fact, that:

My conclusion is that the Executive Government of Nauru does not want these defendants to receive a fair trial within a reasonable time as guaranteed to every Nauruan in the country's Constitution, being the Supreme Law of Nauru. Further, I conclude that instead of fair trial for these defendants within a reasonable time, the Executive Government of Nauru wishes as only that they, and each of them, be convicted and imprisoned for a long time, and that the Government of Nauru is willing to expend whatever resources, including financial resources, as are required to achieve that aim.

I conclude that the Executive Government of Nauru does not wish or intend to provide any resources, including financial resources, to these defendants so as to ensure that they do receive a fair trial according to law within a reasonable time according to the country's Constitution

Orders

Ultimately, at [475], Muecke J held that in the circumstances of this case, where the court was satisfied that a fair trial was not possible, the power to order a permanent stay was not discretionary, but mandatory.

This was, as his Honour described at [476], 'a very rare case where Executive Inference *(sic)*… has been such that I consider that the 'continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so continues an abuse of the process of the court'… the Executive Government of Nauru has displayed persecutory conduct towards these defendants which is all the more serious in the unique context of Nauru.'

David Catterns retires

Australian Championship for the Adams 10 class, in which David Catterns did not compete.

'Mr Murdoch, when witnesses give evidence before this tribunal, it is customary for the tribunal to be told, what is the witness's address. I noticed that your counsel, Mr Meagher, did not ask you, what is your address. Would you mind telling the tribunal what it is?'

This was David Catterns' opening question to Rupert Murdoch, in proceedings in the Australian Broadcasting Tribunal, which were consequential on Murdoch having renounced his Australian citizenship and taken up US citizenship, for the purpose of acquiring media assets in the United States of America. This brought Murdoch into apparent conflict with Australian broadcasting law, in particular concerning his ownership of television licenses TEN-10 in Sydney and ATV-10 in Melbourne.

Murdoch and his advisers sought to outflank the effect of the Australian broadcasting laws, by the transfer of the ownership of his Australian broadcasting interests to companies controlled – at least in a legal sense – by his three sisters, each of whom was an Australian citizen.

With characteristic skill and charm, David Catterns subtly disassembled this legal artifice, in a lengthy hearing in the tribunal, in which his opposing counsel comprised Roddy Meagher and Dyson Heydon (for the Murdoch companies) and Tom Hughes and Jim Spigelman (for the sisters' company), each instructed by teams of lawyers from Dawson Waldron. David, then still a junior barrister, acted on the instructions of his old friend, Peter Banki, on behalf of the relevant trade unions (the Australian Journalists' Association and Actors Equity), who wished to see the end of any involvement in Australian broadcasting, on the part of Murdoch or his family.

David was able to cast enough doubt on the legal efficacy of Murdoch's arrangements, to persuade the tribunal to remit the proceedings to the Federal Court of Australia, to decide the questions of law which arose in the matter. This was notwithstanding that the tribunal had received into evidence the written advice of Mr A M Gleeson QC, opining in favour of the legal validity of the transactions, for the purposes of the Broadcasting Act.

In the proceedings in the Full Court of the Federal Court (*Re Application of News Corp* (1987) 15 FCR 227), David's arguments were successful; with the effect that Murdoch was effectively left with little choice but to dispose of his Australian broadcasting interests, by a true arm's-length sale.

This Murdoch did; but as part of a larger overall series of transactions, in which Murdoch obtained the ownership of a large section of the Australian print media, including the Herald & Weekly Times, the publisher of the Melbourne *Herald* and Adelaide *Advertiser*.

The trade unions then again sought to challenge those transactions in the tribunal, on the grounds that they involved an exercise of power over Australian broadcasting licences, on the part of a US citizen (Murdoch), which exercise of power was impermissible under the Broadcasting Act. In those later proceedings, this argument sank without trace, perhaps in part because in those proceedings, the services of David Catterns had been retained by one of the media interests which was a participant in the overall transaction.

In the highest traditions of the bar, Catterns' services continued to be available to whatever party sent him a brief but, in a later broadcasting case, when David appeared on behalf of the Australian tycoon, Alan Bond, it proved to be beyond even the skill of Catterns, to win the argument that Bond was a '*fit and proper person*', for the purposes of the Broadcasting Act (*Australian Broadcasting Tribunal v Bond* (1991) 170 CLR 321).

While the outcome of this litigation was not in favour of Mr Bond, he at least thereby had the opportunity to do a little bit of yachting with David Catterns, an activity at which, it is fair to say, Bond had the greater fame but Catterns had the greater aptitude.

Catterns' youthful exploits included his participation as the Australian representative in the Laser dinghy world championship at the famous Kiel regatta venue. In later years, he match-raced in Etchell yachts and even beat another famous Americas Cup yachtsman, Sir James Hardy.

Following his appointment as Queens Counsel, Catterns had the opportunity to make use of his yachting background, in litigation over the design of the Adams 30 keelboat, when he led Richard Cobden, before Justice Daryl Davies in *Shacklady v Atkins* (1994) 126 ALR 107. In that case, the copyright in the yacht's plans and their industrial application was in controversy and an interesting question arose as to whether the yacht's design was purely functional or whether it incorporated aesthetic elements. While Mr Adams (the designer) was unwilling to concede in cross-examination that his design involved any aesthetic considerations, Justice Davies was persuaded by Catterns' argument, that it did.

By this time in Catterns' career, he had become the doyen of the law of copyright in Australia.

He was among the co-founders, with John Ireland QC, of Nigel Bowen Chambers in 1991. Sir Nigel, who had recently retired from the Federal Court of Australia (having been Chief Judge since the Court was established in 1976), had graciously given his agreement to the use of his name, when asked by David and John. Sir William Deane spoke, at the opening of the chambers, in the presence of Sir Nigel, who had been a mentor of his. Sir William spoke of the distinction of Sir Nigel's career, not as a judge and a politician, for which he may now be better remembered – but as an advocate. He was able to prove his case in this respect, by reference to only a single volume of the *Commonwealth Law Reports*, and the many important cases within those pages in which Sir Nigel had appeared.

The Federal Court, in which Catterns by then mostly practised, was in the process of becoming Australia's most important forum for the litigation of intellectual property disputes. Ireland and Catterns, as heads of chambers at Nigel Bowen Chambers, gathered around them many of the barristers who were, or went on to be, leading authorities in this field.

As is well-known, at the commencement of his career, Catterns had participated in *University of New South Wales v Moorhouse* (1975) 133 CLR 1, a seminal case in the area. David was then a legal officer with the Australian Copyright Council and had become involved with Peter Banki and others, in the creation of CAL (Copyright Agency Limited), the collecting society which facilitates remuneration for authors, from the copying of their work.

Since those early days, CAL and the many other collecting societies have come to occupy a central position in the functioning of copyright law in Australia and the Copyright Act now recognises them and regulates their activities.

By the time of the foundation of Nigel Bowen Chambers and with David's increasing eminence, he began to do more appellate work, leaving the more mundane trial work to his junior colleagues.

In accordance with the motto '*Servants of all, yet of none*', Catterns has not always acted on the side of the owner of the intellectual property rights. Indeed, in recent years, he has had a strong involvement on behalf of the makers of generic medicines, in legal controversy over the extent of the patent rights of multinational pharmaceutical companies.

Most famously, in *D'Arcy v Myriad Genetics* (2015) 258 CLR 334, Catterns succeeded in getting the High Court to reverse the result in the Courts below, which had applied existing doctrine to uphold the validity of a medical patent. The point in issue was whether genetic information concerning DNA could be the subject of a valid patent and, because of Catterns' success in *D'Arcy*, it is now established that it cannot be.

For the purposes of this article, Catterns was asked to provide a photograph of himself. He has said that none is available. It is known however, that a photograph of him once appeared in the *Sun-Herald* social pages, taken at the annual ARIA music awards. Unwilling to disclose his true identity, David ensured that the caption below this photograph described him as 'David Catterns, international yachtsperson'.

Catterns has been heard to describe himself, as 'the least-famous person in my family'. His sister, Angela, is the well-known broadcaster. His late father, Basil, was a journalist and advertising executive. He was not himself very famous, until the 1980s, when a book about the Kokoda campaign was published and General Paul Cullen was interviewed for the book. Cullen (Major Cullen at the relevant time) described his second-in-command, Captain (later Major) Catterns as 'the best and bravest soldier I ever served with'. Basil had volunteered, with the words, 'I think it's my turn, Sir', to lead the 90 men under his command, in storming a position held by over 1000 Japanese soldiers. They were successful in driving the Japanese away, with the loss of 31 Australians dead and 26 wounded. Cullen's recommendation of the award to Basil of the Military Cross was rejected for the 'ridiculous' reason (according to Cullen) that Basil had already been given a Military Cross for previous acts of valour in the same campaign. Basil himself rarely mentioned his wartime exploits, until his story was published in that and later books, in newspaper articles and television documentaries.

It is understood that David Catterns saw service, as a reservist, in the Sydney University Regiment (under Lieutenant Colonel K R Murray QC) and then in the Small Ships Squadron. Catterns explains his comparative lack of distinction in the Australian military by a failure on his part to conform to its dominant paradigm. He says that he was rejected by Murray, as 'not officer material'.

David Catterns announced his retirement from the profession and appeared in his last case, on 4 May 2018. The judge, Justice Jagot, permitted David's opponent that day, Tony Bannon SC, to make some informal observations in honour of David's career, after which her Honour also placed on the record, her acknowledgment, from the judiciary's viewpoint, of David's service to the law.

This exchange, together with further observations from Peter Banki and from Justice Stephen Burley, was published in the September 2018 issue of the *Intellectual Property Forum*. It records the very high respect in which David Catterns is held, by all sides of the legal profession.

By Stephen Epstein

The Hon Morris David 'Dusty' Ireland QC (1928-2018)

The Honourable Morris David 'Dusty' Ireland died aged 90 on 26 July 2018 at Mudgee in NSW. Dusty was a well-known, much loved and distinguished barrister, a queen's counsel and a Supreme Court Judge. He is remembered as an ebullient gentleman, a learned and sensible lawyer and judge with a deep connection to rural NSW and people. Dusty was a late bloomer, having come to the law later than usual. Dusty had no ordinary life.

In fact, Dusty had lived lifetimes before making Queens Square a professional stamping ground. He had seen the sights of the world and even helped build some icons of Twentieth Century modernity.

Morris David Ireland was born on 14 June 1928 in Victoria. His mother and father lived at Cowra in the Central West of NSW and he started life in a family which well knew the sober years of the Great Depression. He was educated at Knox Grammar School at Wahroonga.

Dusty reached for the stars from the very beginning. As a four year-old at home in Cowra NSW, Dusty's father introduced him to Charles Kingsford Smith, the aviator. That day, Dusty sat on his father's lap in the small propeller plane and together with Kingsford Smith, they flew into the history books. It was possibly the first recorded joy flight. This would become a theme in his life.

Then, as a 13 year-old boy, he recalled peering out of the windows of the Clifton Gardens Hotel with his father (where they stayed when they sojourned in the City) and seeing the American heavy cruiser *The Chicago* moored in Sydney Harbour. On that very night 31 May 1942, three Japanese midget submarines attempted to enter Sydney Harbour by stealth. The famous incident led to 28 sailors being killed during the night when one Japanese submarine fired a torpedo hitting the HMAS *Kuttabul*.

When Dusty turned 16, his father allowed him to leave school without the Leaving Certificate. He made his own way after that. Dusty was a jackeroo for two years, then for six years he was a merchant naval officer (second officer). After the war, he sailed into Hiroshima Bay on the first western merchant vessel to moor after the atomic bomb blast. Dusty observed of Hiroshima a curious normality. It looked perfect to the country boy's eyes. After the merchant navy, Dusty reverted to the land which he loved.

Dusty was a grazier in the Rylstone district for 10 years and then became a manager at Shorncliffe Pty Ltd, a firm of civil engineers constructing roads.

By 1968, he was an unqualified engineer at Favco Industries Pty Ltd, supervising the construction of the cranes which were used to build the Twin Towers of the World Trade Centre in New York City, which were the focus of the 9/11 unprecedented attacks – his employer held the monopoly on the self-lifting crane design.

In the late 1960s, Dusty took the NSW Barristers Admission Board classes while a commercial manager at Favco Industries. He was determined to be a barrister. In order to do this, he took the Leaving Certificate (certain subjects) back at Knox. Alea iacta est. The rest is history.

Dusty was admitted to the bar on 5 December 1969. It was a magnificent time to arrive in Phillip Street, amid the crescendo of the post war promise of untold economic prosperity and then rush headlong into the tumultuous commercial upheavals which punctuated the 1970s, 1980s and 1990s. His pupil master was David Yeldham QC (later a Supreme Court judge). He took chambers on the Twelfth Floor of Wentworth Chambers in the great years with Moreton Rolfe QC, Bill Caldwell QC, a younger MA Pembroke and Mervyn Finlay QC and BT Sully QC and a younger Michael Kirby. The west corridor was where Denys Needham QC practised and once upon a time KR Handley QC among other such radicals. David Nock SC was his friend and so too was the late Hon BSJ O'Keefe QC. Dusty practised all over the country including at the infamous Broken Hill assizes (on each list day, according to the lore, Dusty settled over two hundred personal injury cases before morning tea). Dusty's practice comprised a curious blend of common law, crime and equity – he loved the human aspect of his cases and personal stories of his clients and thoroughly enjoyed being an advocate. Dusty was a *rara avis*. He did not dabble. Dusty was a master of the common law jury trial, so-called. The cases were often about catastrophic industrial and mining accidents. Dusty could talk to a jury and even mesmerise them effortlessly. Nowadays this is a lost art. He was a Bar Councillor in 1982 and 1983 and he was an early influence in the fledgling bar readers course in those years. By 30 October 1985, Dusty was in silk, practising in the style of a queen's counsel.

In 1989, Dusty was appointed an acting Supreme Court judge. On 18 May 1992, he became a permanent judge of the court. During the 1990s, he sat on complex criminal trials. Ever the trail blazer, Dusty sat on the hearing where for the first time, DNA evidence was brought before the courts in

a novel attempt to identify murderers in a large group of balaclava-clad men.

The answer lay in saliva tests on the balaclavas which the bandits wore. It was, as Cicero termed it, a *gre[x] siccariorum* [Cicero MT *Pro Sex. Roscio Amerino*], a flock of murderers or a group of masked bandits - out of

that flock of murderers, who did the deed? Dusty would decide that on the evidence and with a police escort for security. Dusty was the first at so many things throughout his life. He retired from the court on 9 June 2000, after nine years sitting full-time as a judge. Thereafter, Dusty sat as an acting judge of the court in the trial division and in the NSW Court of Appeal, from time to time.

Dusty retired to Mudgee, more precisely to the village of Lue, which he loved. He was back and forth between the city and the country for a time. He always had a longing for country NSW. At times, he could be seen in Queens Square when he sojourned in the city. By chance, having spoken with the Hon PA Bergin SC the Commercial List judge at the time, he attended the Commercial Causes Centenary Dinner in 2003. Dusty loved engaging with people (friends, family and strangers) and he did so with a quaint *bonhomie*, a pleasant turn of phrase and with a certain friendliness reminiscent of a bygone era of Australia.

Dusty was a devotee of the Australian Ballet and loved to attend the Opera House with his wife Jane for its performances. He also enjoyed golf and surfing (after many years holidaying at Narooma on the South Coast). The law was one aspect, albeit a significant one, in his life. Dusty was possessed of a certain authoritative voice, an unequalled stamina and a zest for life. Dusty also had a long and abiding devotion to education having been on the council of his beloved Knox Grammar School and also of Pymble Ladies' College. Education had enabled all the remarkable events and achievements in Dusty's life.

Dusty's funeral was held at St John the Baptist Church at Mudgee. A memorial service was held in late August for him at the Knox School Chapel in Sydney. Many lawyers gathered to farewell Dusty at the Knox Chapel; *inter alios* the Hon Murray Gleeson QC and former Supreme Court judges: Robert Shallcross Hulme QC, JRT Wood QC, Moreton Rolfe QC, John Bryson QC, Trevor Morling QC, Terry Cole QC, Peter Barr QC, David Kirby QC, the Hon WV Windeyer and with Justice Michael Pembroke, Justice Carolyn Simpson, not to mention the bancs of old solicitors and counsel who filed into the chapel to strains of the bagpipes in the fading afternoon light.

Dusty is survived by Jane his second spouse and his large family which he cherished: Wendy and Bob, Angus and Irene and Jenny. He was stepfather to Samantha, Melissa and Remy and Lucy and Jeremy. There are all of his grandchildren who recall him lovingly: Lydia, Felicity, Kate, David, Lachlan, Sarah, Elise, Simone, Owen, Meiba, Jeno, Pepon and Boitne. The affliction of Huntington's Disease claimed Marie

his first wife, and then it took his two sons John and David. They died far too young. As an example to us all, Dusty had the fullest life, it was well lived and he was a delight to all those who knew him. He was learned and kind. He left no stone unturned. His story was extraordinary.

By Kevin Tang

Clive Evatt (1931 - 2018)

Clive Andreas Evatt, barrister and Renaissance man, died on Friday, 3 August, 2018. Born in 1931, he was the only son of Clive Raleigh Evatt QC, a famous barrister and a minister in a number of state governments, and Marjorie Hannah Andreas, the daughter of a prominent businessman. Evatt jnr's uncle was Dr H V Evatt, a former High Court justice. His sister, Elizabeth, won the University Medal for Law and became the first chief judge of the Family Court of Australia. His sister, Penelope, took a different course, became an architect and married the famous architect, Harry Seidler.

Given the family background in the law, it was almost inevitable that Evatt jnr would become a barrister. But law was never his only interest. During his university days, he developed a passionate interest in opera and ballet, literature and classical music and paintings. After leaving university, he also began betting on horses in a systematic way and was extraordinarily successful, winning a seven figure sum in the period 1960-1976, equivalent to many millions of dollars today. In 1972, he opened the *avant garde* Hogarth Galleries which largely pioneered the sale of Aboriginal paintings in Sydney.

Evatt was admitted to the bar in 1956. 'Young Clive' (as he was known in recognition of his father) remained an institution at the Sydney defamation bar until his death. Experienced practitioners knew that beneath his disarming exterior, behind the injured wildebeest appearance of the shuffling old man with a cane, lay a uniquely dangerous opponent. More than any counsel of his era, Evatt knew how to strip his case back to the barest essentials, paring away everything unnecessary to his client's success before the jury. With unsettling frankness and a mischievous glint in his eye, he was unembarrassed about abandoning any part of his case on which the witnesses were not 'coming up to proof'.

Evatt's preferred approach to the notorious technical complexity of the law of defamation was not to engage with it. In pre-trial applications in the Defamation List, his favourite response to thorny arguments raised for the defendant was, 'Well, there's a lot for your Honour to think about there' — effectively shifting to the court the obligation to answer the point.

Where Evatt excelled was in a jury trial. He had an uncanny ability to connect with and charm jurors 40, 50, even 60 years his junior. Unlike his opponents, he would lead all the evidence he needed from a witness in five or 10 minutes. He was also savvy enough to decline to call a plaintiff to give evidence in his own case in chief whenever he thought cross-examination might damage the plaintiff, something most practitioners would

lack the tactical daring to do.

Many lawyers believe that it is unwise to sue for defamation if the would-be plaintiff has done anything else discreditable. Such baggage will usually emerge at the trial, and trial publicity can do more damage to a reputation than the original publication. But Evatt was undeterred that, in the argot of the trade, a plaintiff might not be a 'cleanskin'. He seemed to be a magnet for such clients, who would sue — and win. By any reckoning, he was the king of the plaintiffs' defamation bar.

Evatt was educated at primary schools on the North Shore including Artarmon Opportunity School before going to North Sydney Boys High School where he finished first in the state in geography in the Leaving Certificate. Although he graduated in arts (majoring in economics) and law from Sydney University, he did not do as well at university as he could have done. This was largely because he seemed more interested in attending race meetings as well as playing cards with friends than studying legal texts. He also led a very active social life.

Photo: Sahlan Hayes / Sydney Morning Herald

During winter months in particular, he would host friends to weekends of fun, good food and games to test the mind at the magnificent mansion built by his maternal grandfather at *Leuralla* in the Blue Mountains. Up to twelve people might be staying in the house, around a roaring fire, discussing law, politics, art and racing.

Until 1967, Evatt's practice at the bar was dominated by personal injury cases in which he had an enormous practice. He also did the occasional defamation case with his father for politicians such as Tom Uren, Les Haylen, Bill Rigby and Clarrie Earl and celebrities such as the singer, Shirley Bassey.

In 1967, Evatt became a casualty in the move by the Law Society to end the practices of five solicitors who were charging very high fees for conducting cases for impecunious plaintiffs. Evatt had been briefed by two of these solicitors and, as counsel, had got 18 plaintiffs to sign authorities deducting the solicitors' fees from the verdicts they obtained. The Court of Appeal held that Evatt was guilty of professional misconduct in that he knowingly facilitated a course of conduct whereby the two solicitors charged extortionate fees and he himself charged fees 'which were excessive' and which 'he knew would be paid in part from the amounts so charged'. The Court of Appeal suspended him from practice for two years. The Bar Association appealed to the High Court which held that the Court of Appeal was 'in error to suspend [Evatt] from practice rather than to disbar him'.

Thirteen years elapsed before a unanimous Court of Appeal held that he was a fit and proper person to resume practice as a barrister after hearing evidence of his probity and honesty from many witnesses who had had commercial dealings with him over the intervening years.

During this period away from the law, Evatt's principal source of income was betting on horses. In 1961, Don Scott, a high school friend, and Evatt, using a sophisticated method of assessing the ability of racehorses, won a large amount of money by backing the Doncaster Handicap winner, Fine and Dandy, at 66/1 and 50/1, This win and similar large wins attracted the attention of the journalist, Frank Browne, who subsequently christened them 'The Legal Eagles'. They continued to bet successfully until November 1974 when Scott gave up betting to become a playwright. Evatt continued betting for another two years but in 1977 he mysteriously stopped betting and never again set foot on a racecourse.

Much of Evatt's betting winnings were used to acquire valuable paintings including those by Brett Whitely, Arthur Boyd and Roy Lichenstein and later those by Tim Storrier and Jeffrey Smart. Insuring these paintings attracted the interest of the commissioner of taxation who issued amended tax assessments based on the significant increase in Evatt's wealth over the preceding years. Fortunately for Evatt, his betting was on credit and recorded in his name in bookmakers betting sheets. In a lengthy case before a Taxation Board of Review, Evatt established that the increase in his wealth was the result of betting winnings by tendering the betting sheets, which had been subpoenaed from the State Treasury. By majority, the board held that the winnings were not taxable and set aside the amended assessments.

After the High Court decision, Evatt did a Fine Arts degree at Sydney University and topped the course. Subsequently, he lectured in Fine Arts at the University. His expertise led him to found the Hogarth Galleries in 1972.

Irreverent and irrepressible, Evatt was a larger than life and formative figure in the Australian art world. He loved publicity and revelled in shaking up staid 1970s Sydney with some of his early exhibitions. Ivan Durrant's *Severed Hand Happening* which was alleged to be a human hand displayed in a box made headlines in local newspapers, and the erotic paintings, drawings and sculpture of the Playboy exhibitions turned the Hogarth Galleries into a lively venue. And nowhere else in Sydney could one buy posters by Jackson Pollock for $35 or Salvador Dali for $30.

Evatt became a pioneer of the Australian art market introducing artists such as Garry Shead, Brett Whiteley, Martin Sharp, Cressida Campbell and Peter Kingston. He was an early champion of feminist and women's art and supported Miriam Stannage, Kerrie Lester and Mandy Martin early in their careers. He was also a generous supporter of other early-career artists, a fact he would have quickly dismissed.

Evatt's ability to foresee trends in the art market resulted in early investments in Aboriginal art, Hornby trains and toys. In 1976, he purchased a collection of Aboriginal art and displayed it in the gallery. It became a drawcard for international visitors. The Hogarth Galleries subsequently became Australia's foremost Aboriginal art gallery credited with exhibiting Aboriginal art in the fine art tradition.

A discerning buyer, he amassed an extensive and eclectic personal collection. Some of the more valuable works were on permanent loan and exhibited in local and overseas institutions. Many of his art works were displayed in the Supreme Court of New South Wales.

Evatt loved the arts in all its forms. He had an unparalleled knowledge of art history. He also had an extensive knowledge of music and opera, loved Wagner and was a frequent visitor to the Bayreuth Festival. He had a particular interest in pop art and introduced Andy Warhol, Jasper Johns, and Allen Jones to the Australian market. Jones's *Girl Table* of 1969 was displayed at the gallery and caused a riotous reaction. A newspaper reported that there was now a 'Women's Lib blitzkrieg' which exhorted women to 'smash sexist art oppressors!'

Characteristically, Evatt said he was pleased that 'these people were angry'. He said that the last person who got angry about art was Dr Goebbels, 'and we've had to wait for 30 years for someone else to get angry.'

Evatt is survived by his sisters, Elizabeth and Penelope, his first wife, Dr Susan Hepburn and the five children from that marriage - Mary, Elizabeth, George, Ruth and Victor, his second wife, Elizabeth and their two children, Alice and William.

Ken Horler (1938-2018)

Ken Horler in late 1970 established the Nimrod Theatre, an establishment that would change the country's theatre history. He juggled his theatrical leanings with the day job as a barrister. He was a natural with a sharp, retentive memory and was 'good on his feet'.

Born in Sydney, Ken Horler attended Scots College on a scholarship. He matriculated at 16 with a maximum pass and enrolled in Arts Law at Sydney University. It was there that he forged friendships that lasted his entire life. After graduation, he practised as a barrister, took silk in 1986, became chairman of the Council of Civil Liberties (1987-92), and, for a time, was an acting judge.

Horler was stage struck. He loved the theatre passionately: the plays, the props, the very space itself. He conducted this passion in the teeth of his parents, who desperately hoped the wretched fad would pass. So did the law firm Dawson Waldron, Nichols and Edwards where he was an articled clerk. A frantic phone call to locate him would usually draw from a partner the clenched response 'Mr Horler hasn't been sighted in weeks.'

Eventually he would be found in some basement around the university painting flats for a forthcoming production. The plays he directed included *Twelfth Night*, where his younger contemporary John Bell shone as Malvolio. This was followed by productions of *Him* by the American poet E E Cummings and Shakespeare's *Coriolanus* – Bell was in these too and, as a direct result, was noticed by the critics for the significant actor he later became.

Horler continued to direct plays, including Brecht's *Mother Courage* which starred Germaine Greer. Peter Carroll was also in the cast. His peers graduated and went to England to begin their professional training – the late Richard Wherrett at Stratford East in London and Bell at the Bristol Old Vic and later, the Royal Shakespeare Company at Stratford-on-Avon. The sudden death of his sister Deanne meant he returned home immediately. Then, to his parents' relief, he began to earn his living at the bar.

As a barrister, he was a natural. He absorbed information fast and in court gave no quarter. His colleagues valued his courage in the face of sometimes overbearing judges. They also rated highly his ability to communicate with juries with clarity and humour. His intensely competitive, disputative nature won him admirers.

It was during these years that he made one of his best decisions in his life: he married fellow lawyer Lilian Bodor. She became his helpmeet, collaborator, the mother of his only child Sacha, and his strong right arm.

When Bell and Wherrett returned from the UK having completed their apprenticeships in the profession, Horler sensed change in the wind. Sydney's Old Tote theatre was approaching its final curtain; there was a palpable hunger for a theatre with fresh interpretations of the classics and new Australian plays. He found a disused shed in Nimrod Street Darlinghurst, and arranged a lease. There, in late 1970, he established a theatre with Bell and Wherrett that would change the country's theatre history. Although his mother had burned all his university memorabilia, the wretched fad had not passed.

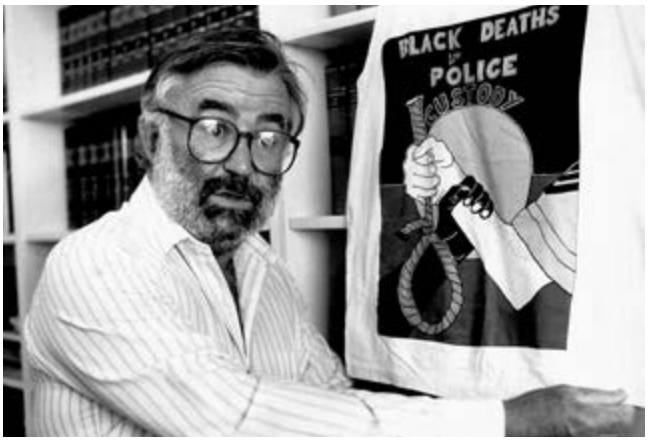


Photo by Antonin Cermak/Fairfax Media

A cross-section of old friends from university and the law were conscripted to repair the Darlinghurst shed. We scraped and painted. Some of his clients worked off their debts to him by labouring on weekends. Horler presided, puffing small cigars and doing some light work with a broom. When the city fathers closed the theatre for its inadequate fire stairs and toilet facilities, Horler got good press space by ridiculing them. He then set to work. He lobbied and fought and raised money. He relished a fight and was in his element in opposition.

When the theatre re-opened, one of his most significant productions was *Basically Black*, a landmark revue he wrote and directed with Aboriginal actors and singers. Brett Whiteley designed a powerful poster for the show. Other work from this time was a revival production of Alex Buzo's *Rooted* and the premiere of another Buzo play, *Coralie Lansdown Says No*. Horler also directed several plays by Jim McNeil, who had written them while in prison.

With Nimrod's growing success, Horler looked around for a bigger space. In 1973 he found the old Cerebos salt factory in Surry Hills and, under what he called 'the Old Mates Act,' negotiated the transfer of the property from its owners to the Nimrod for one dollar – the best deal since John Batman bought Melbourne. Today it lives on as the Belvoir Theatre.

For the new Nimrod he directed Tom Stoppard's West End successes and wrote several plays himself. *Ginger's Last Stand* was his nostalgic treatment of comic strip hero Ginger Meggs. The other was *Party Wall*, about Egon Kisch, the multi-lingual Hungarian communist the Menzies government bumped out of Australia. These plays reflected two of Horler's passions: a lament for a lost Australia where kids had billy-carts, climbed trees and got up to innocent mischief. The other was a serious and abiding passion for justice. Lilian became the general manager and became vital to the running of the new Nimrod. Wherrett, Bell and Horler, already a formidable triumvirate, created a heady and controversial theatre. Of its first 18 productions, 15 were new Australian plays and nine of them were written specifically for the Nimrod. The company's parties for launching each new season became famous for their hospitality and exuberance. 'If there is a heaven,' wrote the late British critic Sheridan Morley, 'It is in the bar of the Nimrod.'

Horler, as a benign impresario, was always on the lookout for new talent and new plays, and brought his own taste to bear. His *Kold Komfort Kaffe*, a confection of cabaret with its echoes of Weimar Berlin, was played with great success by John Gaden and Robyn Archer.

Meanwhile, a cabal was forming against him. Outside opposition he could handle, but not lack of confidence from his peers. He was forced out in a palace coup in 1980. It was an exile he never quite overcame. Even so, the Nimrod's best days were already over. It closed its doors in 1987.

He went back to the law. One Saturday afternoon he went out to Long Bay jail in his weekend clothes (shorts and sandals) to visit a client. While he was inside, there was a change of shift and he had a hard job convincing the new warder on duty that he was a visiting barrister. The theatrical complication of the switch delighted him.

Those of us who have enjoyed lives in the theatre are all deep in Ken Horler's debt. He forced open a door and gave us opportunities to find our own way and our own living. The cockpit of the original Nimrod Street Theatre still stands as The Stables in Darlinghurst where today it is the home of the Griffin Theatre Company. It not only defined an ideal audience-to-stage relationship of the new and larger Nimrod Theatre, it became the prototype for new stages all over Australia.

Ken was admitted to St Vincent's Hospital after a stroke. He died peacefully on September 16.

He is survived by his wife Lilian, daughter Sacha, brother Anthony and two grandchildren.

By Ron Blair

The Hon Justice Kelly Ann Rees

On Wednesday, 5 September 2018 the Banco Court spilled over with judges, members of the profession and the public, in numbers seldom seen nowadays, to witness the swearing in of the Honourable Justice Kelly Ann Rees as a judge of the Supreme Court of NSW by Chief Justice TF Bathurst. It was a remarkable occasion.

The Honourable Mark Speakman SC MP, attorney general of NSW, spoke on behalf of the bar and Mr Doug Humphreys OAM spoke for the solicitors.

Justice Rees started life on the mid north coast of New South Wales at Bellingen. From a young age, her Honour deftly negotiated her place in a family of boys amid the toils of a life on the land on the family cattle farm. Some vivid memories of those years were recounted with humour and nostalgia. This country life explains her boundless determination and endless sense of fun and adventure. She excelled in secondary school studies at the local high school, where she was a champion debater and public speaker. Much of her early education was self-directed and self-motivated which prepared her well for the future in the law. Her Honour's formative years took place when a thoroughly good education was free and for all – the halcyon days of Australian education.

Justice Rees established a scholarship for the dux of her old school, together with another scholarship – for the best performing female student at Bellingen high school. Her Honour held both accolades in the 1980s. This is an expression of her Honour's encouraging and supportive nature, to which she often treated young barristers taking their first steps. Many in the room remembered this aspect of her.

She is an alumna of the University of New South Wales and holds degrees in Law and in Commerce. Needless to say she continued her exemplary academic record in that institution. Her fellow students from that time uniformly speak of her personal qualities as 'brilliant', 'serious-minded' and 'ambitious'.

These qualities augured well for a mooting champion and through this extra-curricular activity, her Honour travelled across the country competing in Brisbane, Perth and Canberra but to name a few exotic locales not to mention the odd television appearance. Famously, she competed in the Jessup Moot, however that year the runners-up did not go to Washington DC. Memorable also was her Honour's ability to make friends with students from all over the world and from all walks of life. Cliques were not her style. She retains most of those old friendships to this day as part of a vast network across the Asia Pacific region. This is testament to her kindly nature and approachability.

Armed with a top academic record, she completed post graduate studies at Cambridge. As a world class debater, she took the floor in the House of Lords on one occasion in the finals of the England and Wales Debating Championships. While living in Cambridge her Honour proved herself an expert punter on the picturesque river Cam. She had vast knowledge of the venerable institution that is Cambridge, giving her relatives who attended her graduation detailed historical tours of that ancient town.

A six-year period in practice as a solicitor followed with the first port of call, the Messrs Kingsley Napley LLP, an eminent white-collar crime and fraud investigation firm in London.

In Sydney, her Honour went to Malleson Stephen Jaques, one of the largest in Australia and became a senior associate in the heyday of commercial dispute resolution. Her Honour paid homage to her old master solicitors Robyn Chalmers and Peter Stockdale among others from that time. This time gave her a taste for complex litigation.

She had the reputation of being unassuming yet brilliant. She had an exceptional worth ethic with steely determination and a resolve to do her best for clients. But she exuded a warmth and genuine human interest in others, and a beaming smile became her personal trademark.

By 1998, her Honour had been admitted to the bar. Her tutors were the Hon. Justice Richard White who promptly took silk shortly after, James Jobson and Adam Bell SC took over. Quoting Jonathan Sumption QC as his Lordship then was 'Most law is only common sense with knobs on' – which was a pivotal sentiment revealing her Honour's approach to law.

Her Honour spoke of her constant fascination with the facts of a case which she as being all important. After mastery of the facts in any case, the law then becomes infinitely approachable. It must all be kept simple, so that the people, for whom the law is here to serve, can actually understand it. Harking back to her country upbringing, her preference is always that the law be in plain English.

Justice Rees remarked upon the myriad roles she has had in her life - a mother, a single mother and a stepmother in addition to her identity as a solicitor, a barrister and senior counsel. Her Honour's ability to adapt to circumstances is remarkable and to remain calm and composed even in the most trying of circumstances. Experiences both personal and professional have made her a different barrister and more resilient individual. Her Honour expressed gratitude for the overwhelming support of her family and children and the environment of the bar which allowed her to thrive. Her Honour also remembered her champions, her mentors who were in court - their support had been priceless.

The judge expressed gratitude for the wonderful group of women whose company she has kept throughout the time she has practised at the bar. The friendships and support have in great measure made all the difference in the trials and tribulations encountered in life. These comments are testament to the pressures and demands of a life at the bar, tempered by the conviviality among practitioners. Touchingly, her Honour read a message of congratulations written by her son on the occasion of becoming a judge – it drew mirth and tremendous good feeling in the vast numbers bearing witness in the gallery that morning.

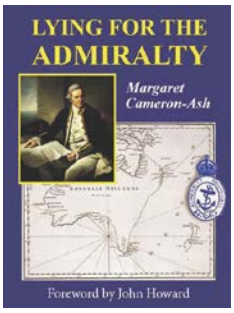
For over 20 years, her Honour practised in the sphere of commercial disputes before courts, tribunals and commissions of inquiry, professional liability, property and insurance law among other areas. Her Honour is known for having been briefed in the C7 litigation and other significant cases and commissions of enquiry. Since 2012, she was appointed a member of the Inner Bar. While at the bar, her Honour was appointed to many committees including for the selection of Senior Counsel.

The Equity Division of the Supreme Court is where her Honour will sit. Her court will be fair. She will be a competent and practical judge, thoroughly committed to good sense. Her court will bear hallmarks of intelligence, courtesy and generosity of manner. Substantial experience as a leading advocate will prove invaluable to the role. She will ensure that litigants and practitioners are treated justly and compassionately.

Justice Rees's appointment to the court will be a significant contribution to the administration of justice in this state.

By Kevin Tang

BOOK



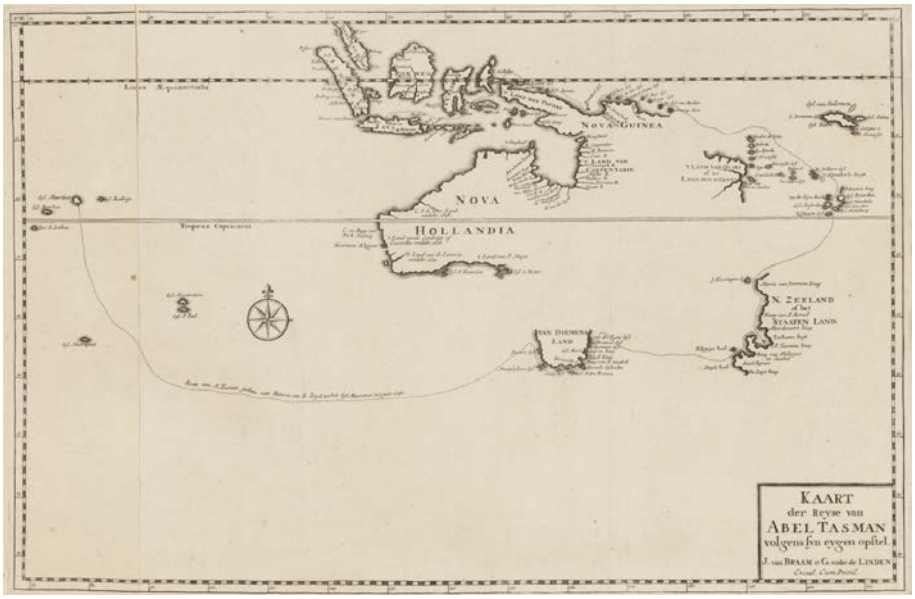
Lying for the Admiralty

By Margaret Cameron-Ash

The title of this book is fierce, and at first glance, unbelievable. We quickly see that the book is about Captain Cook and the first *Endeavour* voyage which resulted in the discovery of the east coast of Australia and the landing at Botany Bay on 28 April 1770. But this book is different from any other about Cook and the *Endeavour*. This book focusses on the author's 'discovery' and thesis that contrary to recorded history, Captain Cook must have not only landed at Botany Bay, but also walked overland and discovered our beautiful Sydney Harbour. Further, that he did in effect discover Bass Strait, realising the separation between 'Van Dieman's Land' and 'New Holland', i.e., Australia. This 'thesis' is not recorded history. History tells us that Captain Cook landed at Botany Bay, went ashore there, missed Sydney Harbour and never realised that there was in effect, Bass Strait. The author notes-

> A few years ago, a veteran of the Sydney to Hobart Race…told me he couldn't understand how Captain Cook had 'missed' the strait where he sailed several leagues into it in 1770. Soon after, another old salt wondered how a mariner as curious and diligent as Cook had resisted the temptation to sail through the majestic heads into Sydney Harbour, particularly after the dangerous shallows of Botany Bay. Both these sailors implied- but dared not say- that the great navigator was a bit of a fool who had failed to observe coastal features the dullest sailor would have noticed. I was intrigued…

We know that at the time of Captain Cook's first voyage, this was a time of great sea adventures and there was a race, between the Spanish, the French, the English and maybe anyone else, to discover new lands, especially in the Southern seas. This was akin to the Russian American space race in 1961, the author notes. But this was also a time of fierce 'Anglo-French rivalry', based on the Seven Years War (1756-1763) and the Anglo-French Cold War (1763-1776), which resulted in European nations racing to explore the Southern Hemisphere, by sea, for empire expansion and the benefits of strategic ports and the potential



'valuables' that were there. Accordingly, the British Admiralty may well have wished if not ordered, that certain sea discoveries should be kept secret, such as a highly strategic and valuable harbour in the 'great southern continent', at least initially. This is what the author argues in this book.

We are in effect, taken on a journey, as the author details all the steps taken which brought Cook and the equally famous Joseph Banks, to Botany Bay. The author tells this story based on her examination of Admiralty records as well as Cook's original manuscripts (digitalised), which include his erasures and alterations. She also tells us what his journals say, what the charts looked like, and what others have written about him, in particular, Cook's main biographer John Cawte Beaglehole. She compares Cook' s own documents i.e., the journals, charts and related commentaries to the 'authorised' versions published with Admiralty approval. She says:

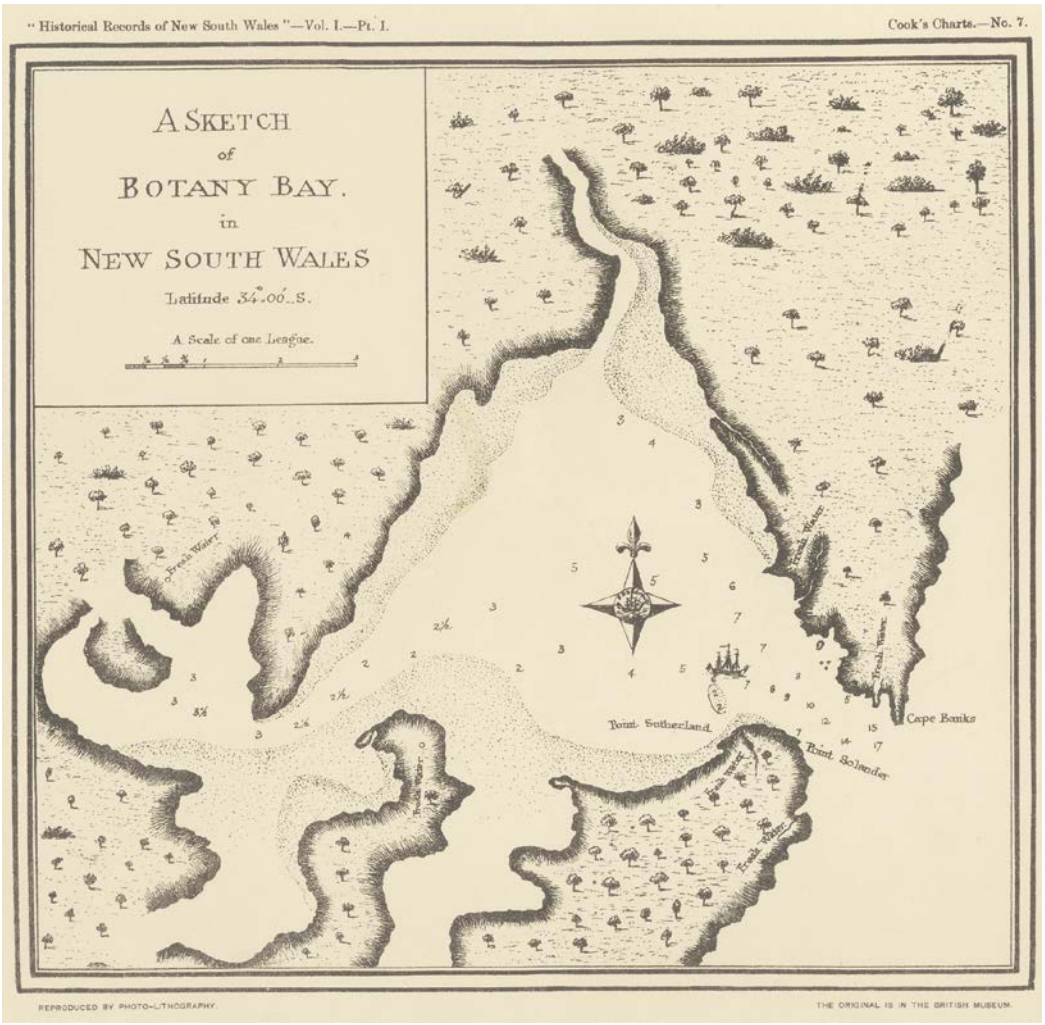
> I began to suspect that some of the 'errors' blemishing Cook's legacy might be deliberate attempts to obscure his discoveries, or that the Admiralty had altered details in the pursuit of its own agenda.

We are told of the original main purpose for the *Endeavour* voyage i.e., to observe the 'Transit of Venus' in the southern hemisphere (a rare celestial event). However, there was no doubt that the Admiralty wanted to make use of this voyage to explore the largely unknown Pacific Ocean. And so we learn of 'the main man' at the Admiralty, Philip Stevens and the Anglo-French rivalry; other main discoveries in the Southern Hemisphere at this time including Tahiti; what the French were doing at this time in the Pacific Ocean, in particular, Capitaine de Vaisseau Louis Bougainville; what the maps looked like in 1770; who were Cook and Banks and their unique relationship; what the Admiralty's real instructions to

Cook must have been; cartographic secrecy; and what really happened at Botany Bay.

The author is a lawyer who has practised as a barrister, and she has used these skills to research and analyse all the documents thoroughly, such that she makes a persuasive argument. One of the most interesting points is as follows:

> Cook has been criticised for 'missing' Sydney Harbour in 1770. But there is both documentary and circumstantial evidence to suggest that he had already seen it. While the ship-and the men-were moored in Botany Bay, Cook found Sydney Harbour by walking overland, following Aboriginal tracks connecting the two inlets. He concealed the prize from his crew by not sailing into it, and from his readers by not mentioning it in his journal. But as soon as the *Endeavour* arrived back in England, he rushed to the Admiralty to report his discovery in person.
>
> The clue to Cook's secret discovery is a memorandum written by Captain Arthur Phiilip, governor designate of New South Wales. Before leaving Britain with the First Fleet in May 1787, Philip



discussed his plans with the Home Office, commenting:

> It must be left to me to fix at Botany Bay, if I find it a proper place-if not, to go to a Port a few Leagues to the Northward, where there appear'd to be a good Harbour, and several Islands-as the Natives are very expert in setting fire to the grass, the having an Island to secure our Stock, would be a great advantage,& there is none in or off Botany Bay.

The author asks, how did Philip, sitting in London in 1787, know of 'a good harbour' nearby and 'several islands'(there were 13 islands in Port Jackson at the time)? He must have got this information from some European and that person could only have been Cook, who told the Admiralty secretary, Philip Stephens, who told Governor Philip.

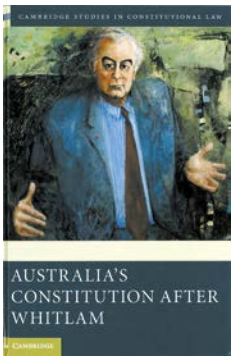
The book is full of research and analysis showing much circumstantial evidence which points to her main argument. It is beautifully written, has some wonderful historical pictures and is incredibly interesting. She says:

> Botany Bay would become one of the most successful decoys in history, equal to the Greek's gift of the Wooden Horse to Troy. In the decades following the *Endeavour*'s visit, the term 'Botany Bay' became a coast, a country, a continent in the British consciousness. The inlet was the single focus for all European discourse concerning New Holland. There was little or no discussion about the much richer country Cook saw to the north and south of the bay.
>
> In reality, Botany Bay remained a remote swampy wasteland for decades, while the regular appearance of its name in European newspapers, shipping manifests and history books suggested a metropolis. The phantom colony was initially created by the British authorities as a decoy to protect Sydney Harbour from prying eyes until it could be defended. By then, however, the lyrical name had taken on a life of its own and became synonymous with British Australia for more than a century.

I recommend that you read it and make up your own mind!

Review by Caroline Dobraszczyk

BOOK



Australia's Constitution after Whitlam

By Brendan Lim, Cambridge University Press, 2017

How does the Constitution change? It depends what is meant by 'Constitution' and 'change'. Beyond the formal text of the Constitution itself, Australian politics and public life have witnessed lasting debate and conflict as to 'informal constitutional principles' – including as to which institutions and actors have the ability to create, change or 'legitimate' informal constitutional principles. The definition and scope of these principles are potentially uncertain and are open to substantial dispute; they may be broadly defined as 'constitutional' principles beyond those set out in the *Constitution* itself, albeit while inviting greater debate as to what principles are 'constitutional' in nature.

Brendan Lim's fascinating new book reinterprets the short life and long shadow of the Whitlam government as a series of conflicts over informal constitutional principles, including whether and how popular elections can confer upon elected governments the power to declare and shape these principles. Even absent a formal constitutional referendum, Whitlam 'sought to weaken prevailing understandings of the federal balance and to expand the powers and responsibilities of the federal government' (p 1) – a profound shift in informal constitutional norms. The resistance to Whitlam challenged the notion that a popular mandate in the House of Representatives, even the election of a 'transformative national government', legitimates informal constitutional change in its own right (pp 1-2).

After introducing the book's key themes in ch 1, ch 2 of Lim's book addresses the vexed and potentially unclear distinction between ordinary and 'constitutional' legal principles. Lim identifies, amid ongoing debate, the significance (in identifying 'constitutional' principles) of 'reception' by a given constitutional community of a principle as constitutional in nature (p 24). Lim proceeds to explain the distinction between 'monist' democracy (with no inherent distinction between normal and constitutional law-making) and dualist democracy (by which the expression of the popular will is not solely the reserve of the elected government, but is 'mediate[d] through 'more complex institutional forms' (p 30)).

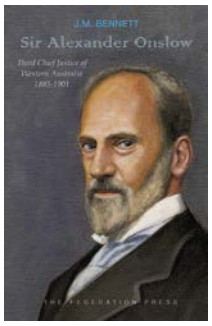
In ch 3, Lim explains the 1975 constitutional crisis as a conflict between two theories of legitimacy. Under Whitlam's 'monist' theories of legitimacy, his government, as recipients of a popular mandate, were 'entitled to plenary lawmaking authority' (p 72). Under the Senate's 'dualist' theories of legitimacy, Whitlam's election was not of itself sufficient to engage in 'higher' lawmaking or to effect informal constitutional change (pp 79-80). Lim acknowledges that elements of his thesis are at odds with the self-presentation of the parties concerned – with Whitlam's lasting concern for formal constitutional change (and hence apparent conceptual distinction between different forms of constitution-making authority) and with how the Opposition themselves explained their role during 1975. But Lim's theories are nonetheless lucid, clearly-explained and compelling.

Lim examines the long shadow of this 'clash of constitutional grammars' upon subsequent events and controversies. In ch 4 he explores the constitutional views and stormy tenure of Justice Lionel Murphy, including the significance of the appointment as an expression of Whitlam's transformative constitutional agenda. In ch 5 he examines evolving ideas of the High Court's institutional role and the role played by the notion of popular sovereignty in that Mason court's self-conception – with the court adhering to the classically dualist notion that the court, a body other than an elected government, was in some sense capable of speaking 'for' the people. This idea clashed with the advent of a new monism under John Howard, and a renewed emphasis in both political and legal spheres upon the primacy of elected governments (with the court's role shifting from the expression of the popular will in its own right to a form of 'representation-reinforcement', seeking at least ostensibly to give effect to the popular will as expressed through legislative intent). Ch 6 examines the 1999 republican referendum, including the impact of the 1975 crisis (and competing monist and dualist conceptions of elected parliamentary governments) on the proposed design of republican institutions.

Lim's book is an inspired synthesis of constitutional analysis and political theory to reinterpret some of the key conflicts of recent decades in Australian public life, employing theories of governance and political power to explain some of those conflicts. This book deserves to have a lasting impact on how those conflicts are understood.

Reviewed by Douglas McDonald Norman

BOOK



Sir Alexander Onslow

J M Bennett, The Federation Press, 2018

This biography of the third chief justice of Western Australia is Dr Bennett's latest addition to his Lives of the Australian Chief Justices. It has the benefit of a foreword by WA Chief Justice Martin, well-positioned to put Onslow's own story in a wider theme. For current purposes – a review in the journal of the NSW Bar Association – the last paragraph of the foreword bears reprinting in full:

> Dr Bennett tells me that he expects this book, the 16th, to be the last in the series. I am sure that I join his many readers in expressing the hope that his prediction of the future is less accurate that his recount of the past. But if this is the last of the series, it is fitting bookend to an exceptional body of work which spans all the then colonies of Australia, providing an extraordinary insight into colonial life through the lens of the law. Lawyers, historians and anybody with an interest in the development of Australia will join me in congratulating him upon the completion and publication of another excellent piece of literature.

In 1969, almost a half century ago, a young John Bennett edited *A History of the NSW Bar*. He is an honorary life member of the association. His contribution to legal history has been extraordinary. His particular fondness for writing the history of people who administered justice but still had time to remind themselves that they were representative of the law and not ruler of it, remains a lesson for every citizen who believes in an independent judiciary.

This reviewer interpolates that all is not quite lost. When Sir Henry Parkes's 17th child was born, a friend congratulated the 77-year-old on his last. Not my last, the politician replied, my latest. This reviewer understands that the current work is the last solo venture but that there is a final work with co-author Dr Ronald Coleman Solomon. The third Tasmanian chief justice Sir

Francis Villeneuve Smith is the subject.

So what does the tale of the third chief justice of Western Australia tell us of an independent judiciary? For an effective description of a human institution begs as many questions as it answers. The rule of law is often called the administration of justice. That's apt, so long as its rulers let lawyers, historians or anyone else keep asking 'who is administering?' and 'what is justice?'

Wikipedia's definition of 'Judicial independence' is 'the concept that the judiciary needs to be kept away from the other branches of government.' It is effective precisely because it states without resolving Juvenal's paradox sed quis custodiet ipsos custodies. In the case of judicial independence, who is the person who decides what is needed and when?

On Australia Day 1808, Governor Bligh found out the hard way that trying to stop rum ruling the guards was not possible. John Macarthur was the instigator of that rebellion, and his reputation remains to today very much at the whim of the politics of the particular historian. His presence lingers too, with descendants ensconced at Camden Park, near Sydney.

John's granddaughter married the eldest son of Arthur Pooley Onslow. The Onslow name was already ancient. Arthur Pooley married one of the daughters of Alexander McLeay, a NSW public servant whose career was both highly distinguished and through his affiliation with Governor Darling often controversial.

The topic of Dr John Bennett's latest contribution to his series of the lives of the Australian Chief Justices was Arthur Pooley's fourth son, Alexander Campbell Onslow. The Alexander is obvious. I expect but do not know that the Campbell may have come from his mother's sister's married name. Her husband Pieter Laurentz Campbell had a close relationship with Governor Bourke but a more difficult time with Governor Gipps.

For the meantime, Alexander Campbell Onslow was born on 17 July 1842 and educated at Westminster and Trinity College, Cambridge. He was a sportsman, being – with a curious consequence for his tale – an enthusiastic cricketer.

After an unremarkable decade at the bar, he married Madeleine Emma Tottenham. Of the same class, it appears that this was a second round for both families: his first cousin Douglas Arthur (Onslow) had married one of Madeleine Emma's elder sisters. Three years later, in 1877, Onslow opted as so many did for a career though colonial advancement.

Onslow's first posting was to British Honduras, but it did not last long. He returned to England and by late 1880, he with his family and a servant sailed on *RMS Siam* for Albany where they arrived on 2 December. By Christmas Day one newspaper reported 'the serious illness of the new Attorney-General, Mr Onslow, who is suffering from too great exposure to the sun [during a cricket game] at Albany'.

It was this event that premises Onslow's life in the colony and Dr Bennett's record of the man as its chief justice. In particular, Onslow's relationship with Sir Frederick Napier Broome, who described his lieutenant as 'a confirmed official mischief maker and contriver of the worst type… so constitutionally irritable, and so affected by a sunstroke as to be hardly responsible for his actions.'

A colonial constitutional crisis between the local chief executive and the local chief justice is never an insignificant thing, still less when there is preparation for responsible government. There is no doubt that personality conflict was a cause but, and much of Bennett's work is directed to this, there can also be, in one or other of the officers, a misunderstanding of and importantly a misconception of the unwritten boundaries of, their own role.

It is a delight for any student of Australian history that another player in the crisis, the local chief legislator, went by the name of Malcolm Fraser. Onslow's assessment was that he was little assistance to the cause of right (i.e., Onslow's) but as the author of Fraser's ADB entry notes:

> An able administrator, especially during his early years in Western Australia, he merits notice as one of the few who were able to work in harmony with Sir Napier Broome, an achievement which his contemporaries in the colony found difficult to understand and his superiors in the Colonial Office quite amazing.

It must have been boring being a clerk in the Colonial Office penning notes for superiors, and opportunities to spice things up would have been seized. My favourite is the clerk who dealt with Onslow's predecessor, Sir Henry Wrensfordley. The Office having decided they needed someone who didn't go into debt with responsible government in the foreseeable future appointed him CJ in Fiji. His debts were dangerous, but the clerk managed to both fan and douse the fire of fear when he noted that the CJ's debts were 'not a credit to us'.

The reader receives glimpses of colonial life away from political unrest. Onslow and his wife were musical. Sir William Robinson, the younger brother of a NSW governor, served three separate terms as WA governor and composed a number of well-known songs. Onslow arrived during his second term and they didn't get on. Things changed by Robinson's third term, and music was no doubt a large factor.

As an aside, for those interested in the stage at which competence becomes irrelevant, Robinson's own experience informs. I mean that line in the sand where the job in question is not only a professional high but a political prize, with the result that merit may make the wrong kind of difference. Each of us thinks we know the paradigm example of a person appointed to a diplomatic post or a judicial post or a quango without any cause except 'be'cause he/she is connected to x, to y or to z. As we age, we realise there are so many paradigm examples because government, like most things, is a human invention.

The gift of gubernatorial rank was serious business in an expanding empire. With a broad brush we can say that 18th century appointments were often military or naval, with a glut coming into the next century as Napoleonic wars climaxed. The 19th century saw the managing class take over. Robinson was a bit of both: the son of Admiral Hercules Robinson (a junior office at Trafalgar), he was himself a well-regarded career officer. After his second term in WA, he served with great distinction in South Australia and had hopes, after an interim role, of being appointed to Victoria, a class gig. As his biographer in the ADB notes:

> He was not permanently appointed though both he and the local politicians expected it; to his chagrin, the British government had adopted a 'new departure' of appointing inexperienced noblemen to prestigious gubernatorial posts.

This policy reached its own climax when Britain in a threat far greater than Napoleon had to find something, anything, for a pro-Nazi ex-monarch, and got him the governorship of the Bahamas. Maybe Robinson penned three of his Australia-wide hits after his own bad news: 'Remember me no more', 'Imperfectus' and 'Severed'.

Broome also enjoyed music. Unsurprisingly the Onslows boycotted Perth's annual performance of *The Messiah* while it was under his patronage. Which means they would have missed, and Broome doubtless loved:

O death, where is thy sting? O grave, where is thy victory?

The sting of death is sin, and the strength of sin is the law.

Juvenal's paradox of the unguardable guard was penned in a patriarchy no modern reader would respect. It was directed to protecting the morality of women; who will protect them from the protectors? Onslow's approach to the problem was in a hierarchy no modern Australian would appreciate, the hierarchy of the Crown colony. But the paradox itself is timeless. Dr Bennett's gives an effective glimpse of a man indubitably of his own time but able to impress real change for the benefit of those who followed.

Review by David Ash, Frederick Jordan Chambers

DOCUMENTARY

RBG (2018)

Much like its subject, this documentary on the personal life and professional career of US Supreme Court Associate Justice Ruth Bader Ginsburg is, in short, terrific.

From her birth in Brooklyn in 1933, to her college education (at Harvard Law school where she was one of nine female students in a class of 560), her academic appointments as law professor at Rutgers Law School and Columbia Law School, and her judicial appointments to the US Court of Appeals for the District of Columbia Circuit and the US Supreme Court, Ginsburg AJ is best described as a trailblazer.

The film traces her successes in the US Supreme Court where she advocated for both men and women in landmark gender discrimination cases. Among the plaintiffs she successfully represented was a male single parent who had been denied social security benefits normally paid only to single mothers and a woman facing housing discrimination in the US Air Force. Ginsburg AJ argued these cases in the 1960s and '70s, when gender discrimination was rampant in US society and an all-male Supreme Court bench was generally sceptical of claims of bias, particularly - but not always - against women.

While tracing these professional successes, the film also pays tribute to her personal achievements, in particular, to her marriage to Martin Ginsburg, an international tax lawyer whose unfailing support, according to Ginsburg AJ, made her professional achievements possible. We learn that it was he who, almost on a daily basis, had to force her to stop working to eat and sleep and that, but for his supervision, she would probably have done neither. We also learn that it was his gregarious, light-hearted nature which offset her inherently serious, stoic one and brought laughter and fun into their family life.

If that all sounds a bit like every other biopic you have seen, think again. Because woven throughout this film is evidence of Ginsburg AJ's status as a pop culture icon, which began in around 2006 when, on the retirement of US Supreme Court Associate Justice Sandra O'Connor, she became the only serving female justice. Her increasingly strident dissents at the time led to a following which grew over time, culminating in a biography (a *New York Times* bestseller in 2015) and spawning everything from RBG emblazoned t-shirts, coffee mugs and tattoos to internet memes.

This energetic documentary will appeal to both men and women of all political leanings, whether legally trained or not – anyone, in fact, who appreciates passion, intellect and purpose. See it if you can.

Reviewed by Sarah Woodland

MOVIE

The Insult (2018)

The Dalai Lama once said: 'Just as ripples spread out when a single pebble is dropped into water, the actions of individuals can have far-reaching effects'. In the case of *The Insult*, a gripping, socio-political, courtroom drama from Lebanese director Ziad Doueiri (who, incidentally, was Quentin Tarantino's camera operator in *Pulp Fiction*), that single pebble is a minor, personal insult between two men which escalates into an explosive jury trial that divides two communities.

Set in contemporary Beirut, the film opens with an urban scene which could take place anywhere in the world. Tony (Adel Karam), a brawny motor mechanic in his 40s is watering his plants on his apartment balcony when he inadvertently splashes a construction crew working on the street below. Yasser (Kamel El Basha), the foreman of the construction crew, is a stoic-looking Palestinian refugee in his 60s. Looking up to find the source of the water, Yasser notices an illegal drain pipe on Tony's balcony and offers to fix it free of charge. Tony, hearing the man's Palestinian accent, refuses the offer and slams the door in Yasser's face. Yasser has his team fix the pipe regardless. Tony is incensed by this and smashes the newly installed pipe, prompting an insult from Yasser, the effects of which reverberate throughout their families and their communities.

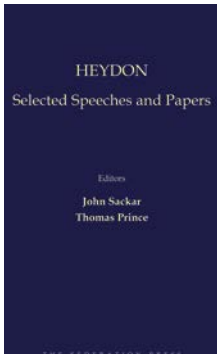
The film culminates in a highly publicised courtroom trial which exposes – in a plausible way - deep historical and personal wounds on both sides.

While *The Insult* undoubtedly delivers a crash course in the tension between two different ethnic and religious groups in Lebanon, it is captivating whether or not you have any prior understanding of - or indeed any particular interest in - these things. This is because the conflict at the centre of it is so personal and its triggers are universally recognisable.

Winner of the Grand Jury Prize at the Venice Film Festival last year and Academy Award nominee for Best Foreign Language Film earlier this year, this tension-filled moral fable will stay with you long after the credits stop rolling.

Reviewed by Sarah Woodland

BOOK



Heydon: Selected Speeches and Papers

This is a genuinely important book. Any real barrister – one with an interest in the history, the philosophy and the development of the law – must acquire a copy of this book. This book will stand alongside Dyson Heydon's judicial work, textbook writing and other academic work, as a lasting tribute to a true Australian intellectual.

The breadth of issues dealt with is astonishing. The selected speeches and papers of Heydon touch upon the philosophy of the law, the foundations of common law and equity, methods of judicial decision-making, and substantive law. These are interspersed with poignant observations on the rule of law, the independence of the judiciary, and on the preservation of social and political freedoms.

It has been said of Sir Owen Dixon that, while his learning was deep, his field of intellectual endeavour was narrow. Not so Heydon. For those interested in history there is a close analysis of the juridical validity of the Tokyo War Trials; *Kulturkampf* – the struggles over religious freedoms in Germany under Bismarck and the Nazis; the creation of the European Union; a major piece of the life and work of Sir Samuel Griffith; related pieces on James Fitzjames Stephen and the origins and development of the Indian Evidence Act. For those interested in judicial theory and methods there are several important articles – of which the paper on the limits of the powers of ultimate appellate courts

will surely stand for a long time as the leading work on that area. For the *aficionados*, there is an important paper on competing theories of constitutional interpretation, and (returning to a lifelong love) two papers by Heydon providing close analysis of tricky aspects of the law of evidence. And while you might have come for the law, why not stay for the guilty pleasure of re-reading two cracking speeches – *Judicial Activism and the Death of the Rule of Law* and *Four Great Australian Legal Disasters*. For those interested in the life of the bench and bar there are some excellent judicial biographies, some delivered in eulogy, others (occasionally cheesy) delivered as tributes to retiring judges. There is even an irreverent 15 Bobber speech given upon the elevation of Bill Gummow to the High Court.

OK, it would be wrong to overstate it and say there is something here for everyone – but there is plenty here to attract the thoughtful lawyer, practitioners, academics and gossips alike.

One of the best features of extra-judicial writing is that it allows the reader to discern some of the political and social views of the otherwise inscrutable judge. A full reading confirms that which was already known – Heydon is naturally and irredeemably conservative. This is not a conservativism in a nasty or reactionary sense; rather, conservatism in a careful sense. His mind is one which automatically respects the status quo, but he will also (occasionally) question it. I confess that there are some (maybe quite a few) opinions with which I cannot agree – but Heydon's views always cause one to think. I read this book, cover to cover, and not one minute of my time was wasted.

This book will stand as a testament to Heydon's writing style. This is more important than it sounds. Reading the book in full immerses one in the Heydon groove. Yet even at the end I still have a difficulty putting a finger on why it works so well: his writing is solemn, yet constantly engaging; it is literary and learned, yet unpretentious. It took me some time to recognise the strength of the rhetoric – while individual propositions are understated, the cumulative force is compelling. I would suggest that Heydon is the best legal writer to have served on our High Court; only Sir Victor Windeyer could challenge him. This book proves that.

Digesting all of the works also reveals another side to Heydon. Despite his dour mien, each chapter is littered with genuinely funny anecdotes. That is right: a lawyer telling jokes – re-tellable jokes – in a successful fashion. A unique achievement.

It is telling that there is a dearth of comparable collections of extra-judicial writings of the great Australian judges. I can think of only four of value – Jordan's *Select Legal Papers*, Dixon's *Jesting Pilate*, Spigelman's *Speeches 1998 – 2008*, and now we have Heydon's *Selected Speeches and Papers*. The absence of books in this genre is not due to a want of demand, it is because of a lack of supply. Heydon's book will be a point of reference for legal thinkers, and this will continue for many, many years. I repeat – this is an important book.

I praise the work of the editors – Justice John Sackar and Thomas Prince. It is through their industry that this book exists. Theirs was a labour of love, not inspired by money. I hope they retain sufficient vigour to consider a second volume. Finally, the support for the publication of this book cements the position of The Federation Press as one of the leading Australian publishers of legal texts.

Reviewed by Geoffrey Watson SC

BOOK

PODCAST

Summer reading and listening

A review of Philippe Sands QC's book East West Street and podcast Intrigue: The ratline, plus the podcast Capital

By Anthony Cheshire

My wife tells me that the British have an unhealthy obsession with the Second World War and she raises her eyebrows when my parents tell us (again) that rationing continued for some years after the war and that you couldn't get bananas.

Whether she is right or not, it does cause me to question my interest in the War. Is it a fascination with what I would do (or, more accurately now, would have done) in a war situation; or is it some sort of macho blood-lust? Can reality TV be seen through the same lens? One of those questions surrounds capital punishment: is my opposition based more on the need for absolute certainty in the verdict, which can so rarely be guaranteed; or is there some moral, religious or humanist instinct against taking a life? Could I justify an exception for Hitler, especially if his death would have saved many lives? What then of the Nuremberg trials and the subsequent executions of many Nazis?

Timothy Spall gave a wonderful performance in the title role of the film *Pierrepoint: The Last Hangman*. Pierrepoint prided himself on not adding to the suffering of the condemned by ensuring that the length of rope was just the right length to ensure immediate death without decapitation; and by reducing the time from his arrival in the cell to execution to less than ten seconds. He executed about 200 Nazis as a result of the Nuremberg trials, often several at a time on specially constructed gallows, but it was this experience of turning the process into a production line that led him finally to question himself and to the conclusion that capital punishment was driven only by an antiquated desire for revenge and solved nothing.

Philippe Sands QC is a practising barrister at Matrix Chambers in London, specialising in international and human rights law. His book *East West Street* is ostensibly a tracing of the history and survival of his family back to his *Jewish* grandparents. Sands examines how, following their wedding in Vienna in 1937 and his mother's birth the following year, his grandfather moved to Paris in 1939. For reasons that he seeks to identify, his grandmother and mother managed to survive, but did not follow until 1941.

The real story of the book, however, interwoven with the family history, concerns the attempts by two Polish lawyers to have crimes against humanity and genocide recognised and prosecuted at the Nuremberg trials. Hersch Lauterpacht, who found refuge in England, believed that 'the individual human…is the ultimate unit of all law', which was best recognised by the focus of crimes against humanity on the killing of individuals on a large scale; whereas Rafael Lemkin, who found refuge in America, believed that 'attacks upon national, religious and ethnic groups should be made international crimes', which also had the advantage that it could extend to acts that occurred before the war began.

Many Nazis were convicted at Nuremberg of crimes against humanity, but the judges rejected attempts to pursue charges of genocide. Both crimes were, however, recognised and adopted by the United Nations General Assembly in late 1946, a few weeks after the end of the Nuremberg trials. They have continued to develop side by side, reflecting the impact of many actions upon both the individual and the group.

Sands concludes with a brief discussion in which he expresses concern that a hierarchy has developed in which genocide is regarded as the 'crime of crimes'; and that a focus on the group may do more to reinforce the conditions that it sought to address and thus make reconciliation less likely.

This is most definitely not a dry legal treatise or history: it is much more a tale of individuals, brilliantly brought to life by Sands. Thus he starts in the court room at Nuremberg with the son of Hans Frank, who as governor-general of Polish territories was responsible for the extermination of the local Jewish population, and who was convicted in that room of crimes against humanity and executed; and finishes with the son declaring: 'I am opposed to the death penalty, except for my father'.

Sands is not only an intelligent and extraordinary story-teller, but rather than adopting a cross-examiner's tone, he is able to put his subjects at ease and tease out revealing statements and admissions from them.

He also clearly has an interest in the children of Nazis. Thus in the podcast *Intrigue: The*

Ratline, he follows the escape and subsequent death in Rome of Otto Wächter, lawyer and Governor of the district of Krakow and Galicia during the Second World War (answerable to Hans Frank, whose son was one of the subjects of *East West Street*) and responsible for creating the Krakow Ghetto and implementing the Final Solution in the areas for which he was responsible.

This is in part a love-story derived from letters between Wächter and his wife Charlotte (read by Stephen Fry and Laura Linney), but also the story of how Wächter escaped Poland after the war, living in the mountains for several years before escaping to Rome, where he was protected by the Catholic Church and, it would seem, accepted as an agent by the Americans (on the basis that Nazis, as enemies of their enemy (Russia), were their friends) and possibly also the Russians. He died in Rome, in potentially suspicious circumstances, before he could be spirited away on the ratline to South America.

There are conversations between Sands and Wächter's son Horst (in a draughty, old castle in Austria), which are similar to the discussions with Franks' son in *East West Street*, save that Horst, in the face of all evidence, refuses to accept that his father had any responsibility for what occurred.

Sands clearly likes Horst, but does not shirk exposing him to the full horrors of his father's conduct. Sands continues to unearth evidence throughout the podcast, but Horst remains unshaken.

The detail of the ratline and how some of the Nazis escaped justice was something of which I was aware, but the format of a podcast over ten twenty-minute episodes allowed Sands to develop why and how it operated by reference to the detail of one particular case, whilst exposing the ordinary, human side and occasional tenderness of the individuals involved, even where they had been guilty of the most heinous of crimes against humanity and genocide. The involvement in protecting the Nazis and the ratline of the Catholic church and the Americans was shocking. I was captivated. Sands presents the evidence and the results of his inquiries in an apparently objective way, but his views are clear and, in the best traditions of the bar, he made it impossible to come to any different conclusions.

Returning to capital punishment, the podcast *Capital* provides a wonderfully entertaining series, the pity of which is that it is difficult to see scope for a second series.

A government has been elected on an election promise to hold a referendum to reintroduce capital punishment; and when it is held, it results in a 51 per cent majority (described by the Minister of Capital Punishment as 'a strong popular mandate') in favour. Four civil servants are then tasked with implementing the vote, at least one of whom is implacably opposed.

An effective disguise in popular culture suggests an interesting character both with and without the mask underneath: thus Batman is the caped crusader and the troubled loner and Zorro the dashing vigilante and the nobleman seeking vengeance. There has always been a sizeable portion of the population that is in favour of capital punishment and *Capital* is a hilarious, but disturbing, look at what might occur if a referendum were held on the issue. Underneath, it is a withering satire on Brexit and the chaos it has unleashed.

The similarities are not limited to the set-up of the referendum, but extend to the inability of the politicians and the civil servants to deliver a sensible response, seeking refuge in modern meaningless management-speak at every turn.

For each half-hour episode, the cast of four main characters improvised around a 'beat sheet' for about ten hours, but the editing is tight and it continues to hit the target without dropping the pace.

There is a team-building exercise where the four each get to nominate what would be their last meal if they were about to be executed, which includes discussion as to whether there is a vegan option.

Then, in debating what method is to be adopted, hanging is characterised as a hard capital punishment with lethal injection being soft. A suggestion that 'national treasure David Beckham kicks their head in' is not adopted and the guillotine is decided to be 'too French' when what is wanted is 'a British punishment for the British people'.

There is a search for an executioner, which ends with the team's pizza delivery guy Mario accepting the offer; and a search for a sufficiently unsympathetic character to be the first victim or 'service user', which includes a suggestion that 'horse botherers, bankers and fake vicars' should be executed and a rush to the airport to prevent the deportation of an ideal candidate.

An intended meaningless soundbite from the incompetent Minister that 'It'll all be over by Christmas' is taken as a policy decision on when the first execution is to occur. The end of the series, which takes place on Christmas day, is arresting, disturbing and thought-provoking.

PODCAST

Season 3 of the *Serial* Podcast

'One courthouse told week by week'

The justice centre in Cleveland Ohio takes up a whole city block downtown. It's a cluster of concrete towers built in the 1970s. I could hedge here, but I'm just going to say it. The buildings are hideous. But practical. … Roughly speaking the building functions like most hierarchies. Vertically. In this case from the bowels up. The main court tower is 26 stories high. So the elevator really runs the place.

So begins Sarah Koenig in the third and latest season of the *Serial* podcast. And in those opening minutes, as Koenig describes suspects being escorted from the underground carpark by 'weary cops', the 'courteous stenographers' dragging their 'squat wheelie bags' into the elevators and the defence attorneys 'riding up and down … muttering to each other, griping about judges, who have their own judge elevator, so they're not overhearing', you can't help but think that Koenig's lyrical sketch could be of any Australian criminal courthouse. It could be the Downing Centre; it could be the Parramatta court complex; it could be the Supreme Court in Queens Square.

For those of you not (yet) addicted, *Serial* is an investigative journalism podcast hosted by Sarah Koenig, a producer and journalist of *This American Life*. When *Serial* first launched in 2014, the podcast became an overnight success. The first season of *Serial* won a Peabody award in April 2015 for its innovative telling of a long-form non-fiction story. The first two seasons of *Serial* have been downloaded more than 340 million times, establishing an ongoing world record.

In the first season of *Serial*, Koenig narrated an investigation into the 2000 conviction of Adnan Syed for the murder of his girlfriend, Hae Min Lee, in Baltimore. (The show led to the grant of a retrial for Syed, which is still pending.) The second season of *Serial* documented the story of Bowe Bergdahl, a U.S. soldier who was captured by the Taliban.

The third season takes a different approach. As Koenig says, Syed's case does not tell us much about the criminal justice system. It was an unusual case, not least because most cases do not go to trial, and because it concerned murder, the most serious of criminal offences. Koenig states 'I don't think that we can understand how

the criminal justice system works by interrogating one extraordinary case. Ordinary cases are where we need to look.' In the third season, *Serial* does just that. Koenig and her co-producer, Emmanuel Dzotsi, spent a full year observing cases in the one courthouse in Cleveland. They tell the stories of the minor misdemeanours, the felonies, the cases of pub brawls, weed possessions, assaults, shootings and armed robberies that they heard about over that year.

The producers of *Serial* chose Cleveland because they were allowed to record everywhere – in 'courtrooms, back hallways, judges' chambers, the prosecutors' office'. As a result, the commentary is illustrated by the voices of judges, prosecutors, defence attorneys, police officers, witnesses, victims and accused persons, as spoken in evidence, in court, and in interviews about their experience of justice.

The success of *Serial* is a comfort to those who fear the demise of journalism – especially for those who fear that investigative journalism is being replaced by superficial events coverage and that thorough reporting is being supplanted by 140 character tweets. It is long - each episode is about an hour long. Each episode is rich in detail, nuanced and intelligent.

Serial is also compelling. Ira Glass (host and producer of *This American Life*) has explained that the intent of *Serial* was to give viewers 'the same experience you get from a great HBO or Netflix series, where you get caught up with the characters and the thing unfolds week after week, but with a true story, and no pictures. Like *House of Cards*, but you can enjoy it while you're driving.' As with Seasons 1 and 2, Season 3 of Serial certainly achieves this aim.

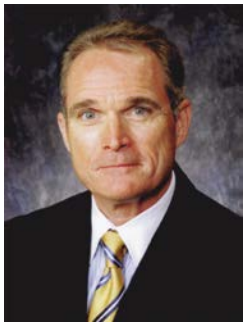
Like the Netflix series '*The Wire*', Season 3 of *Serial* explores broader social issues through the lens of its individual stories. And as with *The Wire*, one of the key issues examined through those individual stories is race, and in particular, the experience of African Americans as victims in and of the American criminal justice system.

In the first episode, Koenig says 'this place is primarily black and white.' The clerks and security guards are most mostly black. Managers, deputies and attorneys are mostly white. Almost all of the county court judges are white. Yet most of the defendants and crime victims are black. Koenig continues:

> 'In the cocoon of the elevator, everyone's polite to each other, pretending that nothing is weird about this. But if the elevators were calibrated to detect a power imbalance in the load, like a socially conscious clothes dryer, they'd be perpetually on the fritz.'

Some issues covered by Season 3 will shock Australian lawyers. *Serial* describes elected judges who become 'controversially entertaining TV judges' and headlines like 'Woman Convicted in Murder Conspiracy Calls Judge Racist, Gets Life Sentence' and 'Judge Compares Man Acquitted of Murder Charge to Las Vegas Shooter at Sentencing' (emphasis on the word 'acquitted'). The audio of a country court judge (unconstitutionally) ordering an offender to not have any more children out of wedlock as a condition of probation is particularly alarming (Episode 2 *'You've got some Gauls'*).

The Cleveland Justice Centre



Judge Gaul, who has been elected to sit since 1992: 'You're on probation ..., and if you have more kids out of wedlock that you can't afford to pay for, I'm going to send you right back to the institution.'

'Judge Compares Man Acquitted of Murder Charge to Las Vegas Shooter at Sentencing' (emphasis on the word 'acquitted').

However, other issues explored in Season 3 will resonate with Australian lawyers, particularly those practising in crime. In the first episode (*'A bar fight walks into the Justice Centre'*), Koenig examines a 'small case' about a young woman ('Anna') who is sexually harassed in a bar and ends up accidentally punching a police officer in the ensuing brawl. Koenig describes the case as an 'example of what's considered functional justice in Cuyahoga County', a case that is considered to be an example of 'the system working'.

And the system does 'work' in that case – the plea that is eventually negotiated (a minor misdemeanour of disorderly conduct) seems fitting, and the fine ultimately imposed is minimal. But Koenig also catalogues the other consequences that Anna has endured: her distress in the back of the police car after her arrest; her four nights in the squalid county jail; the interest that must be paid on her $5000 bail bond money; the onerous conditions of her court supervised release (bail); and the court costs. As Koenig points out: 'What they're not saying, maybe because they're not seeing it, is the extent of Anna's punishment. Which when you take a minute to catalogue the consequences, was not small. It did not fit the crime.'

The institutional pressures on defendants to plead guilty is also a theme which will be of interest to Australian criminal lawyers. *Serial* depicts an overloaded criminal justice system that relies on pleas of guilty to function; a system in which judges who have not read the brief of evidence pressure defendants to plead; in which under-resourced prosecutors overcharge to induce pleas and in which the public funding of defence attorneys is structured to reward those who can convince their clients not to defend charges, even when their client is innocent. As one Cleveland judge explains to Koenig, 'Plea bargaining isn't part of the criminal justice system, it is the criminal justice system. Pleas are cheap. They lead to more convictions and to more incarceration.' (Episode 5, *Pleas Baby Pleas.'*)

But as *Serial* vividly demonstrates, the system's dependence on pleas does not lead to justice. About Anna's case, Koenig states 'Everyone around here, prosecutors, defense attorneys, judges, even defendants, has internalized this idea that a misdemeanor is of little consequence. A lawyer like Russ [Anna's attorney] sometimes has to remind himself how mangled a principle that is. If the prosecution can't prove its case, they should drop it, not simply shrink it until it looks harmless enough to swallow.'

Serial's warning about the risks of a criminal justice system which is structured to apply excessive pressure to plead is timely. Like the Cleveland County Court, our courts are plagued by delay. The encouragement of early pleas is one way of reducing those delays, as is recognised by the Early Appropriate Guilty Pleas (EAGP) legislation. But the dangers of wrongful pleas as illustrated in *Serial* are real. Those risks must be borne in mind by legislators, judges, prosecutors and defence lawyers, to ensure that an incentive to plead guilty does not cause the innocent to forego their right to trial.

Serial, Season 3 is available for free on Apple Podcasts and Google Podcasts. It is also available on the *Serial* webpage: https://serialpodcast.org/season-three/

Mindfulness through football

While some barristers practise mindfulness, Bar FC members find the best form of meditation to be running around the Domain on a weekly basis chasing a round leather ball. For forty minutes, each player's mind is emptied of the usual distractions; thoughts of deadlines, difficult legal issues and getting through the 'too hard' pile of chamber work are all replaced by a single thought. How to get that ball into the back of the net. For this reason alone, Bar FC continues to be an important aspect of life at the bar for many.

This year, Bar FC competed in a weekly lunchtime competition played in the Domain between April and August. The results were mixed with some games slipping away from us as Lady Luck always was just out of reach. A strong surge towards the end of the season however meant that a spot in the finals was secured. Unfortunately, a narrow loss (2-1) to Sydney Business School meant that we did not progress past the semi-final stage. Nevertheless, the season was an enjoyable one with Richard Di Michiel winning the Golden Boot for the season (yet again), Sebastian Hartford Davis getting the Sir Alex Award (for most valuable player) and David Larish won Rookie of the Year.

After 11 years, Bar FC is now stronger than ever. This year saw a replenishment of the squad as a result of Gillian Mahony encouraging all readers to strap on the boots and head to the paddock. While not all readers took up the challenge, Bar FC welcomed a number of readers and others to the team. Newcomers Dewashish Adhikary, Elly Aitkenhead, Graham Connolly, Nicholas Condylis, David Larish, Thomas Liu and Savitha Swami added much-needed pace and guile to the team.

Also great to welcome back some players who for various reasons had a small hiatus in their football carers with Bar FC. Despina Christofis, Stephen Free and Sheriff Habib SC making a number of appearances in the DSL Competition.

Notwithstanding a squad of over 70 players, Bar FC is always looking for new members to ensure the longevity of the team. Players of all abilities are catered for and welcomed to the team. Should you be interested in playing the beautiful game in 2019 and beyond, please contact the team manager, David Stanton (Sir Alex) on d.stanton@mauricebyers.com for more information.

The 2018 Tri State Football Challenge

On Saturday 8 September 2018, members of NSW Bar FC headed south to Melbourne to compete in the annual Tri State Football Challenge against the (best) of the Victorian and Queensland bars.

The weather was not kind to us with the massive electrical storms in Sydney on the Friday night leading to numerous flights being cancelled out of Mascot. Four of our players at the airport that night who had their flights cancelled, and were unable to get rescheduled early flights the following day. So, before had even leaving Sydney, we had lost Patch(aldinho), Coutinho, Younan and Anais D'Arville. Not a very promising start.

However, by match time on Saturday afternoon, we were able to field a squad of 13 at the picturesque South Yarra FC grounds (although Gillian Mahony, making her much anticipated return to the squad was unable to actually play due to injury).

The first game between Victoria and Queensland Bar saw an upset 2-0 victory to Queensland, with NSW goalkeeper Harris having volunteered (as usual) to keep for Queensland and maintaining a clean sheet. Lo Surdo SC was referee for that match.

The next game saw NSW take the field to play Queensland. In an impressive attacking display in the first minutes, Condylis (on his NSW Bar FC interstate debut) picked out Di Michiel who passed to Morrison, then back to Condylis who scored the first NSW goal. Not to be outdone, Di Michiel scored at the 15-minute mark to give us a handy 2-0 lead. Queensland responded with a spirited attack and Harris made a great save to keep the score at 2-0. At the 25-minute mark, Di Michiel scored again giving NSW a 3-0 lead at half time.

In the second half, Morrison nodded in a fantastic corner from Condylis to make it 4-0. The tiring NSW defence was then sorely tested, but with our sweeper Philips keeping the backs in a formidable defensive line, and Harris working hard in goals, NSW managed to keep the Queenslanders scoreless with a fulltime score of 4-0.

After a short break, NSW took the field again, this time against the Victorians. Victoria commenced with a series of strong attacks. Thanks to spirited performances from de Meyrick, Griscti, Bedrossian, Liu, Maghami and (Asher) D'Arville, and with Harris in goals, the Victorian attacking forays were repulsed. Di Michiel managed to score the first NSW goal at the 12-minute mark, and a minute later Morrison was unlucky to just miss with his own shot Under heavy pressure from di Michiel, Victoria conceded an own goal, which was quickly followed by another stike for NSW, putting us up 3-0. Just before half time, Victoria

scored their first goal, making the half time score 3-1 in NSW's favour.

In the second half, considerable pressure by the Victorians resulted in a headed goal off a corner and it was game on with NSW under the pump and only ahead 3-2. But, just when it was needed most, the goal of the day was scored by Condylis, who won the ball deep in midfield, and then ran half the length of the pitch in possession, weaving through several determined Victorian mid fielders and defenders, to score a magnificent fourth goal. Morrison took advantage of a despondent Victoria to score another runaway goal soon after to take NSW's tally to five. The Victorians pressed hard in the last 10 minutes but could not breach the valiant NSW defence, and at full time the final score was 5-2 in NSW's favour.

Two great wins for NSW Bar FC saw NSW retain the silverware.

The touring squad (that actually made it to Melbourne) was as follows:

- Faraz Maghami
- Geoff O'Shea (Manager)
- Simon Philips (Captain)
- Nick Condylis
- Hugh Morrison
- John Harris
- Vahan Bedrossian
- Rohan de Meyrick
- Richard di Michiel
- Thomas Liu
- Ivan Griscti
- Anthony Lo Surdo SC
- Gillian Mahony

Special thanks must go to Geoff O'Shea for managing the squad and to Asher D'Arville for filling in at extremely short notice.

2018 Tri-State Bar Sport Law Conference

On the morning before the 2018 Tri State Football Challenge, the annual Tri-State Bar Sport Law Conference took place in the rooms of the Victorian Bar Association in Owen Dixon Chambers. Ably organised by Tony Klotz of the Victorian Bar (with input from Anthony Lo Surdo SC), the conference was (yet again) a great opportunity of members of the three eastern seaboard bars with an interest in sports law to gather and exchange views about topics of interest.

Adrian Anderson, formerly a senior executive with the AFL and now a member of the Victorian Bar, started proceedings with an excellent presentation about Natural Justice in Sports Tribunals.

Sadly, John Didulica from Professional Footballers Australia was unable to make his presentation, having been called away at short notice to Istanbul to deal with issues involving the Socceroos training camp.

John's absence however allowed more time for Ivan Griscti to make a highly informative presentation of the procedures involved in, and his experiences of, appearing before the FFA Disciplinary and Ethics Committee. This progressed into a wide ranging panel discussion (involving Simon Philips and others) dealing with attendees' experiences appearing before sports disciplinary tribunals generally.

The conference was well attended, thoroughly enjoyable and the perfect pre-cursor to 'the Festival of the Boot' which took place later in the day.

The Bar Knitting (*not only knitting*) Group

Back row, L to R: Brenda Tronson, Sarah Warren, Ingrid King, Fiona Leahy
Front row, L to R: Michelle Painter SC, Jackie Charles, Janet McDonald, Leigh Sanderson

The Bar Knitting Group was co-founded by Bar Librarian Lisa Allen and Michelle Painter. In the true spirit of competition between branches of the profession, the existence of a knitting group at ASIC was a spur to establish a rival group for barristers. And thus, in about 2010 the Bar Knitting Group was established. From the beginning the group has been open to all barristers, and the ability to knit is not a precondition.

The group courted scandal during one Bar Council election cycle, when it was mentioned in dispatches. Putting up a spirited defence, the Knitting Group not only survived but thrived, and the 'scandal' resulted in many more members. Over the years, the group has continued to expand and now has non-barrister 'ring-ins', including a few judges and associates. Barrister members include several prize winning technical knitters, expert crocheters, newbie knitters, and even a wondrously talented embroiderer!

The group fulfils an important mandate – a collegiate atmosphere and a hint of life outside the bar. In the words of longstanding member Janet McDonald:

I joined the Bar Knitting Group in late 2013 when I was feeling very low as a result of the breakdown of my 21-year marriage. I had noted the establishment of the Bar Knitting Group, and perhaps like a few other barristers, had quietly scoffed to myself and did a bit of an eye-roll! But then, with no expectations and with considerable trepidation, I ventured down to the Bar library one Tuesday evening, armed with my knitting needles. Much to my surprise and delight, Lisa Allen was setting up wine and cheese and shortly thereafter a number of barristers I knew arrived. Over the next hour I reconnected with a craft in which I had not engaged in for well over 10 years, gossiped and laughed with my colleagues, was amazed by the incredible knitting talents of very senior barristers and a judge(!) and indulged in some lovely wine and cheese. The whole thing was like a warm hug. The experience was wonderful from beginning to end and I have been a regular attendee ever since.

Judicial tea cosy, knitted for Rees J by Painter SC.

Michelle Painter SC gives Janet McDonald a helping hand (or two)!

The group meets on the fourth Tuesday of the month, usually in the Bar Library, from 5:30pm. Light refreshments are provided, courtesy of the Bar Association, and are thankfully received. Chatham House rules apply. There are no other rules! Except perhaps for one, most important one – to support each other in a spirit of camaraderie and friendship.

Bullfry and the 'overriding purpose'

By Lee Aitken

Once upon a time, thought Bullfry, a Rule was Rule. You knew where you stood – if your statement of claim was defective, you amended it and paid any consequential costs. If, in order to minimise costs by entrusting the task to unskilled neophytes, your opponent revealed confidential and privilege information to you, that there was their lookout. If you discontinued a claim you might, as advised, recommence it subject to any condition imposed on the discontinuance. Now all changed, changed utterly.

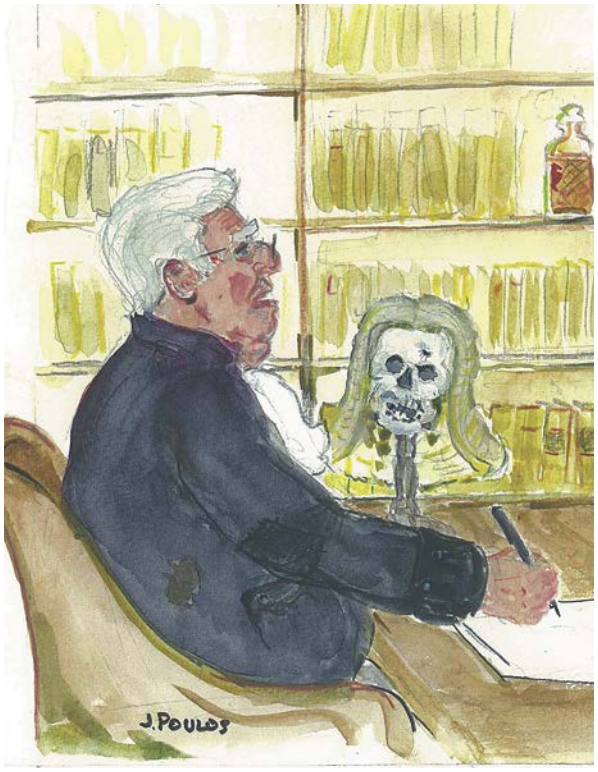
In keeping with the temper of the times, a vast procedural alteration was introduced (a dubious import from England) – the notion of an 'overriding purpose' which controlled both the *Civil Procedure Act 2005* and the Rules themselves - section 56. The 'purpose' in civil proceedings was to 'facilitate the just, quick and cheap' resolution of the 'real' issues. As BA Coles QC had said to Bullfry at the time, 'You see, Jack, even justice gets some recognition!'

No matter that there is a fundamental internal inconsistency between a result being 'just' as well as 'quick' and 'cheap'. Justice done 'too quickly' on the 'cheap' is frequently not justice at all – the old nostrum (in its positive sense) made that clear – 'Fiat iustitia, ruat coelum' – the draftsman of that 'Rule' was not concerned with something quick, nor cheap. 'It might be thought a truism that `case management principles' should not supplant the objective of doing justice between the parties according to law".

A reason that legal advice is so expensive is that, unlike in, say a Contracts I exam, the relevant legal facts have not been distilled at the start. It may take days, weeks, or months, before what is legally relevant to the dispute becomes clear. For that same reason, it may be impossible for a matter to be resolved quickly. And indeed, the whole notion of 'time-costing' provided a perverse disincentive from resolving anything quickly – the longer it took, the higher the fee.

Things had been simpler in Bullfry's youth – then, practising on the South China Sea, the 'billing guide' for the most venerable firm in the colony had, as its first criterion – 'the importance of the matter to the client'!

Bullfry had freed an airline from US arrest



for an anchor client of the firm. He carried the file to the chain-smoking senior litigation partner (now long-deceased) who had said to him:

'How much is on the clock?'

'Four hundred thousand.'

'Say two million'.

Those were the days.

Nevertheless, under the modern dispensation, the needs of the courts as a whole, and efficiency with respect to other litigants is said to be a matter which must be borne constantly in mind. Justice delayed is justice denied – public confidence in the system will be lost if a court accedes to applications without explanation, or justification, for adjournments, amendments, and the vacation of trial dates.

And yet, on the other hand, matters were not struck out summarily or on demurrer. A short TPA matter involving a hearing of one day, and a couple of witnesses, might run each side to $140K with all the costs to come out of a modest estate! As usual in the modern world, there were any number of statutes which set out pietistically what should occur, but very little follow through in practice, except for the odd bit of virtue signalling by the highest court on the *Admiral Byng* principle, when a large number of ancient authorities which predated 2005 were impliedly disregarded, or taken to be overruled by implication, because they no longer conformed to the Zeitgeist.

And, how did the 'purpose' tie in with the notion of the 'real issues' in a case? Until special pleading was abolished a whole series of technical Rules (non-traversable averments, and the like) meant that only one issue would be present for the trier of fact.

Modern civil pleadings (often generated in-house by the larger firms of solicitors to preserve a 'costs-centre') frequently bring to mind Baron Brampton's reminiscence (Chapter XI) and Codd's Puzzle, and the five defences to the presence of the duck in his client's pocket – 'he was like a conjurer who asks you to name a card, and as surely as you do so you draw it from the pack' –

'First,' says Codd, 'my client bought the duck and paid for it'

He was not a man afraid of being asked where.

'Second,' says Codd, 'my client found it; thirdly, it had been given to him; fourthly, it flew into his garden; fifthly, he was asleep,

and someone put it into his pocket.'

There are, so it would seem, no real penalties for departure, even though mutually inconsistent pleadings would seem to be in breach of the 'overriding purpose' and thus put any barrister or solicitor involved in drafting them in breach of section 56(4) of the Act.

Modern authority from the highest tribunal confirms the terrible muddle into which the court has got itself by articulating the 'overriding' purpose. The fundamental practical problem is to work out well in advance which particular homespun litigation practice (long-sanctioned by usage and binding precedent and universally applied) will fall foul of the 'overriding purpose'

Difficulties first arose with *Aon*. Prior to *Aon* it was a forensic given that upon penalty of paying the costs occasioned by it, a party might further amend a pleading on foot. 'In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. *Those times are long gone'*. Now, an amendment may only be made when 'the controversy or issue was in existence prior to the application for amendment being made'. Any unexplained delay in articulating the claim may be fatal.

Then came *Expense Reduction* and the 'discovery' imbroglio. Privileged documents are inadvertently disclosed to the other side – 'the persons who were given the task of reviewing the documents were not very experienced in the process of discovery'! The other side thinks there may have been a deliberate waiver. A powerful Court of Appeal understandably regards the question as one involving equity's jurisdiction over confidential documents. Not so. Once again the question is susceptible of 'simple' resolution by applying case management rules and seeking merely to amend the list of discovered documents.

Finally, most recently, *UBS AG v Tyne* a case where a party which had discontinued without any condition being imposed was prevented from recommencing a claim. It is a most interesting decision – the High Court splits 4\3 in favour of the 'modern view' of litigation with powerful dissents from Nettle and Edelman, and Gordon JJ.

In the Full Federal Court, interpreting the Zeitgeist, Dowsett J had dissented because a 'focus on the `right' of a litigant to discontinue and later commence fresh proceedings is out of keeping with the conduct of modern litigation, consistently with the overarching purpose'.

The 'purpose' involves 'the just resolution of disputes according to law'. Now so soon as 'justice' is expanded from some inquiry between the immediate parties to take into account 'other litigants who are left in the queue awaiting justice' very difficult tactical questions indeed are generated in terms of how, when, and where to implead a defendant.

And even the failure of the party against which the initial claim had been discontinued to seek, as appropriate, conditions on any further claim (as contemplated by the Rules) will not protect the later claim as being stigmatised as an abuse of process!

Justices Nettle and Edelman in dissent in UBS concluded that where the delay complained of was not 'inordinate or inexcusable', the party's claim had not been determined, the prosecution of the claims was not 'unjustifiably oppressive' to a huge, international Bank (!!) and there was no collateral purpose which brought the administration into disrepute, the matter should have proceeded to trial. Gordon J also dissented. Her Honour noted the great challenges of modern litigation and the 'cultural shift' which had occurred in conducting it. Her Honour noted that the Rules specifically contemplated that the original matter might be discontinued, and there was 'unchallenged sworn evidence' as to why that course was taken.

Gordon J summed up the fundamental dilemma posed by the antithetical rationales concealed in the 'overarching purpose'. As her Honour stated emphatically, all the considerations of efficiency, cost, timeliness and the like are directed fundamentally to the '*just resolution*' of the dispute.

Well, there you have it, thought Bullfry.

On the one hand resources must be conserved, costs minimised, and all litigants given their day in court – on the other hand, delicate and complex Rules of procedure which might be mastered and applied for tactical forensic advantage (and upon which the case law exegesis was immense) were available to be invoked by the skilled practitioner.

Which approach was to prevail? And how was the modern lawyer to advise? The chasm between the Cadi and his palm tree, and Mr Tidd looms ever larger!

The delicate dance of decorum

Words are the weapon of the advocate. They are both the overtly powerful armament by which we create and obliterate final argument, and the cloaked dagger we occasionally unsheathe to blood-let a sensible (but bothersome) procedural suggestion of an opponent. Of course, many a wisened counsel will tell you that when appearing before certain members of the Bench, it is best to draw upon one's fine command of the English language…and say nothing.

In the florid fandango between Bench and Bar, language is frequently used by counsel to couch indelicacies (certain, 'inconvenient truths') to their Honours. For example, the following curial messages which counsel are liable to utter are, I respectfully submit, well understood by judicial ears:

What barrister says	What barrister means
'Your Honour, I am instructed that…'	'Your Honour, what I am about to say is so devoid of sense, logic or any underpinning in known law, that I feel compelled to flag with you that my only reason for raising it is the relentless pressure from my instructor and my future need to secure further work from them to feed my family.'
'my learned friend'	'my so-called learned friend.'
'Quite.'	'Your Honour appears to be agreeing with me, and I'm terrified of messing it up.'
'Your Honour, I hear what you say.'	'I respectfully disregard the erroneous characterisation your Honour has just given to my argument and will explain the issue further in a moment.'
'I will need to obtain further instructions on that issue.'	'I have tried to persuade my client of the sensible proposition your Honour puts; but let's see if vthey'll listen to me now they've heard you make the same point.'
'I will take that on notice your Honour.'	'I have no idea what your Honour has just said.'

Of course, the metaphor of dance is an earnest one, and as they say, it takes two to tango. Judges too are liable to rumba in code, issuing statements that are seemingly innocuous to all but their barristerial dance-partners. For example:

What judge says	What judge means
'I'm not suggesting you should, but do you have any submissions in reply?'	'Nothing you say will make any difference to my judgment.'
'…of course, these are merely my preliminary thoughts and you should not be dissuaded from putting forward your arguments to the contrary.'	'Nothing you say will make any difference to my judgment, but I want to appeal-proof my reasons by hearing all of your wayward submissions.'
'I think I have the point, it's as I understood the usual practice to be.'	'The runway is before you, alight and bearing welcoming semaphore. Hurry up and land this plane.'
'I would like to ask the witness some questions.'	'Let me land this plane.'
'I see your only authority for that proposition is the dissenting judgment of Kirby J in reliance upon international law.'	'I'm afraid man was never meant to fly.'

There is something to be said for the subterfuge by which truth is transmitted between the actors in court, and that is: one's dignity is better preserved before solicitor and/or client instructors. It permits after-court conversations like the following:

	What person says	What person means
Client	'How do you think that went?'	'How do you think that went?'
Barrister	'It was not without interest. Lunch?'	'Well that was an absolute bloodbath. I need carbs.'
Client	'Sounds good.'	'Yay – free food!'

Learning to be a good judge

It was a shock, of course, for Jenkins to discover upon his unexpected elevation to the bench that all those aspects of private practice which had heretofore annoyed him were simply replaced with new, possibly worse, diversions. He was, for example, quite taken aback to learn that continuing legal education had not only failed to disappear from his life but had morphed into something even more alarming: continuing judicial education. At first, he thought this was some kind of sick joke, but when he was invited to an afternoon seminar titled 'How to get one's judgments written in under five years' he knew that things had gone south, and not just his buttocks which, in moments of quiet personal contemplation, like his chin, he suspected had fallen under the pernicious sway of gravity.

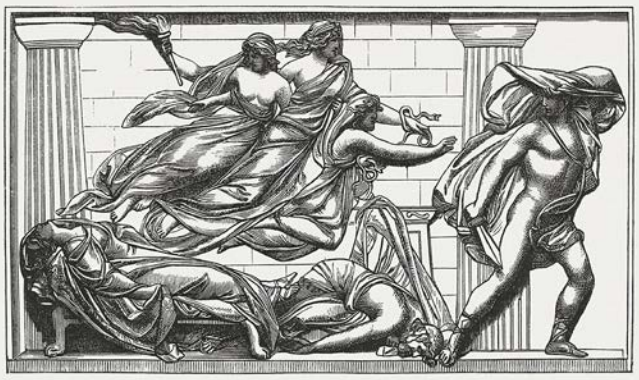
Worse lay in stall for him. He was, so it seemed, to be sent to some sort of judicial Hogwarts known as 'Baby Judges School'. This was held in a distant seaside resort away from the public gaze but surrounded at a distance by curiously disturbing seagulls. This resort was just flash enough to conform to the class members' newly found sense of self-importance but not so flash as to break the budget. Jenkins had already noticed that judicial organisations did not seem to have quite as much cash as the associations of the practitioners and this alarmed him for the future. In any event, he could tell from the décor, which reminded him of a declining chalet at which he had once stayed during a blizzard while skiing in Chile, that while the week would not be jelly it would not be all crème brûlée either.

There was a rigorous schedule. On the first day all the new judges from the various courts across the country would be sorted into houses (Barwick, Murphy, Eldon and Gummow) according to disposition. Jenkins had ended up in Barwick which troubled him. On the first day they would be introduced to key topics such as 'Avoiding brawling in public', 'Should I sit on a case where my sister is the plaintiff?', 'Judgment writing' and 'Is it alright to sue my neighbour because of his defective retaining wall?'. Jenkins found the notion that he should be told how to write a judgment quite insulting as he had always prided himself on the loftiness of his expression and the pithiness of his prose. The bottom line of the lecture was, so it seems, that one should write a judgment with a view to showing some mercy to the reader. 'Piffle' thought Jenkins.

He was, so it seems, to be sent to some sort of judicial Hogwarts known as 'Baby Judges School'.

In the evenings there were to be social activities in the drawing room aimed at self-improvement and the pursuit of the higher and the good. The registrar had warned him about these soirées and had especially counselled him against socialising with the County Court of Victoria who were, apparently, 'unsound'. In a previous year, so the registrar shared with him in a hushed conspiratorial tone, the County Court had been involved in some sort of nocturnal incident in the resort swimming pool involving the creepy crawly and a stuffed teddy bear. The registrar declined to be more specific but his expression left Jenkins in no doubt that a lapse of taste had been involved. The week crept by: 'What to do if your litigant in person is a homicidal psychopath', 'Dealing with naughty counsel', 'How to shut up and not interrupt' (Jenkins failed this one) and one for which he had no use 'Avoiding over-anxious displays of knowledge'. Exhausted towards the end of the week by his studies, he did not attend 'Running a commercial list using mixed martial arts', 'Judicial Humour – All My Jokes Are Funny' or 'Timely delivery of judgments – the Lost Tribe of the Amazon'.

When he returned from this course, Jenkins was, of course, a much better judge. He could tell, for example, that his jokes had got much better since people seemed to laugh at them more and more. Although he had not attended the judicial humour class, he put his new abilities down to his unexpected after-dark bacchanal with the County Court of Victoria. His recollection of that evening was a little hazy but he was sure that he had, at least, avoided the dangerous charms of the swimming pool, if not the teddy bear. Regardless of the registrar's advice, this evening had paid admirable dividends and his mastery of high slapstick was now much more adroit. He had noticed, too, that, people were much more polite to him now. It seemed that he was finally being treated in a way which was congruent with his own estimation of himself. It was just a matter of getting sufficient exposure, he mused.



Q. What is the appropriate response to fellow counsel, robed or unrobed, reaching out and offering to shake hands? I was raised in the tradition that counsel do not shake hands. Do I (a) reluctantly accept the hand-shake while politely admonishing fellow counsel? (b) refuse the hand-shake and politely admonish fellow counsel? (c) refuse the hand-shake and laugh it off (d) simply ignore the hand-shake and forget it never happened or (e) fully embrace the hand-shake knowing full well that I have contravened one of the most ancient rules of etiquette and conventions at the Bar and contributed to diminishing the splendour and mystery of our esteemed profession?

We all know the inverse relationship that exists between weapon wearing and handshaking and no more needs to be said on that score[1]. Instead, we are intrigued by your reference to 'the most ancient rules of etiquette and conventions at the Bar' and even more so by 'the splendour and mystery of our esteemed profession'. We assume you to be referring to such things as the wearing of the horse hair wig, the black gown, the strange bit of cloth on the back shoulder and generally the idiosyncrasies that mark us out from the general population as we walk up Phillip Street. Those conventions date precisely to 6 February 1685, being the tragic date King Charles II sadly departed this mortal coil. Prior to that time and stripped of all our distinguishing customs, we imagine barristers looked much like any other of the disreputables hanging around the courts. However, the demise of that great leader brought on our esteemed profession an ostentatious and far reaching display of mourning little seen in modern times outside of the more extreme religious sects and North Korea. In this context, we must consider the barrister non-handshake.

Non-handshaking is not just a failure to shake hands: it is a secret acknowledgment, a knowing look, a slight nod and hands gripped firmly around one's folder or the vertical seams of one's robe lest a hand should shoot out involuntarily. More mysterious than a masonic handshake and less elaborate than an American frat combo with fist bump, non-handshaking suffers from being both overly subtle and obscure such that, to the uninitiated, it may seem just plain rude[2]. Consequently, the non-handshake should only be practised with those in the know. For those who do the unthinkable and extend the hand, it may be tempting to disapprove, but it just may be that these seemingly ignorant members of the profession are actually the most observant. It may just be that there is an inner sanctum of barristers even more esteemed, even more mysterious and even more splendid who, in honouring the death of King Charles II, have chosen to shake hands. Indeed, for a king with fourteen known illegitimate issue, we hardly think he would have been squeamish about the pressing of flesh. Therefore, the next time another barrister extends to you a hand, look knowingly and shake firmly. But not too firmly, and we do urge you to draw the line at fist bumps.

Q1. Let's just admit it: some barristers are frustrated test cricketers who like nothing more than to sledge their opponents. Sotto voce or loud enough for the public gallery, they see it as one of their core courtroom functions. Is this workplace bullying? Or am I a wowser ruining everyone's fun? And is it ever becoming to draw attention to sledging in the judge's presence? Or is your remedy invariably an awkward exchange of words in the lift foyer?

Whether it's a leather-bound ball or words from a leather-bound book, delivery is everything. In that sense, sledging in a court room is not like sledging in test cricket. The better analogy is ball tampering. Enough said.

If we are too harsh in our views, and it is all just a bit of fun between counsel, then we ask this question: When have you ever seen a barrister sledge (by which we mean international grade sledging and not light-hearted bonhomie at the backyard level) (a) a good friend; or (b) someone more senior and respected? We thought not. It's just not cricket.

We have heard of many tactics to deal with sledging over the years. Some suggest indicating to the court that your friend wishes to say something and then sitting down, others say a quick 'save it for your submissions' hissed sotto voce does the trick. We suggest that if someone treats you so discourteously as to sledge you, just ignore it and be courteous, but dismissive and withhold any small generosities or exchanges you might otherwise offer up to more pleasant counsel. Why make their life easy? Oh! And next time you see them, you may want to shake their hand just to check they are not concealing sandpaper.

ENDNOTES

1 For those of you unfamiliar with the ancient custom of handshaking, it was borne of a need to show that one was not holding or concealing a sword, hence the superfluity of shaking hands, in those times, with children, women, peasants, people lacking apposable thumbs and members of the landed gentry. We assume barristers inhabited one or more of just such a class of person.

2 Although not to children, women, peasants, people lacking apposable thumbs and members of the landed gentry.

If you have a question you want the Bar's agony aunts to answer send it to: ingmar.taylor@greenway.com.au

Many girls white linen

no mist no mystery
no hanging rock only

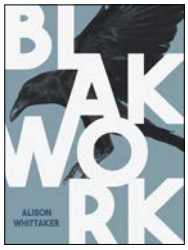
many girls white linen
men with guns and
harsher things white women
amongst gums white linen
starch'er things later plaques
will mark this war
nails peeling back floor
scrubbing back blak chores
white luxe hangnails hanging
more than nails while
no palm glowing paler

later plaques will mark
this sick linen's rotten
cotton genes later plaques
will track the try
to bleed lineage dry

its banks now flood

a new ancestor, Ordeal,
plaits this our blood

if evil is banal
how more boring is
suffering evil two bloodlines
from it how more
raw rousing horrifying is
the plaque that marks
something else rolling on
from this place a
roll of white linen
dropped on slight incline
amongst gums collecting grit
where blak girls hang
nails hang out picking
them hangnails



Blakwork

Alison Whittaker,
Magabala Books, 2018

'***Many girls white linen***' is a poem in Alison Whittaker's second book, *Blakwork*, which reviewer Karen Wyld (*Books + Publishing*) has described as 'a bold mix of poetry, micro-fiction, memoir and critique'. Whittaker 'bravely unpacks themes such as colonisation and Aboriginal rights in Australia'.