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# THE JOURNAL OF THE NSW BAR ASSOCIATION | AUTUMN 2014 barnews

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

8th Floor Selborne Chambers  
8/174 Phillip Street  
Sydney 2000  
DX 395 Sydney

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The feature article in this issue looks at the great silk debate – whether NSW silks should be able to use the post-nominal letters ‘QC’ instead of ‘SC’.

Daniel Klineberg looks at the main arguments for both sides. Among other things, he recounts the remarks of Kirby P at a ceremonial sitting of the New South Wales Court of Appeal on 14 December 1992.

In an address to the newly appointed QCs of that year – they were the last silks appointed in NSW by the Executive, the Fahey government having announced that it would shortly quit the practice – Kirby P articulated a number of arguments which are still central to the debate today, more than twenty years later. For example Kirby P questioned the extent to which the designation ‘SC’ would be recognised in markets outside Australia, particularly Asia.

While searching the Bar Association’s archives for material relevant to the current debate, Daniel unearthed a letter dated 10 December 1992 written by Sir Garfield Barwick to the then president of the New South Wales Bar Association, John Coombs QC.

Sir Garfield took a very different position to that of Kirby P. Barwick was strongly in favour of severing the executive from any role in the appointment of silk; he regarded the change in nomenclature as immaterial:

My suggestion is that you accept the Premier’s move. To do so will end the intrusion of the Attorney General into this aspect of the life of the Bar. Of course, one result is that the letter ‘Q’ drops out of the nomenclature. But we are readily spoken of as senior counsel. The letter ‘S’ replacing the ‘Q’ ought not to matter.

The letter is set out in full on p.54 of the current issue.

Sir Garfield Barwick is the subject of another piece in this issue, contributed by the Hon Tom Hughes QC.

Hughes knew Barwick well, and his description of Barwick’s life and achievements has the singular advantage of being drawn at least in part on his personal recollections of the man. Hughes’ conclusion is worth quoting:

Barwick was a good and faithful servant of the law, starting with nothing but his inborn talents, rising to the pinnacle in practice, then becoming a great law reformer before 17 years in office as chief

justice of Australia, where his tenure of office was efficient but at times controversial. By any acceptable standard, he was a truly great Australian.

Other articles in this issue include the chief justice’s reflections on case management and judicial bias, which includes a discussion of the correct protocol for communications between practitioners and judges.

The latter issue – which frequently arises in practice and is insufficiently understood by some – is taken up in more detail in a piece by Lachlan Edwards, which appears immediately after the article by the chief justice.

The Hon John Nader QC has contributed an opinion piece on a potential change to the law to enable legal title to underground materials to remain the permanent property of the state until sold for value by the state. Ian Bourke has contributed a useful paper on appearing in the coronial jurisdiction.

**Jeremy Stoljar SC**  
**Editor**

## Mandatory sentencing

By Phillip Boulten SC



In January the then premier, Barry O'Farrell, announced a range of important policy proposals in response to widespread and strongly held community views about alcohol related violence in Sydney and Kings Cross. The proposals were unexpectedly broad. Surprisingly, the premier announced a 1.30am 'lock out' and 3am 'last drinks' in Kings Cross and the CBD. Much more predictably, the premier also announced a large number of proposed mandatory sentences that would apply to violent offences when committed whilst intoxicated.

There was no community consultation about the mandatory sentences. The Law Reform Commission's extensive discussion paper on the reform of sentencing law was delivered to the government late last year. The Law Reform Commission has not mentioned mandatory sentences in their discussion paper.

Initially, the list of offences that would attract mandatory sentences included assaulting a police officer, assault occasioning

actual bodily harm and affray. If every intoxicated person convicted of these offences each year had to serve a minimum of two years imprisonment (as was proposed), the state's prison population would escalate by at least 1000 per year. A conservative estimate of the cost of this proposal was 1.5 billion dollars.

The Bar Association and the Law Council of Australia have always opposed mandatory sentences. The removal of judicial discretion negates the concept of individualised justice. At the very time that the US Senate Justice Committee began the process of winding back mandatory sentences for drug offenders, the New South Wales Government decided it would embrace the concept.

*There was no community consultation about the mandatory sentences.*

Media interest in the topic was high. I began to spend more time on the radio than I did in court. The legal profession was the only prominent contradictor in the argument. Over time, though, the arguments against mandatory sentencing gained significant traction.

The parliament met in February and on one day created a new offence of unlawful homicide that carries a mandatory minimum sentence of eight years. But, the government's further proposals

for mandatory sentences met with strong opposition in the Legislative Council even after assaulting police, assault occasioning actual bodily harm and affray were dropped from the list of offences that would carry mandatory sentences.

The opposition with the support of the Greens and the Shooters party significantly amended the Crimes Amendment (Intoxication) Bill, eliminating the concept of mandatory sentences for the various offences on the government's list and creating another new offence of gross alcohol fuelled violence that mirrored a similar proposal in Victoria that maintains a significant degree of judicial discretion on sentence.

The government rejected the amendments twice and at the time of writing, the original bill is due to be reconsidered by the Legislative Council a third time.

It is because the bar is actually independent and free of obligation to any political power, movement or institution that we can influence the legislative process. When we attempt to influence the shape of laws we always act in what we perceive to be the public interest. Whenever we ask the government to listen to us we must be guided by principle and the greater benefit of the community.

### SC or QC?

By 2013 a national conformity about the title of senior counsel had been achieved. Every state and territory and the

*We have had a very widely recognised and respected system of appointing senior counsel in NSW for more than 20 years.*

Commonwealth itself appointed senior counsel and not queen's counsel. Last year the Queensland Bar enthusiastically responded to an invitation from their attorney general to revert to QC. In February this year, the Victorian Bar Council resolved to give senior counsel the option of being QC or SC.

In our state we have had no option since the government amended the Legal Profession Act to effectively abolish QC in NSW. We have had a very widely recognised and respected system of appointing senior counsel in NSW for more than 20 years. For most of that time we were on our own in this regard. None of us operated under any measurable market disadvantage at any point in that history.

As a result of the Queensland and Victorian developments, the Bar Council established a working

group to advise it about the advantages and disadvantages of reverting to QC. This group was chaired by Bill Priestly. It received more than 200 submissions from our members. The submissions and the opinions of the members of the working group reflected a stark and deeply held division amongst us about reversion to QC.

At the time of writing the Bar Council had yet to consider the working group report but, irrespective of its decision on the issue, many people will be unhappy. Of course, the issue cannot be finally determined by the bar. Ultimately, if there is to be reversion, it will need legislative change.

Like any political advocacy that the bar engages in, any approach to the government needs to focus on public interest issues. To revisit 'QC' in NSW, the bar will

need to convince both houses of parliament that the public will benefit from the move.

### The Bar Child Care Initiative

This month I was honoured to be able to launch the new child care initiative for members of the Bar Association. We conducted a survey of our members and found strong support for the association facilitating access to child care. As a result, we have entered into an agreement with Jigsaw Corporate Childcare to underwrite the cost of a number of childcare placements in Jigsaw's first class facilities in the CBD. Parents increasingly struggle to juggle work and child care burdens. The waiting lists for placements in child care facilities are almost as long as the waiting list for membership of the SCG. We have places reserved for barristers and their staff.

I foresee great demand for the existing places and growth in the arrangement.

## Corrections

Page 84 of *Bar News* Summer 2013-14 included an article on the swearing-in ceremony for the Hon Justice Darke. The article referred to his Honour as 'the Bar Association's representative' on Justice Sheahan's inquiry into workers compensation common law matters in 2001. This was

incorrect. Justice Darke was counsel assisting the inquiry. *Bar News* regrets any confusion this might have caused.

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Page 5 of *Bar News* Summer 2013-14 featured a group photograph of barristers

in the Bar Practice Course 02/13. The caption misspelt Ramesh Rajalingam. *Bar News* apologises to Mr Rajalingam.



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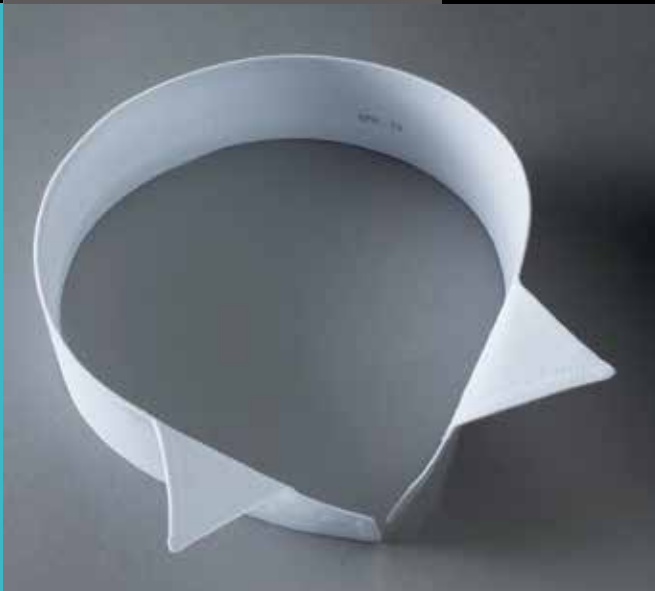
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## In miners we trust

By the Hon John Nader QC



Aerial view of the Tarrawonga coal mine owned by Whitehaven Coal adjacent to the Leard State Forest., February 2014. Photo: <https://www.flickr.com/photos/leardstateforest/>

The arbitrator Bridget Barker-Hudson made a sweet-sounding but serious error when she said in her interim determination in the case of *Kepco v Shaw and Another*: ‘The arbitrator must balance the rights given by the state to the land-holder concerning the surface of the land, its management and environmental sustainability, with the holder of a right also granted by the state to explore for minerals held beneath the surface, *which the state holds in trust for the people of NSW.*’ (My emphasis.)

It’s more than a slight error and ought to be corrected. It conceals the reality. It carries the inference that all of the minerals vested in the state while in the ground are held in trust by the state for the people. With great personal respect, that is quite misleading. It runs counter to the effect of the legislation on the matter which provides that *any mineral that*

*In NSW the miner is the beneficiary of the only trust-like relationship that exists.*

*is lawfully mined becomes the property of the person by or on behalf of whom it is mined at the time the material from which it is recovered is severed from the land from which it is mined.*

In fewer words, when a material is taken from the earth the mineral in it ceases to belong to the state.

Unlike other state owned assets, the state ownership of minerals is not trusteeship in any meaningful sense, and it is said to be so in ignorance; I do not believe it was said mischievously. The only benefit that accrues directly to the state from the mining of the ore is a credit for the royalty to be paid by the miner. The value of that royalty is minute when compared with the value of the mineral itself. I am not overlooking other significant benefits, largely

in the form of taxation, which comes indirectly.

Therefore, it is misleading to say that the people of NSW are the beneficial owners of minerals of which, immediately steps are taken by mining, the trust in their favour evaporates. In NSW the miner is the beneficiary of the only trust-like relationship that exists. While in the ground, the mineral benefits no identifiable persons – remove it from the ground and it belongs to the person who happens to have mined it.

When the mineral does acquire actual value it has been removed from the ground, when, *ipso facto*, it becomes the beneficial property of the miner.

I wish to ventilate an idea – not new, I hasten to add – that would

*...the basic purpose of my suggestion is to alter the law so that the legal title to underground minerals will remain the permanent property of the state whether or not separated from the earth, until sold for value by the state.*

obviate the need for the silly fiction I have just exposed. My idea must for now remain incomplete because, if it were to be adopted, it would have to be accompanied by difficult legislative and administrative planning to which I have given no thought. That must be the work of others. I can say, however, that the implementation of such a scheme as I suggest is feasible. My researches show that a number of like schemes are operating highly profitably in a number of countries including Norway, Malaysia, Indonesia and others. Common to them all is that the ownership of the mineral does not pass from the state until the state sells it for value: not, I emphasise, for royalties. In NSW the highly beneficial result of one of those schemes, or a variant of one of them, would enable it to be

truly said that the minerals, in the ground and after mining, are held on trust for the people. When they might be sold by the state for their value, the proceeds of sale would then be held on the same trust.

Indeed, the basic purpose of my suggestion is to alter the law so that the legal title to underground minerals will remain the permanent property of the state whether or not separated from the earth, until sold for value by the state.

The mining would have to be done in an arrangement with the state; the miner would be recompensed probably under either a 'production sharing agreement', a 'risk sharing agreement' or some like arrangement.

The minerals, continuing to be the property of the state would generally be sold by or for the

government at the best available price: that price would then, as I have said, be held on the same trust as the minerals. Minerals, surplus to immediate requirement for sale or use, continuing to be held in trust by the state, could be stockpiled.

The potential revenue from such an exercise could be vast but that would depend on the world market.

It would then be true to say that the state holds the minerals in trust for the community: the real beneficiaries of the state's trusteeship.

I foresee that an obstacle to the implementation of my scheme might be the willingness of the state to accept the risk of undertaking any large business enterprise. Is the state willing



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to take on a large commercial enterprise?

It is now a time when governments are selling their great enterprises to private owners and avoiding the undertaking of large business enterprises. But would we have the Sydney Harbour Bridge, the Snowy Mountains Scheme, or the Sydney Opera House without governments that had the courage to take risks?

*... if the regime that I now propose is adopted there would have to be a mechanism to determine whether the state, through its agents, can access private land for prospecting or mining even against the will of the landholder.*

But this is a special case. Mining is the nation's biggest business. Just now Australia is primarily a mining nation. Mining in Australia therefore differs from other businesses that have been converted into money by privatisation; it is a special case that warrants a rethink of current policy.

While the present regime continues, no entry to private property by a private corporation, however large, should be permitted without the consent of the landholder embodied in an arrangement with the prospector or miner. I have made my reasons for that clear, I hope.

However, if the regime that I now propose is adopted there

would have to be a mechanism to determine whether the state, through its agents, can access private land for prospecting or mining even against the will of the landholder.

A landholder would have to be fully and justly compensated in a number of respects for his or her loss caused by prospecting and mining on the land. The parliament should include guidelines for the

assessment of compensation in the legislation establishing the court which is essential to the scheme.

A new court would have to be established: a true court that would form part of the NSW judicial system. This Mining Court that I suggest could be a division of an existing court such as the Land and Environment Court or a separate court, but it must be a court in the full sense. It should be so constituted as quickly to gain the respect of the general population. It is said that you can't please everybody, but if a tribunal is seen to have integrity and competence, and if it is seen to be beyond the improper reach of special interest groups, it would gain general respect. The court

would have to publish reasons for its decisions.

A court is the only body with the required qualities, having members immune from executive or other interference. The members of the court would have security of tenure in office until a specific retirement date. It would be comprised of Australian legal practitioners who may or may not have practised in mining law. It would generally exclude legal practitioners who have been reputed activists for either miners or landholders. I mean activists in the sense we commonly use it. Compliance with the cab-rank rule by a barrister who happens to receive more work from one side than the other does not identify him or her as an activist in that sense.

A true court, exercising judicial power and instinctively committed to procedural fairness, would be necessary for the determination of disputes between the state and landholders in order to resolve questions of access for prospecting and mining and to assess compensation and other payments to landholders. I ask readers to call to mind the Industrial Commission of NSW which was a superior court of record of Supreme Court status, and the high reputation it had with both employers and unions.



## Mining and extinguishment of native title

David Parish reports on *Western Australia v Brown* [2014] HCA 8

In assessing whether native title has been extinguished under the *Native Title Act 1993* (Cth) it is necessary to determine whether the competing rights are inconsistent with the asserted native title rights and interests.<sup>1</sup> This requires an objective inquiry that identifies and compares the two sets of rights.<sup>2</sup>

In *Western Australia v Brown*<sup>3</sup> the court was asked to decide whether the grant of two mining leases at Mount Goldsworthy in 1964 extinguished native title of the Ngarla People.

Finding that native title was not extinguished by the grant, the court held that the inquiry into extinguishment was directed at the grant of the title at the time of that grant and not the subsequent or potential use of the grantee. In doing so, the High Court rejected the analysis of the full court of the Federal Court in *De Rose v South Australia (No 2)*<sup>4</sup> and approved the principles enunciated by Brennan CJ in his dissent in *Wik Peoples v Queensland*.<sup>5</sup>

### Background

The primary judge held that while the mineral leases did not confer the right of exclusive possession upon the joint venturers<sup>6</sup> so as to wholly extinguish native title rights and interests; where the exercise

of rights under the mining leases was inconsistent with native title, such as where mines, town sites and infrastructure had been developed, analogous to rights of exclusive possession, native title was diminished correspondingly.<sup>7</sup> This finding was consistent with the full court of the Federal Court decision in *De Rose v South Australia (No 2)* in which the exercise of a pastoral lease was held to be inconsistent with the native title rights to access and use the land.<sup>8</sup>

Hence the crux of the dispute in the full court became whether the grant *and the subsequent use* of the land subject to the mineral lease extinguished to any extent the native title of the Ngarla People. Brown appealed the primary judge's finding that native title was extinguished to any extent; the state and the licence holders cross-appealed on the basis that native title was wholly extinguished.

This left the full court of the Federal Court to ask what the effect of the developments were on the land and to answer the same question three different ways: the title was extinguished to the extent of the subsequent use (as found by the primary judge and approved by Mansfield J); or to the extent of any part of the land used inconsistently with native title (Greenwood J); or no title was extinguished but

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it yielded to any inconsistency (Barker J).<sup>9</sup> While divided in its opinion, the full court agreed with the orders proposed by Brown.

The state appealed to the High Court, submitting that the mineral leases either granted an exclusive possession inconsistent with native title or the rights and uses given by the grant had the effect.<sup>10</sup> With the principles of the full court in *De Rose (No 2)* under scrutiny, South Australia joined the proceedings as amicus curae.

### Exclusive possession

First, the state argued the joint venturers had exclusive possession of the land by virtue of the mineral leases. This argument was rejected by the High Court.

The important analytical principle that comes out of this case is that, unlike the decision in *De Rose (No 2)*, the High Court held that nature and content of the right must be determined at the time the grant was made and not by reference to some later performance or some contingent or potential extinguishment made possible by the grant.<sup>11</sup>

With this in mind the High Court analysed the mineral leases and the legislative instrument that gave rise to them<sup>12</sup> to identify what rights the state had granted to the licence holders. The court found that at the time of the grant, the nature and content of the right was to go into and under the land to take away the iron ore they found there.<sup>13</sup> There was nothing with the flavour of exclusive possessory rights to exclude all for any reason of the kind referred to in *Fejo v Northern Territory*<sup>14</sup> and so it could not be said the licence holders had exclusive possession inconsistent with native title rights.<sup>15</sup>

### Actual or conflicting use

Secondly, the state argued that because the grant permitted them to mine anywhere on the land and make improvements anywhere on the land the rights granted by the leases were inconsistent with native title,<sup>16</sup> likewise because actual development had occurred.<sup>17</sup> However, this contention had already been rejected by the High Court in finding that contingent or potential use at the time of the

grant was not relevant to identifying the nature and content of the right.<sup>18</sup>

Yet the High Court still took time to consider a statement from Brennan CJ in *Wik* that the state had relied upon and to note that in its full context it meant the opposite. Brennan CJ had stated in *Wik* that while two rights cannot co-exist in different hands if they cannot be exercised at the same time (the statement emphasized by the state), the focus of inconsistency had to be between the rights at the moment they are conferred and not their manner of exercise (the statement emphasized by the High Court in the present case). In approving Brennan CJ's observations, the High Court continued 'These propositions, though stated in a dissenting judgment, state principles which must now be taken to be firmly established.'<sup>19</sup>

### Conclusion

The High Court's decision approves the dissenting analysis of Brennan CJ in *Wik* that the grant conferred when comparing title rights and interests must be determined at the time of, and by reference to, the actual grant of interest and not by the exercise or potential exercise of use.

### Endnotes

1. *Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1 at 89 [78].
2. [2002] HCA 28; (2002) 213 CLR 1.
3. [2014] HCA 8.
4. [2005] FCAFC 137; (2005) 145 FCR 290.
5. [1996] HCA 40; (1996) 187 CLR 1 at 87.
6. [2014] HCA 8 at [22]; *Brown (on behalf of the Ngarla People) v State of Western Australia (No 2)* [2010] FCA 498; (2010) 268 ALR 149 at 205 [230].
7. [2014] HCA 8 at [22]; and [2010] FCA 498; (2010) 268 ALR 149 at 200 [202].
8. (2005) 145 FCR 290 at 331-332 [149].
9. [2014] HCA 8 at [27].
10. [2014] HCA 8 at [29].
11. [2014] HCA 8 at [37].
12. *Iron Ore (Mount Goldsworthy) Agreement Act 1964*.
13. [2014] HCA 8 at [44].
14. [1998] HCA 58; (1998) 195 CLR 96 at 128 [47].
15. [2014] HCA 8 at [46] and [47].
16. [2014] HCA 8 at [48].
17. [2014] HCA 8 at [59].
18. [2014] HCA 8 at [51].
19. [2014] HCA 8 at [51].

# Best endeavours in the supply of gas

David Parish reports on *Electricity Generation Corporation v Woodside Energy* [2014] HCA 7

## Facts

In *Electricity Generation Corporation v Woodside Energy* the High Court grappled with an acronym bonanza and more definitions than have been seen since the time of Dr Johnson.

Verve Energy (the trading name of EGC) bought gas under a long-term gas supply agreement (GSA) from Woodside Energy and other gas suppliers (the sellers) to run its power stations.

Commercial gas supply is a complicated business. It frequently involves supplying a volatile and pressure based commodity to large industrial clients in fluctuating quantities from a complicated supply chain.<sup>1</sup> The GSA had a clause not unusual in gas supply agreements requiring the sellers to make available to Verve a maximum daily quantity of gas (an MDQ) and a optional top up amount should it be required, called a supplemental daily quantity of gas (SMDQ). Each contract year Verve was obliged to pay for an annual minimum quantity (AMQ) whether that minimum was used or not, what is colloquially known as a take or pay clause.

The mischief of the case was caused by an explosion at the Apache gas plant on Varanus Island which led to an interruption in supply and a corresponding surplus in demand.<sup>2</sup> To plug the supply shortage, the sellers sold their gas to Apache.<sup>3</sup> Over the period of the shortage the sellers were unable to supply SMDQ and Verve was required (under protest) to enter into expensive short term supply contracts with the sellers and other gas suppliers at the prevailing market price rather than the price set by the GSA.<sup>4</sup> In short, Verve alleged sellers abandoned their SMDQ obligations so they could take advantage of a spike in short term gas prices, forcing Verve to buy gas at inflated prices.

## The best endeavours clause

If Verve required more gas than they received under the MDQ, the clause relating to the supply of SMDQ required the sellers to use reasonable endeavours to make the extra gas available for delivery (clause 3.3(a)) but that obligation did not require the sellers to provide extra gas where, taking into account all relevant commercial, economic and operational matters, the sellers formed the reasonable view there was insufficient capacity or time to meet the SMDQ

(clause 3.3(b)).<sup>5</sup>

At the heart of the dispute was the interaction between these two sub-clauses.<sup>6</sup>

The crucial issue of construction was the relationship between the sellers' obligation in cl 3.3(a) to 'use reasonable endeavours' to make SMDQ available for delivery to Verve, and the sellers' entitlement under cl 3.3(b), in determining whether they 'are able to supply SMDQ' on any particular day, to 'take into account all relevant commercial, economic and operational matters'.

Verve argued that the sellers were obliged to use reasonable endeavours to make the SMDQ available and that clause 3.3(b) gave further content to that obligation to establish whether the sellers were able to supply the gas, not whether they wished to.<sup>7</sup> The sellers argued the reasonable endeavours clause could not be read in isolation and depended on the anterior questions arising under clause 3.3(b), such that the sellers were allowed to determine their ability to supply Verve based on all commercial, economic and operational matters available to them.<sup>8</sup> In other words, the sellers sought to use the commercial, economic and operational matters to subjectively read down the reasonable endeavours clause; Verve on the other hand sought to limit the operation of clause 3.3(b) to objective considerations.

The primary judge agreed with the sellers that clause 3.3(b) conditioned the best endeavours clause.<sup>9</sup> The Court of Appeal of the Supreme Court of Western Australia overturned that finding, accepting Verve's argument that clause 3.3(b) did not condition the reasonable endeavours clause but set out a set of factors to be taken into account<sup>10</sup> or to inform and delineate<sup>11</sup> the exercise of obligations under that clause.

The High Court accepted the interpretation put forward by the sellers, setting aside the decision of the Court of Appeal.

## The majority<sup>12</sup>

In giving clause 3.3 a businesslike interpretation, the majority noted that the chief commercial purpose of the GSA was two-fold: it provided Verve with a certainty of supply up to the MDQ and it provided the sellers with an assured price in respect of the

ADQ. This insulated both parties from the risks of fluctuations in demand and price.<sup>13</sup>

The High Court noted that the supplementary nature of the SMDQ meant that Verve was not obliged to buy it and the sellers were not bound to reserve capacity in their plants for it.<sup>14</sup> Taken as a whole then, the majority held that cl 3.3 provided for a balancing of interests if the business interests of the parties did not coincide or if they conflicted.<sup>15</sup> The majority held that what is a 'reasonable' standard of endeavour is conditioned by both the sellers' obligations to Verve but also an express entitlement to take into account relevant commercial, economic and operational matters.<sup>16</sup> This meant that the sellers did not have to forego or sacrifice their business interests when using reasonable endeavours to make available SMDQ. Accordingly, Verve's argument that the use of the word 'able' to supply should restrict the considerations to capacity were rejected:

The word 'able' in cl 3.3(b) relates to the sellers' ability, having regard to their capacity and their business interests, to supply SMDQ. This is the interpretation which should be given to cl 3.3.<sup>17</sup>

### The minority

Gageler J's difficulty was that allowing the obligation of reasonable endeavours to be subject to the sellers' business interests rendered the clause 'elusive, if not illusory'.<sup>18</sup> The ability to sell gas at a higher price to someone else was not a factor relevant to whether 'they are able to supply SMDQ on the same day' in the words of clause 3.3.<sup>19</sup> Obtaining a higher price elsewhere does not make the sellers less able or have less capacity. 'They would remain 'able', just reluctant or unwilling.'<sup>20</sup>

### Conclusion

It is uncertain whether the majority's definition of 'able' operates successfully outside the complicated world of commercial supply contracts. One could hardly avoid washing the dishes if one's inability proceeded from not coinciding with other interests. As a matter of ordinary usage in the words of Gageler J, one remains remain able, just reluctant or unwilling.

It may also be argued that the majority has elevated a businesslike interpretation over the plain words of the section that makes 'ability' its touchstone, not motivation.

*It is uncertain whether the majority's definition of 'able' operates successfully outside the complicated world of commercial supply contracts. One could hardly avoid washing the dishes if one's inability proceeded from not coinciding with other interests.*

However, the case does illustrate the importance of the businesslike interpretation aid to the construction of commercial contracts. This begins with a precise identification of what in fact the commercial purpose and objects of that contract are. For legal advisers, this requires as objective an analysis as possible.

For some transactional lawyers, this case may prompt a rethink of reasonable or best endeavours clauses that preface the ability to meet the obligations with the promisor's other interests.

### Endnotes

1. See for instance the *Gas Supply Chain in Eastern Australia* March 2008 by NERA Economic Consulting.
2. [2014] HCA 7 at [5].
3. [2014] HCA 7 at [5].
4. [2014] HCA 7 at [7] – [10].
5. [2014] HCA 7 at [17].
6. [2014] HCA 7 at [11].
7. [2014] HCA 7 at [24].
8. [2014] HCA 7 at [24].
9. [2014] HCA 7 at [24].
10. per Murphy JA cited at [2014] HCA 7 at [30].
11. per McLure P (Newnes JA agreeing) cited at [2014] HCA 7 at [31].
12. French CJ, Hayne, Crennan and Kiefel JJ.
13. [2014] HCA 7 at [45].
14. [2014] HCA 7 at [47].
15. [2014] HCA 7 at [45].
16. [2014] HCA 7 at [47].
17. [2014] HCA 7 at [47].
18. [2014] HCA 7 at [60].
19. [2014] HCA 7 at [66].
20. [2014] HCA 7 at [66].

## Marriage equality

Radhika Withana reports on *The Commonwealth v Australian Capital Territory* [2013] HCA 55 (ACT Same Sex Marriage Act case)

On 3 December 2013, the High Court heard argument on the question of whether the ACT's *Marriage Equality (Same Sex) Act 2013* (ACT law), which purported to legalise same sex marriage in the ACT, was inconsistent with either or both the *Marriage Act 1961* (Cth) and the *Family Law Act 1975* (Cth). By operation of s 28(1) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth), if such an inconsistency were found, the ACT law would be inoperative to the extent of that inconsistency. In a judgment handed down in just over a week after the hearing, a six-member bench of the High Court<sup>1</sup> unanimously found the whole of the ACT law to be inconsistent with the Commonwealth Marriage Act and of no effect (and thus found it unnecessary to answer whether the ACT law was inconsistent with the Family Law Act).

Acknowledging implicitly the current political potency surrounding the issue of same sex marriage, the court emphasised in the opening line of its reasons that '[t]he only issue which this court can decide is a legal issue'.<sup>2</sup> The court held that under the Commonwealth Constitution and federal law as it now stands, it is a matter for the Parliament of Australia to legislate to allow same sex marriage and accordingly, the ACT law was inconsistent with the Marriage Act.

The court reasoned, through an orthodox treatment of well-established principles of constitutional law and statutory interpretation, that the Marriage Act is to be read as providing that the only form of 'marriage' permitted in Australian law is that recognised in that Act. Following reforms introduced by then Prime Minister John Howard in 2004, the Marriage Act defines marriage as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'. The definition of marriage that was introduced in 2004 (into an Act which, before that time, was silent as to the definition of marriage) was taken from the formulation by Lord Penzance in *Hyde v Hyde* (1866) LR 1 P & D 130, which has now been superseded by legislative reform in the UK.<sup>3</sup>

In order to determine whether there was inconsistency between the ACT and Commonwealth Acts, the court examined the ambit of federal legislative power provided for in s 51(xxi) of the Constitution (the marriage power), the scope of which (and the

constitutional concept of 'marriage' more generally) has not been subject to sustained analysis by the court until this case.<sup>4</sup> It is to be noted, however, that both the Commonwealth and the ACT conceded that the marriage power gives the Parliament of Australia power to make a law providing for same-sex marriage.<sup>5</sup> Nonetheless, the court stated that the parties' submissions did not determine that question and that 'parties cannot determine the proper construction of the Constitution by agreement or concession'.<sup>6</sup> It is also notable that the questions for determination by the court, as framed by the Commonwealth, did not mean that it was necessary for the court to examine the marriage power in order to answer the construction question as to inconsistency.<sup>7</sup> The court, on the other hand, saw the analytic task differently, in that to answer the question of inconsistency, it was necessary to first consider the ambit of federal legislative power under s 51(xxi).<sup>8</sup>

Notwithstanding the definition currently in the Marriage Act, the High Court confirmed that the Constitutional definition of marriage is not frozen in time and is not strictly confined to 'the union of a man and a woman'. Rather, the constitutional term 'marriage' is 'a topic of juristic classification' that changes over time.<sup>9</sup> Thus, the court's analysis centred on the legal understanding of the term 'marriage' rather than identifying any particular type of marriage and selecting one or more particular forms of marriage to give content to the constitutional notion of marriage.

The court confronted cases from the nineteenth century including *Hyde*, explicitly debunking antiquarian definitions 'which accord with a preconceived notion of what marriage 'should' be'. The court did so by contextualising the reasons in *Hyde* and other nineteenth century cases. Relevantly, the court observed that *Hyde* and like cases were concerned, in part, with identifying what kind of marriage contracts in foreign jurisdictions would be recognised as marriages within English law. Such cases accepted that there would be other relationships that could properly be described as 'marriage' (such as polygamous relationships) but confined 'marriage' to the *Hyde* definition for the purposes of English law. Thus the genesis of the definition of 'marriage', which *Hyde* and related cases



articulated, arose as a rule of private international law that necessarily accepted that there could be other kinds of relationships that could properly be described as marriage relationships in other legal systems, but would not necessarily accept those relationships as marriage under English law.<sup>10</sup> Thus, the High Court reasoned that the legal category of marriage encompasses more than that set out by the *Hyde* definition.

The court cast the question of the interpretation of the ambit of the marriage power as a binary choice between, on the one hand, a particular legal status of marriage as understood at the time of federation and having the legal content which English law accorded it at the time, and on the other hand, use of the word 'marriage' in the sense of a topic of juristic classification the meaning of which was not immutable over time. By doing so, the court side-stepped difficult questions of constitutional theory while expressly eschewing the utility of adopting or applying a single, unified theory of constitutional interpretation and declining to resolve any conflict, real or imagined, between competing theories.<sup>11</sup> Indeed, the court stated that fierce doctrinal debates as to the approach to constitutional interpretation in 'other jurisdictions' between the differing and opposed theories of 'originalism' and 'contemporary meaning' (which appeared to be a thinly veiled reference to American constitutional jurisprudence) serve more to obscure than to illuminate.<sup>12</sup>

*The High Court brings Australian constitutional law in line with legislation in countries that have permitted same sex marriage, and now goes further than comparable jurisdictions in other parts of the world in relation to the legal understanding of marriage.*

Leaving such debates to one side, the High Court articulated the definition of 'marriage' under s 51(xxi) of the Constitution as 'a consensual union formed between natural persons in accordance with legally prescribed requirements'.<sup>13</sup> Therefore, '[w]hen

used in s 51(xxi), 'marriage' is a term which includes a marriage between persons of the same sex'.

*...the High Court recognised that there is no constitutional impediment to the Parliament of Australia providing for same sex marriage in federal law.*

Although the Parliament of Australia has power under the marriage power to legislate with respect to same sex marriage, the fact that the federal parliament had not made a law permitting same sex marriage did not supply a reason for why the ACT law was capable of operating concurrently with the Marriage Act, since the question of the concurrent operation of the two laws turns on the proper construction of the laws. Since, on its true construction, the Marriage Act is to be read as providing that the only forms of marriage permitted are those formed or recognised in accordance with that Act, the court stated that the ACT law cannot operate concurrently with the federal law and is thus inconsistent.<sup>14</sup>

Finally, the court referred to definitions of marriage in other jurisdictions, not to influence the content of Australian law, but simply to demonstrate that the social institution of marriage 'differs from country to country' and is now more complex than the anachronistic conceptions of 150-year-old English jurisprudence, which itself has been overtaken by legislative amendment. The High Court brings Australian constitutional law in line with legislation in countries that have permitted same sex marriage, and now goes further than comparable jurisdictions in other parts of the world in relation to the legal understanding of marriage.

On the footing that s 51(xxi) does not use a legal term of art, the particular content of which is fixed according to its usage at the time of federation, the High Court recognised that there is no constitutional impediment to the Parliament of Australia providing for same sex marriage in federal law. In clear and unambiguous language, it is a rare unanimous judgment on a constitutional question, carrying the full weight of the court's authority.



## Endnotes

1. Justice Gageler did not sit.
2. *The Commonwealth v Australian Capital Territory* [2013] HCA 55 at [1].
3. *Marriage (Same Sex Couples) Act 2013* (UK) applicable in England and Wales. Scotland has introduced separate legislation to recognise same sex marriage, which presently awaits royal assent. Same sex marriage remains unrecognised in Northern Ireland.
4. For cases dealing with the marriage power see: *Attorney General for NSW v Brewery Employees' Union of NSW* (1908) 6 CLR 469, 610 (Higgins J); *Attorney General (Vic) v Commonwealth* (1962) 107 CLR 529, 549 (McTiernan J), 576, 577 (Windeyer J); *Cormick and Cormick v Salmon* (1984) 156 CLR 170, 182 (Brennan J); *Re F; Ex parte F* (1986) 161 CLR 376, 389 (Mason and Deane JJ), 399 (Brennan J); *Fisher v Fisher* (1986) 161 CLR 438, 454, 456 (Brennan J); *The Queen v L* (1991) 174 CLR 379, 392 (Brennan J); *Re Wakim* (1999) 198 CLR 511, 553 (McHugh J).
5. *The Commonwealth v Australian Capital Territory* [2013] HCA 55 at [8].
6. *Ibid.*
7. *The Commonwealth of Australia v The Australian Capital Territory* [2013] HCATrans 299 at p3.
8. *The Commonwealth v Australian Capital Territory* [2013] HCA 55 at [6].
9. *The Commonwealth v Australian Capital Territory* [2013] HCA 55 at [14].
10. *The Commonwealth v Australian Capital Territory* [2013] HCA 55 at [29].
11. *Ibid.*
12. *Ibid.*
13. *The Commonwealth v Australian Capital Territory* [2013] HCA 55 at [33].
14. *The Commonwealth v Australian Capital Territory* [2013] HCA 55 at [56].

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# When and how can a liquidator 'disclaim property of the company'?

Susan Cirillo reports on *Willmott Growers Group Inc v Willmott Forests Limited (Receivers and Managers Appointed) (In Liquidation)* [2013] HCA 51

Say a company in liquidation is the landlord under a long-term lease and the tenant has fully paid rent in advance: What if, before the end of the term of the lease, the company's liquidator wants to sell the company's interest in the land without the encumbrance of the lease?

According to a majority (4:1) of the High Court, the liquidator can disclaim the lease pursuant to s 568(1) of the *Corporations Act 2001* (the Act). The tenant loses its right to exclusive possession of the land and is required to prove for its losses in the winding up.

### Background

Willmott Forests Limited (Willmott) owned or leased land which it then leased to the participants of forestry investment schemes to grow and harvest trees (the growers). Each lease to the growers was for a term of generally 25 years and some included a renewal option. Some leases required the rent to be fully paid in advance rather than periodically.

Willmott's liquidators negotiated contracts to sell Willmott's interests in the land which it owned or leased unencumbered by the leases to the growers. The liquidators applied for directions and orders from the court under s 511 of the Act in respect of those negotiated contracts.

In the Supreme Court of Victoria, Davies J, as matter for preliminary determination, found that although the liquidators were able to disclaim the growers' leases, this did not have the effect of extinguishing the growers' leasehold estate or interest in the subject land. The liquidators successfully appealed to the Court of Appeal. A body representing the growers appealed to the High Court.

### The relevant provisions

Section 568(1) of the Act gives a liquidator power to 'at any time, on the company's behalf...disclaim property of the company that consists of' any of six enumerated categories of property, of which, relevantly sub-paragraph (f) refers simply to 'a contract'.<sup>1</sup>

A liquidator cannot disclaim a contract (other than an unprofitable contract or a lease of land) except

with the leave of the court: s 568(1A).

From its date of effect, disclaimer terminates the company's rights, interest, liabilities and property in or in respect of the disclaimer property, and only affects any other person's rights or liabilities so far as necessary in order to release the company and its property from liability: s 568D(1).

A person aggrieved is taken to be a creditor of the company to the extent of any loss suffered because of the disclaimer and is allowed to prove that loss as a debt in the winding up of the company: s 568D(2).

### The majority's reasons

The majority (French CJ, Hayne and Kiefel JJ; Gageler J writing separately) dismissed the growers' appeal.

The growers had argued that the liquidators could only 'properly' disclaim Willmott's reversionary interest in the leases, that is, the estate in possession that reverts to Willmott, as lessor, after the lessee's right to exclusive possession has ceased. Therefore, they submitted that this reversionary interest was a type of property that was engaged by sub-paragraphs (a) and (c) of s 568(1) of the Act, being respectively, 'land burdened with onerous covenants' and 'property that is unsaleable or is not readily saleable'. However, this argument was understood as advancing the proposition that leases are not property of the company for the purposes of s 568(1).

French CJ, Hayne and Kiefel JJ rejected this proposition. Their Honours stated that the reference to 'property of the company' in s 568(1), which conferred a power to 'disclaim' such property, was not confined to the object in respect of which property rights exist, but rather directed attention to the legal relationship which exists between the company and the object, and so it referred to the company's possession of any wide variety of legal rights against others in respect of some tangible or intangible object of property.<sup>2</sup> Therefore, the reference in paragraph (f) to 'a contract', their Honours said, identified, 'as the disclaimer property, the rights and duties which arise under the contract'.<sup>3</sup> Their Honours stated that a lease was a species of contract<sup>4</sup> and referred to

Deane J's classic description of a lease in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*, where his Honour said that a lease is both 'an executory contract and an executed demise'<sup>5</sup>. In separate reasons Gageler J, also referring to this description, explained that even where the rent is fully paid, a lease is never fully executed during its term because the lessee maintains an ongoing right to exclusive possession and the lessor has an ongoing obligation to give exclusive possession.<sup>6</sup>

French CJ, Hayne and Kiefel JJ held that the bundle of rights and duties of landlord and tenant under a lease can be identified as a species of property – they derive from the contract of a lease, and therefore, even when it is the company that is the landlord, a lease can be properly described as 'property of the company that consists of...a contract'.<sup>7</sup>

The growers argued, alternatively, that even if s 568(1) of the Act allowed a liquidator to disclaim a company's lease of land to a lessee, then that would not mean that the effect of disclaimer set out in s 568D(1) would destroy a third person's interest in property which existed before the disclaimer. French CJ, Hayne and Kiefel JJ said that it was important to recognise that tenants do not stand as third parties divorced from the rights, interests and liabilities of the company which are to be brought to an end – the company's rights, interests and liabilities in respect of the leases cannot be brought to an end without bringing to an end the correlative liabilities, interests and rights of the tenants.<sup>8</sup>

Gageler J's approach differed from that of French CJ, Hayne and Kiefel JJ. Their Honours considered, as a matter of statutory construction, whether a lease of which the company was a landlord would constitute 'a contract' within the meaning of s 568(1) (f). In contrast, Gageler J appeared to consider the effects of 'disclaimer', by reference to the 'long history of judicial consideration of similar provisions in insolvency legislation'<sup>9</sup> and then posed the question of whether a lease of which the company is the landlord answers the description of 'property of the company that consists of ... a contract', so as to fall within the power of the liquidator to disclaim.<sup>10</sup>

Gageler J observed that disclaimer only operates to release the company from its prospective rights and obligations in relation to the property that is disclaimed, not any liability which the company incurred to another person in relation to the property before the disclaimer took effect, nor an interest in the property which the company transferred to another person before the disclaimer took effect.<sup>11</sup> Therefore, a lease cannot be equated to an interest in property which has already been transferred, given that it is contingent upon the ongoing enjoyment of rights conferred by the lease.<sup>12</sup> His Honour essentially found that a lease of which the company was a landlord could be disclaimed pursuant to s 568 because the recognition in s 568D(1) that disclaimed property may include property of which the company has liabilities, as well as rights and interests, effectively enlarged the meaning of 'property' in s 568(1).<sup>13</sup>

#### Keane J's dissent and the issue of seeking leave to disclaim

French CJ, Hayne and Kiefel JJ noted that it was not necessary to consider whether the liquidators required the leave of the court before disclaiming the leases and what considerations would inform the decision to grant or refuse leave.<sup>14</sup>

Keane J would have allowed the appeal and determined that, without the leave of the court under s 568(1A), the liquidators' purported disclaimer of the leases were not effective, but that if the liquidators were to successfully apply for leave to disclaim the leases, then only Willmott's ongoing obligations to the growers would be terminated. His Honour held that Willmott could not seize possession of the land contrary to the rights which have 'accrued' to each of the growers.<sup>15</sup> A court of equity would restrain an attempt to deprive the growers (who had paid their rent fully in advance) of their right to possession.<sup>16</sup>

On the issue of leave, Keane J concluded that the liquidator could disclaim, without leave, a lease of land in which the company was the lessee (because as his Honour appeared to reason, this power applied in respect of a lease contract that is 'property of the company' which in 'ordinary parlance' would be understood as 'property of the lessee'<sup>17</sup>), but that if

the company was the lessor, the liquidator would require leave to disclaim pursuant to s 568(1A).<sup>18</sup> His Honour appeared to query whether the legislature might have assumed that leases in which the company receives rent as the lessor (supposedly like contracts that are the opposite of ‘unprofitable contracts’) are beneficial to the company, hence leave to disclaim is required.<sup>19</sup> Though, in the present case, the liquidators did not share that assumed view.

Practically, one would query why a liquidator would want to disclaim a contract which from the point of view of the company and waiting creditors at least, likely could be described as ‘profitable’. This may suggest that the legislature did not intend that the question of leave be determined by reference to whether a contract is beneficial to the company or not.

In circumstances where the issue of leave has not been fully determined by the High Court and there may be difficulties in determining whether a contract is ‘unprofitable’ within the meaning of s 568(1A), prudence would suggest that if in doubt, leave should be sought (or at least the issue might be canvassed in an application for directions under the Act). On the other hand, practitioners will note that by reason of s 568C, disclaimer takes effect by reference to the notice that the liquidator must give under s 568A, which includes notice to each person who appears to the liquidator to have, or to claim to have, an interest in the property and that s 568E allows such a person to apply, with the leave of the court, for an order setting aside the disclaimer after it has taken effect.<sup>20</sup> Depending on the circumstances, issues as to the propriety of a liquidator’s purported

disclaimer may be canvassed, in any event (without leave having been sought pursuant to s 568(1A)), in the course of litigation if an interested party objects to the disclaimer.

### Endnotes

- Subparagraphs (a) to (e) state:
  - land burdened with onerous covenants; or
  - shares; or
  - property that is unsaleable or is not readily saleable; or
  - property that may give rise to a liability to pay money or some other onerous obligation; or
  - property where it is reasonable to expect that the costs, charges and expenses that would be incurred in realising the property would exceed the proceeds of realising the property...
- [2013] HCA 51 at [35]–[36]. Their Honours noted that this reading was consistent with the Act’s definition of ‘property’ in s 9, as it stood at the time of hearing before the primary judge, i.e., ‘any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includ[ing] a thing in action’.
- [2013] HCA 51 at [38].
- [2013] HCA 51 at [39].
- (1985) 157 CLR 17 at 51.
- [2013] HCA 51 at [65]–[67].
- [2013] HCA 51 at [40].
- [2013] HCA 51 at [54].
- [2013] HCA 51 at [71].
- [2013] HCA 51 at [75].
- [2013] HCA 51 at [71].
- [2013] HCA 51 at [72].
- [2013] HCA 51 at [76]–[77].
- [2013] HCA 51 at [54].
- [2013] HCA 51 at [134] and [161].
- [2013] HCA 51 at [157].
- [2013] HCA 51 at [129].
- [2013] HCA 51 at [116].
- [2013] HCA 51 at [133].
- Only if the court is satisfied that it is unreasonable in all the circumstances to expect the person to have applied for an order setting aside the disclaimer before it took effect.



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# Contract damages and frozen sperm

Felicity Maher reports on *Clark v Macourt* [2013] HCA 56

The unusual facts of this case explain its apparently counter-intuitive result. The High Court confirmed an award of damages in excess of \$1 million for breach of a contract for sale of assets of a business where the total purchase price was less than \$400,000, the breach related to some only of the assets and there was no claim for loss of profits.

## Facts

Dr Clark and Dr Macourt specialised in assisted reproductive technology. In 2002, Dr Clark agreed to buy the assets of St George Fertility Centre Pty Ltd, a company controlled by Dr Macourt. The assets included 3513 'straws' of frozen donated sperm. The total purchase price, calculated according to a complicated formula based on Dr Clark's income, was \$386,950.91. Under the contract, the company warranted that the sperm complied with relevant guidelines. In fact, 1,996 straws of the sperm were not as warranted and were unusable. In 2005, having exhausted the stock of usable sperm, Dr Clark bought replacement sperm from the only available supplier, a company in the US (Xytex), for a cost of over \$1 million. Dr Clark recouped this cost by charging her patients a fee for use of the replacement sperm.

## Proceedings

In the Supreme Court of New South Wales, breach of warranty was made out on the basis of admissions, and the sole issue was the assessment of damages. Gzell J held that the company's breach of warranty deprived Dr Clark of the use of 1,996 straws of sperm and assessed damages as the difference, as at the date of breach, between the amount Dr Clark would have obtained in a 'hypothetical sale' of the unusable straws (assumed to be nil), and the amount she would have paid in a 'hypothetical purchase' of 1,996 replacement straws. The best evidence of this was the amount she in fact paid to Xytex in 2005. Gzell J accordingly awarded damages of \$1,246,025.01.<sup>1</sup>

On appeal to the New South Wales Court of Appeal, Tobias AJA (Beazley and Barrett JJA agreeing) reversed this decision, holding that Dr Clark should have no damages for breach of warranty. The decision rested on two broad strands of reasoning. First, as the contract was for the sale of a business, rather than the sale of goods, the measure of damages adopted by Gzell J did not apply. Further,

given ethical and legal constraints on Dr Clark's use of the sperm, and the impossibility of apportioning a part of the purchase price to the sperm under the contract, it could not be demonstrated that Dr Clark had actually paid anything for the sperm, so she had suffered no loss from her inability to use it. Second, Dr Clark had mitigated any loss she would otherwise have sustained from her inability to use the sperm, by charging her patients a fee which covered her costs of buying replacement sperm from Xytex.<sup>2</sup>

Dr Clark appealed to the High Court. By a majority of 4:1, the court allowed the appeal.<sup>3</sup>

## Majority judgments

Hayne J affirmed the 'ruling principle' that contract damages put the promisee in the position he or she would have been in had the contract been performed.<sup>4</sup> Further, the loss which is compensated is the value of what the promisee would have received if the promise had been performed.<sup>5</sup> Here, if the contract had been performed, Dr Clark would have received a further 1,996 usable straws of sperm. The value of this loss was the amount it would have cost, at the date of breach of the contract, to acquire replacement sperm.<sup>6</sup>

Hayne J also rejected the Court of Appeal's mitigation reasoning, on the basis that Dr Clark obtained no relevant benefit from her subsequent acquisition and use of sperm from Xytex, as it merely replaced what the company had agreed to supply.<sup>7</sup> Further, the commercial consequences flowing from Dr Clark's use of the replacement sperm would have been relevant to assessing the value of what she should have received under the contract only if she had obtained some advantage from its use.<sup>8</sup> The value of that advantage would then have mitigated the loss she otherwise suffered. But the transactions did not mitigate the loss Dr Clark suffered from the company not supplying what it agreed to supply.<sup>9</sup> Accordingly, showing that Dr Clark had recouped from her patients her costs of acquiring replacement sperm from Xytex was irrelevant to deciding the value of what the company should have, but had not, supplied.<sup>10</sup>

Crennan and Bell JJ also affirmed the ruling principle and noted that in a contract for the sale of goods, the prima facie measure of damages is the market



price of the goods at the time of breach.<sup>11</sup> Here, there was nothing to displace the *prima facie* measure.<sup>12</sup> Like Hayne J, their Honours rejected the Court of Appeal's mitigation reasoning on the basis that Dr Clark's subsequent dealings with her patients did not avoid or diminish the loss of her bargain for the delivery of usable sperm.<sup>13</sup>

Keane J affirmed the ruling principle and noted that it is not displaced by the circumstance that a case does not involve the transfer of marketable commodities.<sup>14</sup> His Honour considered that it was irrelevant that the contract here did not permit a calculation of the price paid by Dr Clark specifically for the sperm. Her loss was not measured by reference to what she outlaid as compared to what she obtained from the company, but by reference to the value of what the company had promised to deliver her but did not.<sup>15</sup> His Honour also affirmed that contract damages are to be assessed as at the date of breach of the contract:

...not as a matter of discretion but as an integral aspect of the principle, which is concerned to give the promisee the economic value of the performance of the contract at the time that performance is promised.<sup>16</sup>

Keane J then considered the Court of Appeal's mitigation reasoning. The key to rejecting that reasoning was the correct identification of the loss for which Dr Clark sought compensation. That was a loss occurring at completion of the contract, at which time the assets which she acquired were not as valuable as they should have been.<sup>17</sup> The loss was not confined to the expense that Dr Clark incurred (but was able to recoup from patients) in acquiring replacement sperm from Xytex.<sup>18</sup> The value of the sperm lay not in what it might bring in a market for sperm as a commodity, but as stock of a business. As stock of the business they were distinctly inferior.<sup>19</sup> The company's breach meant that Dr Clark's business was not augmented as expected by the addition of a quantity of stock in trade.<sup>20</sup>

### Dissenting judgment

Gageler J dissented. His Honour affirmed the ruling principle but added that the promisee cannot recover more than he or she has lost.<sup>21</sup> Gageler J noted that in the standard category of case where a seller fails to deliver goods to a buyer in compliance with a contractual warranty, it is ordinarily appropriate to

measure the buyer's damages as the difference, at the date of delivery, between what the buyer would have received in a hypothetical sale of the non-compliant goods, and what the buyer would have paid in a hypothetical purchase of compliant goods from another seller. This gives the buyer the value of the performance of the contract by the seller.<sup>22</sup> However, in his Honour's view, this case did not fit within the standard category. The critical difference here was the limited value to Dr Clark of the performance of the contract by the company, given the peculiar nature of the sperm.<sup>23</sup> The sperm was of no use to Dr Clark except for the treatment of patients in the normal course of her practice. In doing so, Dr Clark was ethically bound not to charge patients more than the costs of acquiring that sperm.<sup>24</sup> Accordingly, the value to Dr Clark was in gaining control over sperm which she could then use, relieving her of the need to acquire it from an alternative source later.<sup>25</sup> Dr Clark was only worse off to the extent that later she was forced to incur, and was not able to recoup from her patients, the cost of sourcing 1,996 straws of sperm from Xytex.<sup>26</sup>

### Comments

The High Court's decision affirms that contract damages are measured by reference to the loss of the value of what the promisee would have received if the contract had been performed, not by reference to the difference between what the promisee paid and what he or she received. The decision also affirms that, in all cases, contract damages are to be assessed as at the date of breach.

Of the nine judges who considered the assessment of damages in this case, the final result was supported by only five. The case demonstrates the difficulties of applying well-established principles to unusual facts.

### Endnotes

- |   |                     |                     |
|---|---------------------|---------------------|
| 1. <i>St George Fertility Centre Pty Ltd v Clark</i> [2011] NSWSC 1276. | 5. At [9].          | 16. At [109].       |
| 2. <i>Macourt v Clark</i> [2012] NSWCA 367.                             | 6. At [12].         | 17. At [128]-[129]. |
| 3. <i>Clark v Macourt</i> [2013] HCA 56.                                | 7. At [19].         | 18. At [129].       |
| 4. At [7].  | 8. At [20].         | 19. At [134].       |
|   | 9. At [21].         | 20. At [135].       |
|   | 10. At [22].        | 21. At [60].        |
|   | 11. At [26], [28].  | 22. At [67].        |
|   | 12. At [30].        | 23. At [68].        |
|   | 13. At [37].        | 24. At [69].        |
|   | 14. At [106]-[107]. | 25. At [70].        |
|   | 15. At [111].       | 26. At [71].        |



## Lange in a state context

Rebecca Gall reports on *Unions NSW v New South Wales* [2013] HCA 58

A six-member bench of the High Court unanimously held that certain provisions of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) impermissibly burdened the implied freedom of communication on government and political matters and are therefore invalid. The sections considered related to the identities of donors and caps on the amount that can be donated.

### Legislation and parties

In March 2012, the two provisions at issue in this case were inserted into the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (EFED Act).

Those sections were:

- s 96D, which provides that it is unlawful for political donations to be accepted unless the donor is an individual who is on the roll of local, state or federal elections; and
- s 95G(6), which aggregates the amount spent by way of electoral communication expenditure by a party and its affiliates for the purpose of capping provisions.

The plaintiffs to the proceedings were trade unions who intended to make political donations to the Australian Labor Party, its NSW branch or other entities. The defendant was the State of New South Wales and the Commonwealth; State of Queensland, State of Victoria and State of Western Australia all intervened.

The questions as to the validity of the provisions were reserved by French CJ for determination by the full bench of the High Court pursuant to s 18 of the *Judiciary Act 1903* (Cth).

### Decision of the High Court

The High Court unanimously<sup>1</sup> held that ss 96D and 95G(6) impermissibly burdened the implied freedom of communication on government and political matters. Accordingly, the sections were held to be invalid.

### The applicable test

The High Court confirmed that the test consists of two limbs as set out in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, being:

*The plaintiffs to the proceedings were trade unions who intended to make political donations to the Australian Labor Party*

1. Whether the provision effectively burdens the freedom of political communication either in its terms, operation or effect. This requires consideration as to how the section affects the freedom generally.<sup>2</sup>
2. Whether the provision is reasonably appropriate and adapted or proportionate to serve a legitimate end in a manner which is compatible with the maintenance of the prescribed system of representative government. This limb involves consideration of whether there are alternative, reasonably practicable and less restrictive means of achieving this.<sup>3</sup>

However, the High Court also used this case as an opportunity to make a contextual clarification as to when legislation will be held to be invalid on this basis:

The point sought to be made in *Lange* and in *APLA* was that legislation which restricts the freedom is not invalid on that account alone. It will be invalid where it so burdens the freedom that it may be taken to affect the system of government for which the Constitution provides and which depends for its existence upon the freedom. *Lange* confirmed that if certain conditions concerning the operation and effect of the legislation or the freedom are met, legislation which restricts the freedom may nevertheless be valid.<sup>4</sup>

Justice Keane criticised the ‘indefinite and highly abstract language’<sup>5</sup> of the test and suggested that:

the question for the Court can only be whether the impugned law can reasonably be said to be compatible with the free flow of political communication within the federation.<sup>6</sup>

However, as no party or intervener advanced such an argument, Keane J applied the second limb in its current form.<sup>7</sup>

### Application of test in a state context

Prior to considering the application of the test it was necessary for the High Court to determine whether

the implied freedom, confirmed in *Lange*, applied in a state context.

In a joint judgment, French CJ, Hayne, Crennan, Kiefel and Bell JJ held that given the complex interrelationship between levels of government and common issues it was necessary to take a wide view of the operation of the freedom of political communication.<sup>8</sup>

Justice Keane ultimately reached the same conclusion but approached the issue on the basis that:

Where political and governmental information which flows to and from the electorate in state and local government campaigns (that electorate being part of the people of the Commonwealth) might be pertinent to the political choices required of the people of the Commonwealth, the sources and conduits of that information must be kept open and undistorted.<sup>9</sup>

### The nature of the freedom

The High Court made it clear that the freedom of political communication is not a personal right.<sup>10</sup>

The plurality referred to the fact that *Lange* ‘implies that a free flow of communication between all interested persons is necessary to the maintenance of representative government’<sup>11</sup> but ultimately did not develop this further.

In contrast, this issue was a particular focus for Keane J. After confirming that the issue is not concerned with the vindication of personal rights his Honour stated that:

In truth, the issue is whether the provision which restricts the free flow of political communication is justifiable in terms of the indispensable need to maintain the free flow of political communication within the federation.<sup>12</sup>

*The High Court made it clear that the freedom of political communication is not a personal right.*

### Application of the Lange test

Argument focussed on the second limb as the defendant conceded that the first limb was satisfied.<sup>13</sup>

Before consideration could be given to the application of the second limb, that is, whether the

prohibition is proportionate, the plurality held that it was necessary to identify the object which the section seeks to achieve.<sup>14</sup>

The plurality found that the application of the second limb was forestalled because it was not possible to attribute a purpose to the provisions that was connected to, or in furtherance of, the anti-corruption purposes of the EFED Act.<sup>15</sup> In relation to s 96D, their Honours stated that:

It is not evident, even by a process approaching speculation, what s 96D seeks to achieve by effectively preventing all persons not enrolled as electors, and all corporations and other entities, from making political donations.<sup>16</sup>

Similarly, in respect of s 95G(6) the plurality concluded that there was ‘nothing in the provision to connect it to the general anti-corruption purposes of the EFED Act’<sup>17</sup> and therefore ‘no further consideration can be given as to whether the provision is justified.’<sup>18</sup>

Justice Keane, while ultimately reaching the same conclusion as the plurality, did not conclude that it was not possible to identify the object which the provisions were directed toward. His Honour reached the view that the provisions were invalid as they distorted the flow of political communication within the federation.<sup>19</sup>

His Honour held that the proscriptions in s 96D ‘do not reflect a calibrated balancing of legitimate ends as contemplated by the second limb’ and are very broad:

they are not calibrated to give effect to the rationale identified by the defendant by criteria adapted to target the vices said to attend the disfavoured sources of political communication.<sup>20</sup>

In respect of s 95G(6) his Honour also found that it distorted the free flow of political communication and:

is not calibrated, even in the most general terms, so as to target only sources of political communication affected by factors inimical to the free flow of political communication throughout the Commonwealth.<sup>21</sup>

Accordingly, the High Court unanimously declared that ss 96D and 95G(6) were invalid as those provisions impermissibly burdened the implied freedom of communication on government and political matters.

## Endnotes

1. French CJ, Hayne, Crennan, Kiefel and Bell JJ wrote a joint judgment, Keane J wrote a separate judgment. Gageler J did not sit after recusing himself. His Honour stated that he had, as a solicitor-general of the Commonwealth provided signed legal advice to the attorney-general of the Commonwealth in response to a request for advice which touched on the validity of provisions of the EFED Act: [2013] HCATrans 263.
2. At [35] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; at [115] per Keane J.
3. At [44] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; at [115] per Keane J.
4. At [19] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.
5. At [129] per Keane J.
6. At [133] per Keane J.
7. At [134] per Keane J.
8. At [25] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.
9. At [158] per Keane J.
10. At [30] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; at [109] per Keane J.
11. At [27] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.
12. At [166] per Keane J.
13. At [38] and [43] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.
14. At [46] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.
15. At [60] and [64].
16. At [56] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.
17. At [64] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.
18. At [65] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.
19. At [137] and [168] per Keane J.
20. At [141] per Keane J.
21. At [168] per Keane J.

## Patents for methods of medical treatment

Emma Beechey reports on *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* [2013] HCA 50

The High Court recently ruled that a method of medical treatment of the human body involving the application of a product to produce a therapeutic or prophylactic result is a ‘manner of manufacture’ for the purposes of s 19(1)(a) of the *Patents Act 1990* (Cth) (the Act). The court also held that a new therapeutic use of a known pharmaceutical substance having prior therapeutic uses can be a ‘manner of manufacture’. This is the first occasion on which the High Court has ruled on the patentability of methods of medical treatment of the human body.

### The facts and the proceedings

The drug leflunomide is used to treat psoriatic and rheumatoid arthritis. It was patented in 1979 by Hoechst AG.<sup>1</sup> That patent expired in 2004. In 1994, Hoechst AG applied for a patent for a method of preventing psoriasis by application of leflunomide. That patent is the subject of the proceedings and will expire in 2014.

In 2008, Apotex Pty Ltd obtained registration on the Australian Register of Therapeutic Goods of a generic version of leflunomide (Apo-Leflunomide). The product information supplied with Apo-Leflunomide stated that the product was indicated

for the treatment of rheumatoid arthritis and psoriatic arthritis. It stated that it was not indicated for the treatment of psoriasis not associated with arthritic disease.

The respondents brought proceedings in the Federal Court alleging that Apotex would infringe the patent under s 117 of the Act by supplying Apo-Leflunomide for the treatment of psoriatic arthritis. Apotex denied that it would infringe the patent and cross-claimed seeking revocation of the patent.

### Lower courts

The primary judge (Jagot J) held that the patent was valid<sup>2</sup> and that the supply of Apo-Leflunomide for treatment of psoriatic arthritis would infringe the patent because the effect of such treatment would be the indirect treatment or prevention of psoriasis.<sup>3</sup>

The full court of the Federal Court dismissed the appeal, upholding the primary judge’s finding as to validity of the patent and finding that the supply of the Apotex product would infringe the patent, but for different reasons to those set out by the primary judge.<sup>4</sup> The full court found that the construction of the claim preferred by the primary judge was incorrect; the patent claim was not for treatment

*Hayne J, in dissent, held that a method of prevention or treatment of human disease is not a proper subject for the grant of a patent because the product, being the improvement of the condition of a human being, cannot be turned to commercial benefit by the holder of the patent or by any person other than the individual who has been treated.*

having the *effect* of treating psoriasis but rather for the deliberate administration of leflunomide for the specific purpose of preventing or treating psoriasis.<sup>5</sup> However, the full court found that Apotex had reason to believe that people would use the product for the treatment of psoriasis (engaging s 117(2)(b) of the Act) and that the product information document contained an instruction to use Apo-Leflunomide to treat psoriasis (engaging s 117(2)(c)) of the Act).<sup>6</sup>

### High Court

#### Patentable invention

French CJ examined the history of the *Patents Act 1900*, going back to the Statute of Monopolies 1623, from which the ‘manner of manufacture’ requirement stems. His Honour noted that there was a logical and normative tension between the patentability of pharmaceutical products and the exclusion from patentability of medical treatment. It was ‘an anomaly for which no clear and consistent foundation has been enunciated’.<sup>7</sup> His Honour concluded that methods of medical treatment fall within the scope of a manner of manufacture, as it would not serve a logical or normatively coherent application of the concept to hold otherwise.<sup>8</sup>

In coming to this conclusion, French CJ focused on the application of common law processes and, in particular, the endeavour to achieve coherence in the law. His Honour disavowed any attempt to resolve policy questions.

Crennan and Kiefel JJ examined the provisions of the Act, noting where the Act distinguished between product and method claims and where the Act referred to pharmaceutical patents as including both substances and methods. Their Honours examined the relevant English and Australian authorities and then considered the positions in Europe, the UK, the USA and Canada. In introducing the overseas positions, their Honours noted that the Act includes provisions designed to harmonise Australian patent law with

the laws of Australia’s major trading partners and to ensure compliance with Australia’s international obligations. Their Honours drew specific attention to the Agreement on Trade-Related Aspects of Intellectual Property Rights (1995) (TRIPs),<sup>9</sup> to which Australia is a signatory, which gives all contracting states the option to ‘exclude from patentability ... diagnostic, therapeutic and surgical methods for the treatment of humans’.<sup>10</sup> Australia made amendments to the Act consequent upon its entry into TRIPs but it did take up this option.<sup>11</sup>

Their Honours set out seven reasons why Apotex’s submission that the subject matter of the patent was ‘essentially non-economic’ must be rejected.<sup>12</sup> The critical reason, which Gaegler J also found the most compelling, was that product claims, method claims for new products and method claims for known products could not be distinguished in terms of economics or ethics.<sup>13</sup> Patentability was consistent with the Act and with the practices of the Australian Patent Office since at least 1984.<sup>14</sup> To find otherwise would be to ‘introduce a lack of harmony between Australia and its major trading partners, where none exists at present’.<sup>15</sup>

Gaegler J agreed with Crennan and Kiefel JJ but added an additional reason for accepting the patentability of the invention: the position reached by the Federal Court in *Rescare*<sup>16</sup> and *Bristol-Myers*<sup>17</sup> has been accepted as representing orthodoxy in Australian patent law, informing both legislative assumptions when the Act was amended in 2006 and legitimate commercial expectations, and should not now be departed from.<sup>18</sup>

Hayne J, in dissent, held that a method of prevention or treatment of human disease is not a proper subject for the grant of a patent because the product, being the improvement of the condition of a human being, cannot be turned to commercial benefit by the holder of the patent or by any person other than the individual who has been treated. His

Honour analysed the cases and found that a wrong turn had been taken in the English case of *Schering AG's Application*<sup>19</sup> and in the Australian case of *Joos v Commissioner of Patents*<sup>20</sup> (a single judge decision of Barwick CJ). For Hayne J, the fact that a process produces a result for which people are prepared to pay (as found in *Schering*) is not sufficient for the grant of a patent.

### Infringement

Crennan and Kiefel JJ (with whom French CJ and Gaegeler J agreed) agreed with the full court that the patent was limited to the *purpose* of treating or curing psoriasis (rather than the effect of psoriasis being cured) and therefore the patent was not directly infringed by the use of leflunomide to treat psoriatic arthritis.<sup>21</sup> However, their Honours found that the full court was incorrect in its other findings as to infringement. The High Court found that Apotex did not have reason to believe that its product would be used to treat psoriasis and that its product information document contained 'an emphatic instruction to recipients' to restrict their use of the product to the non-patented uses.

### Remaining question

There remains the question of whether surgical or diagnostic methods are patentable inventions. It appears from the reasons of Crennan and Kiefel JJ that such methods are excluded from the scope of patentable inventions in Europe<sup>22</sup> and the UK.<sup>23</sup> In the USA, surgical methods may be patented but actions for patent infringement against medical practitioners are barred.<sup>24</sup> In Canada, methods of medical treatment are not patentable but novel uses of known compounds are considered patentable, so long as they do not include a medical or surgical step.<sup>25</sup>

Crennan and Kiefel JJ found it unnecessary to decide this point but noted that such procedures are 'essentially non-economic' and not capable of industrial application, so are unlikely to satisfy the test for patentability.<sup>26</sup> Gaegler J stated that the question of '[w]hether *all* processes for treating the human body ought now to be recognised as within

the concept of a manner of manufacture ... need not be determined'.<sup>27</sup> Although French CJ referred to cases in which ethical concerns were expressed regarding patenting of surgical procedures,<sup>28</sup> his Honour ultimately appeared to accept patentability of all medical treatment for reasons of logic and normative coherence.<sup>29</sup> The question did not arise for Hayne J. The resolution of this question remains for another day.

### Endnotes

1. Hoechst AG later became a part of the second respondent. The parties drew no distinction between the respondents, all of which were associated companies.
2. *Sanofi-Aventis Australia Pty Ltd v Apotex Pty Ltd (No 3)* (2011) 196 FCR 1.
3. *Ibid.* at [154]-[155], [264]-[266].
4. *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* (2012) 204 FCR 494.
5. *Ibid.*, at [37], [40], [45]-[46], [124]-[125], [128]-[129].
6. *Ibid.*, at [54], [57]-[58], [143], [146], [148], [155].
7. *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* [2013] HCA 50 at [50] (*Apotex*).
8. *Ibid.*, at [50].
9. Annex 1C to the Marrakesh Agreement establishing the World Trade Organization [1995] ATS 8.
10. TRIPS, Art 27(3).
11. *Apotex* [2013] HCA 50 at [280].
12. A proposition first rejected in *Rescare Ltd v Anaesthetic Supplies Pty Ltd* (1992) 111 ALR 205 (Gummow J); *Anaesthetic Supplies Pty Ltd v Rescare Ltd* (1994) 50 FCR 1 (full court) and *Bristol-Myers Squibb Co v FH Faulding & Co Ltd* (2000) 97 FCR 524.
13. *Ibid.*, at [282].
14. *Ibid.*, at [190], [284].
15. *Ibid.*, at [280].
16. *Rescare Ltd v Anaesthetic Supplies Pty Ltd* (1992) 111 ALR 205 (Gummow J); *Anaesthetic Supplies Pty Ltd v Rescare Ltd* (1994) 50 FCR 1 (full court).
17. *Bristol-Myers Squibb Co v FH Faulding & Co Ltd* (2000) 97 FCR 524.
18. *Apotex* at [315].
19. [1971] 1 WLR 1715.
20. (1972) 126 CLR 611.
21. *Apotex* at [294].
22. *Ibid.*, at [246].
23. *Ibid.*, at [258].
24. *Ibid.*, at [271].
25. *Ibid.*, at [272]-[274].
26. *Ibid.*, at [287].
27. *Ibid.*, at [312], emphasis in original.
28. *Ibid.*, at [39], [42].
29. *Ibid.*, at [50].



## Duties of bar and bench: some reflections on case management and judicial bias

The following paper was delivered by Chief Justice Tom Bathurst at a New South Wales Bar Association CPD conference on Saturday, 29 March 2014

It is always a pleasure to be invited by the Bar Association to speak at continuing professional development conferences. These are important events not just for ongoing legal education, but also because they provide an opportunity for members of the bar from different chambers and with diverse practices to come together and discuss issues facing the profession. As always, the Bar Association should be commended for putting together what looks to be an excellent program. I hope you also take the opportunity today to discuss some of the broader issues that concern the profession. With that said, I'm sure you will be unsurprised that I have no intention of offering any opinion about Phillip Street's current topic of the day, which was summed up neatly in a headline from last month, 'To QC or not QC'.<sup>2</sup>

Unfortunately, I have discovered that one challenge of CPD conferences is working out what on earth to talk about. Philip Selth and Chris D'Aeth seem to think that anything I discuss will be of interest to a room of barristers. But I'm sure that isn't the case, particularly after lunch on a Saturday afternoon. It probably won't come as a shock that there is generally a scuffle among judicial speakers to secure any topic that ends with 'perspectives from the bench'. Sadly on this occasion Justice Perry just pipped me at the post.

Instead, this afternoon I want to discuss several issues regarding case management and judicial decision making. It probably seems as if case management is a topic that is constantly wheeled out by judges at these events, and I'm sure it can feel like you are receiving a lecture rather than attending a conference of your own free will. However, I hope what I have to say today won't seem at all like a finger waving exercise. In fact, costs, the use of case management and the nature of modern litigation are challenges that the judiciary and the bar must continue to confront together.

### **I Litigation costs and case management: shared obligations**

I want to frame the issues I am discussing around a number of recent decisions. This approach provides some context and also has the added benefit of making it clear that I am not just reusing old material. As I mentioned, I want to begin by considering

litigation costs and case management, particularly in the context of a decision of the Victoria Court of Appeal from late last year in *Yara Australia Pty Ltd v Oswal*.<sup>3</sup> This case provides a remarkably clear picture of some of the challenges presented by civil litigation today, the duties owed by practitioners, and the need for courts to actively direct and sometimes even constrain the litigation process.

*Yara v Oswal* involved an application for security for costs. Yara had applied for leave to appeal against a single judge's decision which set aside an order for security for costs made by an associate judge. The Court of Appeal refused leave and following the publication of reasons asked the parties to put on submissions addressing why there had not been a breach of one of the overarching obligations under the Victorian Civil Procedure Act.

The obligation in issue requires that a person use reasonable endeavours to ensure that costs associated with proceedings are reasonable and proportionate to the complexity of the issues and the amount in dispute.<sup>4</sup> The court was concerned that the application for leave involved five silks, six juniors, five firms of solicitors and six leaver arch folders of material. The amounts for security sought by the parties totalled just under \$141,000.<sup>5</sup>

The court ultimately found that the level of representation was acceptable, but the filing of excessive materials had breached the obligation.<sup>6</sup> In doing so, the court addressed in detail the regime of obligations that was introduced under the Victorian Civil Procedure Act. Without going into too much depth it is worth outlining a few of their observations. First, they noted that the overarching obligation regarding litigation costs overrides the duty that practitioners owe to their client to the extent there is any inconsistency. They emphasised that practitioners – both solicitors and barristers – involved in the preparation of pleadings, affidavits and other materials, each have individual responsibilities to comply with the obligation.<sup>7</sup>

The court then considered its powers under the Act to issue sanctions.<sup>8</sup> They indicated that the Victorian provision is unique in that it provides broader powers to sanction practitioners and parties than legislation in other jurisdictions across Australia. They described



the Act as being 'clearly designed to influence the culture of litigation', giving the court, and I quote:

...a powerful mechanism to exert greater control over the conduct of parties and their legal representatives, and thus over the process of civil litigation and the use of its own limited resources.<sup>9</sup>

The court noted that there had been an under-utilisation of the provisions. They emphasised the responsibility of judges to give effect to the obligations, despite any reluctance they might have about initiating inquiries concerning possible breaches in the absence of an application by one of the parties.<sup>10</sup> The court ordered that each applicant's solicitor indemnify their client for half of the respondent's costs associated with the excessive application books, and that the solicitors be disallowed from recovering half of the costs of preparing the books. Each of the applicant's solicitors was also required to provide a copy of the court's reasons to their client.

Now, it could easily be said that the reasoning and outcome in *Yara* simply involved an interpretation of the reworked obligations under the Victorian legislation, which in turn has no meaningful implications for practice in New South Wales. That, of course, may very well be true. However, in my view, *Yara* falls into a broader series of decisions that have further articulated and clarified the duties owed by practitioners, the function of case management and the obligation of courts to actively manage the litigation process.

In this respect, there is no doubt that the scale and complexity of litigation continues to grow. This is particularly the case with the overwhelming role technology now plays in business, our almost complete reliance on electronic communication and the ease of electronic document retention. For instance, it was reported that in 2010 1.9 billion email users sent 107 trillion emails. Apparently we spend nearly 30% of our time at work reading and answering emails. It has also been estimated that in 2012 there were 2.4 billion global internet users, and that the amount of digital information around the globe that is created and shared is now measured in zettabytes.<sup>11</sup> I have no concept of what that is, but it sounds very large. It has also been estimated that it would take one person over six million years to read

all the web pages available.<sup>12</sup> That figure is from a 2012 publication, so by now I assume they would be settling in for even more reading time.

Of course technology and email are not solely responsible for the complexity of litigation and the volume of documents that is sometimes involved. However, at times it does feel as if that is the case. Several examples come to mind: in a recent matter the Court of Appeal was asked to consider more than 20 volumes of documents that had been annexed to an affidavit and provided to the court electronically. The affidavit had been rejected in the court below and its rejection was one of the grounds of appeal. When I asked about its relevance, I was told 'background'. My response was perhaps unduly terse. However, had I been off the bench, it would have been unprintable. I have also had materials for a case delivered to my chambers on a portable hard drive, and I am led to believe that a recent appeal involved upwards of 55 appeal books. I am certainly not suggesting the material provided by the parties on all of these occasions was not relevant. However, it demonstrates the difficulties that judges and barristers are confronted with on a regular basis.

Courts frequently receive electronic bundles and appeal books, and so-called electronic courtrooms with multiple monitors controlled by a single computer are not uncommon. On the other side of the bench, I understand that barristers are increasingly receiving electronic briefs, where documents are provided solely by email or through more sophisticated cloud based storage services. This all makes the single folder briefs held together with red tape that were once delivered to me seem like a relic of the past. I'm certainly not saying that these developments are a bad thing. Even if I were, I would be wasting my breath. In my experience, access to electronic materials can at times make case management and judgment writing much easier, as I am sure it can also assist you in preparing cases. However, changes of this nature often have both positive and negative consequences.

The court in *Yara* noted that '[o]verly voluminous... material strains the administrative resources of the court and the time of judges themselves.' They found that most of the material in the application folders was irrelevant to the resolution of the issues

and more than half was entirely unnecessary to the questions raised by the notice of appeal.<sup>13</sup> In my view, there are certainly occasions where documents have been included in court books at trial for the simple reason that there could be a need to point to them in any future appeal. It is not uncommon for judges to be taken by counsel, either in written or oral submissions, to only a fraction of the materials that are actually provided to the court. This can unnecessarily complicate matters and result in the strain on court resources that was referred to in *Yara*. One of the most pernicious results is that courts are left with a huge amount of evidence with no submission as to what should be done with it. Do they put it to one side or read it, and if they adopt the latter course and rely on it, are parties being denied procedural fairness?

Now, it may sound as if I am only discussing the obligations of barristers. To broaden things out, I want to talk about shared responsibilities. In my view *Yara* needs to be considered in the context of the High Court's decision in *Aon v Australian National University*, and also their decision from last year in *Expense Reduction Analysts v Armstrong Strategic Management*.<sup>14</sup>

To provide some context, former Justice Dyson Heydon wrote extra-curially in 2007 about the obligations of bench and bar in the following terms:

Both courts and counsel have duties to maintain control over the bulk of the evidence and the time which the matter takes to try. Modern conditions have made these duties acutely difficult to comply with. Every aspect of litigation has tended to become sprawling, disorganised and bloated...<sup>15</sup>

He then listed a range of concerns relating to the preparation of matters, the scope of discovery, the conduct of hearings, and judgments themselves. The passage neatly summarises the related duties of courts and counsel, and some of the difficulties presented by contemporary litigation; although his words are not as descriptive as his criticism in *Aon* that '[t]he torpid languor of one hand washes the drowsy procrastination of the other.'<sup>16</sup>

In *Aon*, the plurality emphasised that case management is now an accepted feature of the system of civil justice administered by Australian

courts. The efficient and cost-effective resolution of proceedings is not only important for the parties to a particular case, but also for other litigants who approach the court to resolve their disputes.<sup>17</sup> This was reinforced in *Expense Reduction Analysts* in the context of inadvertent disclosure during discovery, where the court reiterated that New South Wales courts must actively engage in case management in order to achieve the purposes of the Civil Procedure Act.<sup>18</sup>

In this respect, it is important to emphasise that the purpose underlying case management is not economic efficiency purely for the sake of efficiency. Last year I discussed the fact that, in my view, the principal challenge to the separation of powers today is the increasing trend by governments to treat courts as service providers. This tendency undermines the reality and perception of the court's institutional independence, and places pressure on the judiciary to prioritise efficiency over other matters that are equally important to the fair determination of disputes.<sup>19</sup> Courts should only pursue efficiencies if they advance the just and fair adjudication of claims, while at the same time not undermining the essential independence of the judiciary.

Case management is certainly not an objective in and of itself; it is directed to purposes well beyond economic efficiencies. The time and cost that can be associated with litigation are undoubtedly barriers that limit access to justice, and case management is one important response to these challenges.<sup>20</sup> It is worth mentioning that the Productivity Commission is currently completing an inquiry into access to justice arrangements for civil disputes. Significantly, the inquiry's scope includes an analysis of discovery and case management. The issues paper released by the commission poses a number of questions about the effectiveness of case management, how systems could be improved and examples of best practice.<sup>21</sup> It will be interesting to see what recommendations come from the inquiry and, in particular, any changes that the Supreme Court can make to its case management procedures. There is no doubt that we can do more to further develop processes to improve access to justice; balancing the competing needs for fairness, timeliness and cost burdens.

However, achieving these objectives is a task

that must be undertaken by the judiciary and the profession in collaboration. This is reflected in *Expense Reduction*, where the High Court referred to the obligations of both the courts and the legal profession. As I've mentioned, they emphasised that courts in New South Wales should actively use case management, and that minimum delays and expenses are essential to the just resolution of proceedings.<sup>22</sup> However, the court went on to criticise the fact that a rule has recently been added to the New South Wales solicitors' rules that deals with the handling of inadvertently disclosed confidential material. The court said that: first, 'such a rule should not be necessary'; second, in the not too distant past it was understood that acting in a way that is consistent with the new rule prevents unnecessary applications; and third, that behaving in this way is an example of how practitioners' professional obligations support 'the objectives of the proper administration of justice'.<sup>23</sup>

While these comments were made in relation to the new solicitors' rules that apply in this state, the relationship between the efficient and cost-effective conduct of proceedings and the proper administration of justice certainly requires the same, if not greater, assistance from members of the bar.

You may be familiar with a number of recent changes that have been made in the Supreme Court to improve case management. In 2012, there was some initial anxiety when a new practice note clarified that for matters in the Equity Division, the court would not, subject to exceptional circumstances, make orders for discovery prior to the parties serving their evidence. As you are aware, there has been recent criticism of the increase in securities-related class actions. One reform suggested was that evidence be filed prior to discovery. This is a reform that we introduced 12 months ago. Similarly, a new Equity Division practice note in 2012 in relation to expert evidence is intended to encourage discussion between parties, minimise the cost of expert evidence and reduce hearing times. In relation to criminal law, an amended practice note for the Common Law Division has altered the timeframes for the disclosure of materials by the prosecution and defence. Finally, I should mention that amendments to Part 3 of the Uniform Civil Procedure Rules regarding electronic case management came into effect last month. These

rules address the broad range of documents that can now be filed online and the methods parties can use to submit documents for e-filing. These are simply a few of the steps that the court has taken to establish straightforward case management procedures.

Returning to *Yara*, it is also useful to compare the regimes under the Civil Procedure Acts in New South Wales and Victoria. It is clear that the Victorian provisions which set out the overarching obligations and sanctions that can be imposed, provide courts in that state with a powerful set of tools to exert control over the conduct of parties and their lawyers. However, in my view, I must take some issue with the statement in *Yara* that the New South Wales provisions 'remain more aspirational than obligatory'.<sup>24</sup> As you know, the court has general powers to give directions as it thinks fit, to give specific directions regarding the conduct of hearings, and, where there is a breach of a direction, the power to make various orders including orders as to costs.<sup>25</sup> When he was president of the Court of Appeal, Chief Justice Allsop observed in *Hawkesbury District Health Services v Chaker* that:

Courts are being more demanding about behaviour from clients and practitioners in order to obtain sufficient co-operation among them to enable the real issues in dispute to be litigated with efficiency and civility and in a cost-effective manner. Clients and practitioners can expect these demands for good faith and common sense in their conduct of litigation to continue and to be reinforced by orders, including orders for costs.<sup>26</sup>

The Victorian regime undoubtedly contains more detail than the provisions in Part 6 of our *Civil Procedure Act*. However, that does not mean that courts in New South Wales are not sufficiently equipped to manage the progress of cases and step in where parties fail to meet their obligations. Consistent with the cases that I have referred to, courts are required to supervise proceedings and make orders where they are deemed necessary.

As a side note, orders for costs are based on the indemnity principle (albeit the indemnity is only partial), and are not intended to operate as a sanction. Now, while I am not expressing a view, it is generally assumed that our system in which the successful party is awarded costs is preferable to the default approach in the United States. The rationale

for awarding costs to the successful party is that it is just and reasonable that they be indemnified for expenses incurred as a result of the proceedings.<sup>27</sup> However, there may be value in asking whether this approach promotes access to justice? For instance, where cases are arguable but by no means certain, plaintiffs may be fearful of pursuing the matter, particularly in the face of a Calderbank offer, even if it is one in the very low range. In these circumstances solicitors and barristers may also be deterred from advising. In the course of the present inquiry it seems the Productivity Commission will consider the principles that should apply in awarding costs. It will be interesting to see if any recommendations are made as to sanctions, beyond costs orders, that can be imposed by courts to control litigation.

What I have said so far clearly indicates that case management remains a work in progress. Courts will continue to develop and adjust case management processes with the objective of controlling costs and delays, while maintaining the highest standards in the administration of justice. This will require ongoing collaboration between the bench and bar as we confront the challenges of modern litigation. As *Yara* illustrates, courts should not be afraid to actively manage proceedings. However, practitioners – especially members of the bar – must remain mindful of their duties and the effect that time consuming and costly proceedings can have on access to the courts.

### II Judicial bias

As I mentioned, my aim this morning was to avoid anything that sounded like a reprimanding lecture; although I'm not sure how successful I have been so far. To ensure I am striking a balance, I thought I would say a few words about judicial decision making and, in particular, judicial bias.

It is worth noting at the outset that there is a close connection between case management and the issue of bias. As we move toward increasingly active case management, there is the potential for proactive intervention by judges at interlocutory stages to raise concerns about prejudgment. As promised, to take a recent example, this scenario arose in a decision of the full Federal Court from last December in *GlaxoSmithKline Australia v Reckitt*.<sup>28</sup>

In *Reckitt*, the primary judge dismissed an application to transfer the matter to another judge's docket. The application concerned certain remarks the judge had made in relation to one of the expert witnesses' evidence at a directions hearing and during an application for an interlocutory injunction. The comments were said to give rise to a reasonable apprehension of bias.

The full court found that there was nothing in the judge's statements that might cause a fair-minded observer to reasonably apprehend that the judge might not bring an impartial mind to the issues in dispute at the final hearing. In doing so, the court made several important observations about the relationship between case management and claims of apprehended bias.

The court emphasised that an allegation of apprehended bias must be considered in the context of ordinary judicial practice. Picking up language from *Johnson v Johnson*, they indicated that judges cannot be expected to sit in silence during argument, and will often form tentative opinions about the matters in issues. Importantly, the process of raising opinions during the course of proceedings is meant to draw a response from counsel that may assist the judge to clarify an issue or correct a mistaken view.<sup>29</sup> The court accepted that there had been a debate between bench and bar about the expert's evidence. However, they rejected the proposition that the debate showed prejudgment or a view held by the judge that could not be altered. In this respect they found the fair-minded observer would appreciate that robust debate can form part of the process of testing counsel's arguments.<sup>30</sup>

A possible perception of bias can arise from the increasing need for judges to manage the progress of cases, while at the same time remaining neutral arbiters. While the use of case management has grown, the participation of judges in the course of hearings is not new. For instance, it has been the position for many years that judges should not sit silently through proceedings.<sup>31</sup> For centuries judges have been telling counsel, sometimes in particularly strong terms, if they think a submission or course of action is unlikely to succeed.<sup>32</sup> At one end of the spectrum, I remember in my early days at the bar that appearing in the Court of Appeal was often a

terrifying prospect, where commentary and criticism from the bench could politely be described as ‘frank’. I certainly hope the experience of advocates today is characterised by polite and constructive discussion between bench and bar.

The point I am trying to make is that case management and the conduct of modern litigation – be it through a docket system or otherwise – will continue to raise issues regarding the possible appearance of prejudgment, and will also affect the concept of apprehended bias and the way courts apply it. For instance, in *Johnson v Johnson*, the plurality explained that the rules of judicial practice are not frozen. They said the rules, and I quote:

...develop to take account of the exigencies of modern litigation. At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx.<sup>33</sup>

As I have mentioned in relation to *Reckitt*, the test for apprehended bias is easily stated: you ask whether a fair-minded lay observer might reasonably apprehend that the decision maker might not bring an impartial and unprejudiced mind to the resolution of the question in issue.<sup>34</sup> Unfortunately, while the test seems straightforward, it is not always easy to apply.<sup>35</sup> With that in mind, I want to refer to three specific matters in relation to applying the test for apprehended bias that may be of some interest.

First is the issue of logical connection. It is important when applying the test that practitioners bear in mind the two step approach set out by the High Court in *Ebner*. Broadly speaking, the second step involves asking whether there is a logical connection between the conduct complained of and the alleged departure by the decision maker from deciding the matter on its merits.<sup>36</sup> This requires the applicant to show an association between the conduct and the fear that the judge will not decide the case impartially. As one commentator has put it, the party must ‘essentially ‘join the dots’.<sup>37</sup>

The need to establish a logical connection was central to the decision in *Duncan v Ipp* last year, which, as

you are no doubt aware, arose from allegations of apprehended bias on the part of the commissioner of ICAC.<sup>38</sup> The principal question was whether there was a connection between the commissioner’s conduct – including communication with and advice to the Executive and the Department of Premier and Cabinet – and the possibility that the commissioner had a closed mind about the outcome of the inquiry.

In my view, which I expressed in *Duncan*, it is not necessary for the logical connection to be absolutely certain. All aspects of the test – for instance, the two ‘mights’ that I have referred to – are framed in terms of ‘possibility’. In that sense what is required is that the fair-minded observer might perceive a logical connection between the conduct complained of and the judge’s possible departure from deciding the matter impartially. In addition, when assessing if there might be a logical connection, it is appropriate to look at alternate possibilities as to why the decision maker took a particular course of action. Considering other explanations may affect whether the fair-minded observer might see a logical connection. However, the fact there are other possibilities does not mean that the fair-minded observer might not conclude that there was the possibility of bias.<sup>39</sup>

I realise this sounds complicated. However, as you probably imagine, applying the test for apprehended bias, including the two step process in *Ebner*, will depend almost entirely on the facts. Perhaps the simple message is that it is always necessary to identify the link between the alleged conduct and the possibility of bias – to join the dots so to speak. This does not mean that the conduct complained of *must* lead to the alleged bias. However, as *Ebner* dictates, it is important to consider and articulate how that connection might lead the fair-minded observer to perceive bias.

This leads to the second issue concerning the knowledge of the lay fair-minded observer. The objective test, which is often simply referred to as the ‘double might’ test, has lowered the bar for proving apprehended bias, as compared to the subjective ‘real likelihood’ test that continued to be applied in the United Kingdom and New Zealand until the late 1990s and 2000s.<sup>40</sup> However, the extent and detail of



the knowledge that is attributed to the fair-minded observer is one aspect of the test that has proved complicated.

Many useful resources have summarised the positions taken in a litany of cases regarding the knowledge that the fair-minded observer would have about a range of matters.<sup>41</sup> This includes some knowledge of the facts and circumstances of the proceedings, the nature of the relevant body (be it a court, tribunal or commission), and the professional ethics of judicial officers. It is worth pausing to mention that there are various criticisms of the hypothetical fair-minded observer; particularly in relation to the extent of the knowledge they are considered to have. In fact, several judges have themselves recognised these shortcomings, including concerns that the observer is simply a thin façade for the judge's own personal views.<sup>42</sup>

For my part, I am sure there will be ongoing scrutiny about the nature of and knowledge that is attributed to the fair-minded observer. However, despite criticisms, it seems to me that the fair-minded observer provides a valuable position from which to consider claims of apprehended bias. The objective observer reflects the fact that claims of bias, at their very essence, concern the public's perception of the judiciary. It gives effect to the requirement in our system that justice should both be done and be seen to be done. In this sense, it is important that the analysis of claims regarding allegations of bias occurs from the standpoint of the public, even if that involves some degree of artificiality. Furthermore, we know that a range of legal tests employ notions of reasonableness and the reasonable person. While it may present some difficulties, it seems the fair-minded observer is just as useful as the passenger on the Clapham omnibus or the Bondi tram is in other contexts.<sup>43</sup>

Finally, a series of recent publications have addressed the correct protocol for communicating with judges and members of their staff.<sup>44</sup> This is an important reminder that unilateral contact between a decision-maker and a party or their legal representative can form grounds for disqualification on the basis of apprehended bias. The general position is that a judge

should not receive any communication regarding a case that the judge is to decide, where that communication is made with a view to influencing the conduct or outcome of the proceedings.<sup>45</sup> As Sir Anthony Mason explained in *Re JRL*, one of the cardinal principles is that a judge should try a case 'on the evidence and arguments presented...in open court by the parties or their legal representatives and by reference to those matters alone'.<sup>46</sup> Consistent with what I have said already, claims of apprehended bias arising from inappropriate communications are assessed according to the double might test.

Communication with the courts and with individual chambers has become increasingly easy, first through the introduction of fax machines, which already seem virtually redundant, and now email. This has simplified many court processes, from listing matters, right through to providing materials prior to a hearing. To pick a couple of basic examples, a new return date for a subpoena can be requested using a specific court email address, and lists of authorities in the Court of Criminal Appeal can be submitted via email. Achieving efficient case management also relies on effective communication between the parties, their legal representatives and the court.<sup>47</sup> However, the need for more regular contact between judges and parties, along with the ease of that contact, has the potential to create an apprehension of bias.

Practitioners need to be mindful of their professional obligations in relation to communications with the court: counsel under rules 53 to 55 of the recently amended Barristers' Rules and solicitors under rules 22.5 to 22.7 of the revised Solicitors' Rules, both of which are in the same terms. Courts and the profession should be working together toward the goals of effective case management and efficient communication. However these objectives must be viewed in the context of the overarching need for impartiality. You should be careful to not let the ease of modern communication distract from the cardinal principle that was referred to by Sir Anthony. While there are many advantages to instantaneous means of contact like email, you should keep in mind that correspondence with the court or a judge – whatever form that happens take – is a communication with the court like any other. The procedures that



govern contact between the court, parties and legal practitioners are arguably more important today than ever before.

These types of concerns are certainly very different to earlier days where judges' salaries were sometimes supplemented by court fees. In fact I'm led to believe that up until 1924, associates at the High Court were able to sell copies of the court's judgments to increase their wage.<sup>48</sup> I assume this may well be a system that my associate would be keen to reintroduce.

It seems there has been an increase in the past few decades in the number of applications for recusal made on the basis of apprehended bias. There are no doubt many reasons that may have led to this, including the acceptance of an objective test and an increase in the number of litigants in person,<sup>49</sup> which is a topic that I want to turn to briefly in just a moment. Whatever is the case, it is important to bear in mind that claims of bias must be considered having regard to ordinary judicial practice, which includes the increasing use of case management. Judges and practitioners must also be mindful of the possible appearance of prejudgment during interlocutory proceedings, and practitioners in their communications with the court. Ultimately, there are ongoing challenges in applying the test for apprehended bias, and I have no doubt that the practice of litigation will continue to throw up new issues that require further consideration.

### III Self-represented litigants

In the few minutes that I have remaining I would like to say a few words about self-represented litigants. I am sure that many of you have faced what is often a difficult task of appearing against a litigant in person. In the criminal context an unrepresented accused has been described as being disadvantaged in a number of ways: first, because they almost always have insufficient legal knowledge and skills; and second, because they are generally unable to dispassionately assess and present their case in the same way as opposing counsel.<sup>50</sup> This situation presents challenges not only for the litigant in person, but also for the court and for other parties.

There is a general perception that an increasing

number of litigants are representing themselves in Australian courts and tribunals.<sup>51</sup> However, accurately calculating the number of people who are acting for themselves presents a range of challenges. For instance, some jurisdictions encourage self-representation and only allow legal representatives to appear where permission is granted. In the Supreme Court, it is difficult to precisely gauge the extent of self-represented litigants. Some parties file their own documents that may or may not have been prepared by lawyers, some are represented for a portion of the proceedings, while some appear in person at interlocutory hearings and are then represented at the final hearing.

There have been a great many inquiries into access to justice that have considered the needs of self-represented litigants.<sup>52</sup> It is highly likely that the Productivity Commission will also consider the extent and impact of self-representation, and how those who are representing themselves can be best assisted by government, community bodies and the courts.

The courts are acutely aware of the needs of self-represented parties. *Cachia v Hanes* contains an early statement by the High Court in relation to the challenges they can present. In *Cachia*, the plurality observed that while it is a fundamental right to appear in person, the presence of self-represented litigants in increasing numbers is creating a problem for courts. They noted that litigation involving a self-represented person is usually less efficient and tends to be prolonged, can transfer costs to the opposing party and is a drain on court resources.<sup>53</sup> At this point I should again reiterate that it is a fundamental right to appear in person; indeed, there are many people who elect to represent themselves despite being in a position to access legal help. There are of course others who have no such choice.

In addition to the difficulties referred to in *Cachia*, the presence of a self-represented litigant can create a further concern for judges that ties in with what I have already said today. As you have probably experienced, it is at times necessary for judges to provide assistance to self-represented litigants so they understand the proceedings and to ensure

the trial is conducted fairly. This, it has been said, should be limited only to advice and assistance that is required to diminish the disadvantage that the self-represented party will ordinarily suffer when appearing against a lawyer.<sup>54</sup> However, determining the extent to which advice and assistance should be offered to a litigant in person in a particular case is a difficult task. Providing too much assistance can compromise the court's impartiality and potentially create an appearance of bias. In this sense, there is a tension between the duties of the court to act impartially and to ensure a fair hearing.<sup>55</sup>

This is a challenge that judges confront on a regular basis. However, in my view, the progress of cases involving self-represented litigants is a further area in which the courts and the legal profession share a similar goal. I understand that a second edition of the Bar Association's guidelines on dealing with self-represented litigants was released in late 2011. Can I encourage you to review this document and reflect on the approach that you take when dealing with and appearing opposite a litigant in person. The guidelines provide a great deal of practical advice about preparing for and presenting cases in which there is a party who is self-represented. The way in which judges preside over such cases, along with the preparation and conduct of counsel appearing, can help to alleviate some of the challenges that I have referred to. Ultimately, I am sure we share a common hope that focus will remain on the needs of litigants who are not self-represented by choice. Can I commend the efforts of those here today that donate time to the Legal Assistance Referral Scheme and the Duty Barrister Scheme.

### IV Conclusion

To conclude, there are many areas in which the courts and legal profession can work in collaboration. Case management is certainly one such matter. The decision in *Yara* illustrates the need for judges to actively manage litigation, and the obligations of parties to facilitate the just, quick and cheap resolution of proceedings; particularly in light of challenges posed by evolving technologies. The conduct of litigation today, including the use of case management requires constant monitoring by

courts. As I have mentioned, the active management of civil litigation can present difficulties in respect of creating an appearance of prejudgment. While in very different circumstances, similar challenges can arise in relation to assistance given by judges to litigants in person. These are areas where courts and the bar can assist one another. Courts by managing litigation in a way that achieves the objectives of the Civil Procedure Act, and barristers through considered preparation and presentation of matters.

I hope you find the remainder of today's program stimulating and that you take the opportunity to discuss broader issues concerning the law and the legal profession. One of the main reasons that I enjoy coming to speak at these conferences is they give me an opportunity to hear your concerns and answer some questions about the operation of the court. In those circumstances, and while it is a large group, I would be delighted to answer any questions you may have in the short time that is remaining.

### Endnotes

1. I express my thanks to my research director, Haydn Flack, for his assistance in the preparation of this address.
2. J Whealing, 'To QC or not QC', *Lawyers Weekly* (4 February 2014).
3. *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337 (*Yara*).
4. *Civil Procedure Act 2010* (Vic) s 24.
5. See, generally, *Yara* at [1]–[4].
6. *Yara* at [39], [52].
7. *Yara* at [14]–[15].
8. See *Civil Procedure Act 2010* (Vic) Pt 2.4.
9. *Yara* at [17], [20]–[22].
10. *Yara* at [25], [27].
11. See *Business Insider* (15 January 2011) available at <http://www.businessinsider.com.au/internet-statistics-2011-1>; McKinsey Global Institute, *The social economy: unlocking value and productivity through social technologies* (July 2012) available at [http://www.mckinsey.com/insights/high\\_tech\\_telecoms\\_internet/the\\_social\\_economy](http://www.mckinsey.com/insights/high_tech_telecoms_internet/the_social_economy); FEDTECH (12 June 2013) available at <http://www.fedtechmagazine.com/article/2013/06/18-incredible-internet-usage-statistics>.
12. Diane P Wood, 'Adrift in a Sea of Data: Electronically Stored Information', 2012 John Lehan Memorial Lecture citing R Esenberg, A Modest Proposal for Human Limitations on Cyberdiscovery, 64 Fla L Rev 965, 965 (2012).
13. *Yara* at [40], [49].
14. *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; (2009) 239 CLR 175 (*Aon Risk Services*); *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; (2013) 303 ALR 199 (*Expense Reduction Analysts*).

15. The Hon J D Heydon, 'Reciprocal duties of Bench and Bar', (2007) 81 *Australian Law Journal* 23, 28 extracted in The Hon M Warren, 'The duty owed to the court: the overarching purpose of dispute resolution in Australia', Bar Association of Queensland National Conference (6 March 2011) at 2.
16. *Aon Risk Services* at [156].
17. *Aon Risk Services* at [92]. See also *Sali v SPC Ltd* [1993] HCA 47; (1993) 67 ALJR 841 at 849.
18. *Expense Reduction Analysts* at [42].
19. See Hon T F Bathurst, 'Separation of Powers: Reality or Desirable Fiction?', JCA Colloquium (11 October 2013) at 6.
20. See, for example, The Hon R Sackville, 'The future of case management in litigation', (2009) 18 *Journal of Judicial Administration* 221, 222; L Anderson, 'Does case management undermine the rule of law in the pursuit of access to justice?', (2011) 20 *Journal of Judicial Administration* 240, 240-241.
21. Productivity Commission, *Access to Justice Arrangements* (Issues Paper, September 2013) at 22-23.
22. *Expense Reduction Analysts* at [42], [51].
23. *Expense Reduction Analysts* at [64]-[67].
24. *Yara* at [17].
25. *Civil Procedure Act 2005* (NSW) ss 61-62.
26. *Hawkesbury District Health Service Ltd v Chaker* [2010] NSWCA 320 at [2].
27. See, for example, *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534, 543.
28. *GlaxoSmithKline Australia Pty Ltd v Reckitt Benckiser Healthcare (UK) Limited* [2013] FCAFC 150 (*GlaxoSmithKline*).
29. *GlaxoSmithKline* at [36] referring to *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488.
30. *GlaxoSmithKline* at [45]-[47].
31. See, for example, *Vakautu v Kelly* [1989] HCA 44; (1989) 167 CLR 568, 571.
32. See *Antoun v The Queen* [2006] HCA 2; (2006) 80 ALJR 497 at [27].
33. *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 568 at [13].
34. See *Michael Wilson & Partners Ltd v Nicholls* [2011] HCA 48; (2011) 244 CLR 427 at [31]; *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 at [6].
35. See, for example, *R v Lusink; Ex parte Shaw* (1981) 55 ALJR 12, 16 (Aickin J in dissent); *Kirby v Centro Properties Ltd (No 2)* [2008] FCA 1657; (2008) 172 FCR 376 at [17].
36. *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 at [8].
37. M Groves and H P Lee (ed), *Australian Administrative Law* (Cambridge University Press, 2007) at 320.
38. *Duncan v Ipp* [2013] NSWCA 189; (2013) 304 ALR 359, special leave to appeal to the High Court refused in *Duncan v Ipp* [2013] HCATrans 157.
39. See *Duncan v Ipp* [2013] NSWCA 189; (2013) 304 ALR 359 at [147]-[150].
40. See J Tarrant, *Disqualification for Bias* (Federal Press, 2012) at 52-56.
41. See, for example, J Tarrant, *Disqualification for Bias* (Federal Press, 2012) at 61-66; M Aronson and M Groves, *Judicial Review of Administrative Action* (Lawbook Co 5<sup>th</sup> ed, 2013) at [9.80]-[9.90]; M Groves, 'The imaginary observer of the bias rule', (2012) 19 *Australian Journal of Administrative Law* 188, 190-199.
42. See, for example, *Smits v Roach* [2006] HCA 36; (2006) 227 CLR 423 at [95]-[96] (per Kirby J); *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488 at [48]-[51] (per Kirby J); *British American Tobacco Australia Services Limited v Laurie* [2011] HCA 2; (2011) 242 CLR 283 at [48] (per French CJ in dissent).
43. See, for example, *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7 at 36.
44. See, for example, G Ulman and A Southwell, 'Judicial impartiality and communications with the court' (March 2014) 36 *Law Society Journal* 46; R Lilley and J Carter, 'Communications with the court' (2013) 87 *Australian Law Journal* 121; M Groves, 'Emailing judges and their staff' (2013) 37 *Australian Bar Review* 69.
45. *John Holland Rail Pty Ltd v Comcare* [2011] FCAFC 34; (2011) 276 ALR 221 at [12].
46. *Re JRL; Ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342 at 350.
47. See *John Holland Rail Pty Ltd v Comcare* [2011] FCAFC 34; (2011) 276 ALR 221 at [26]-[28].
48. The Hon K Mason, *Lawyers Then and Now* (Federation Press, 2012) at 241-242.
49. See *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488 at [44].
50. *Dietrich v The Queen* [1992] HCA 57; (1992) 177 CLR 292 at 302.
51. See E Richardson and T Sourdin, 'Mind the gap: making evidence-based decisions about self-represented litigants' (2013) 22 *Journal of Judicial Administration* 191.
52. Inquiries and studies are canvassed in detail in E Richardson, T Sourdin and N Wallace, 'Self-Represented Litigants: Literature Review', Australian Centre for Court and Justice System Innovation (2012); E Richardson and T Sourdin, 'Mind the gap', above n 51.
53. *Cachia v Hanes* [1994] HCA 14; (1994) 179 CLR 403 at 415-416. See also *Kenny v Ritter* [2009] SASC 139; (2009) 263 LSJS 158 at [14].
54. *Rajski v Scitec Corporation Pty Ltd* (Court of Appeal, 16 July 1986, unreported) extracted in *Caladine v The Commissioner, New South Wales Health Care Complaints Commission* [2007] NSWCA 362 at [55].
55. See Australian Institute of Judicial Administration, *Litigants in Person Management Plans: Issues for Courts and Tribunals* (2001) at 5-6. See also *Kenny v Ritter* [2009] SASC 139; (2009) 263 LSJS 158 at [19]-[20].

## Communication with a judge's chambers

Lachlan Edwards writes on practitioners' and out of court contact with the courts.

*Get away from my associate. This isn't a shop counter.<sup>1</sup>*

If you read no further than this first paragraph – and take nothing else away from this note than a reminder – the rule is this: you may contact a judicial officer's chambers only with the knowledge and consent of all other parties in the proceedings that are before that judicial officer. The precise terms of any proposed written communication with a judge's chambers should be provided to the other parties for their consent. You must copy those parties in on the communication.

The rule arises from the proscription against barristers communicating in their opponents' absence with the court concerning any matter of substance in connection with current proceedings. The exceptions to this rule are few and relatively rigid. They are:

- the court has first communicated with the barrister in such a way as to require the barrister to respond to the court;
- the opponent has consented beforehand to the barrister dealing with the court in a specific manner notified to the opponent by the barrister; or
- in ex parte matters (but, the author suggests, take the same stringent view about your obligations of disclosure in those communications<sup>2</sup>).

The rule was discussed in Justice Kunc's recent judgment in *Ken Tugrul v Tarrant's Financial Consultants Pty Limited (in liquidation)*<sup>3</sup>. In that case his Honour dealt with an unauthorised communication with his chambers in which a party, purportedly acting upon an order of the court, forwarded a joint expert report but annexed to it documents that were objected to by the other parties, making clear that the offending documents were the subject of objection. His Honour returned the offending material and instructed his staff to delete the communication from the court's email system.

His Honour provided further clarification of the exception to the rules prohibiting unilateral communication with the court, so as to include: trivial matters of practice, procedure or administration

(e.g., the start time or location of a matter, or whether the judge is robing), and where the communication responds to one from the judge's chambers or is authorised by an existing order or direction (e.g., for the filing of material physically or electronically with a judge's associate).<sup>4</sup> In such circumstances, the communication with the court should:

- expressly bring to the addressee associate's or tipstaff's attention the reason for the communication being sent without another parties' knowledge or consent;
- where consent has been obtained, expressly state that fact;
- always be copied to the other parties.<sup>5</sup>

*The precise terms of any proposed written communication with a judge's chambers should be provided to the other parties for their consent. You must copy those parties in on the communication.*

It does not appear in that case that any party made an application for his Honour to recuse himself. There is no rule that any unauthorised communication between a judge and a party will necessarily require a judge to disqualify her or himself.<sup>6</sup>

His Honour's reasons in *Tugrul* and the other decided cases raise other interesting issues. Why should the rule persist as long as parties are copied in? We live in modern times and courts at all levels have acknowledged that there may be some advantages to less formal communication between courts and litigants, not the least of which is the tendency of communications in relation to matters of no controversy, or to permit efficient conduct of proceedings, promoting the just, quick and cheap disposal of the proceedings.<sup>7</sup>

Communications breaching the above rule are sent reasonably frequently in this email age. Anecdotally, that the infraction is most often committed by solicitors, probably unwittingly. In the author's experience, it rose no higher than the commission of a professional discourtesy.

We should of course all guard against discourtesy, but if that isn't reason enough, we know an offended opponent can be a dangerous opponent; an offended bench is of a different order altogether. Happily, in NSW at least, all new barristers are told, very early in the Bar Practice Course, about the existence of these rules.

The rules, as expressed, guard against practical infringements of the principle of natural justice. In *Carbotech Australia Pty Ltd v Yates*<sup>8</sup> (a case in which improper communication had been made with a court-appointed referee, rather than the bench), Brereton J stated:

The 'twin pillars' of the rules of natural justice are the hearing rule ... and the bias rule ... However ... they may overlap: a persistent failure to hear one party might establish an apparent lack of impartiality as well as a breach of the hearing rule.

In *R v Fisher*<sup>9</sup> Redlich and Dodds-Streton JJA said that the rule was founded upon:

... [the] undoubted principle that a judge's decision should be made on the basis of the evidence and arguments in the case, and not on the basis of information or knowledge that is acquired out of court.

In *R v Magistrates' Court at Lilydale, ex parte Ciccone*<sup>10</sup> McInerney J put the rule, and its foundational basis, in the following terms:

The sound instinct of the legal profession - judges and practitioners alike - has always been that, save in the most exceptional cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party. Once the case is under way, or about to get under way, the judicial officer keeps aloof from the parties (and from their legal advisers and witnesses) and neither he nor they should so act as to expose the judicial officer to a suspicion of having had communications with one party behind the back of or without the previous knowledge and consent of the other party. For if something is done which affords a reasonable basis for such suspicion, confidence in the impartiality of the judicial officer is undermined.

The danger being protected against is that the judicial mind might be coloured by information that has not been subject to open debate with another party (or

at the very least, consideration by the other party). The rule, strictly applied, of course goes further than that. It also, for example, guards against familiarity, and the apprehension of bias that accompanies it.

Three further questions arise. First, why should communications with chambers (rather than with the judicial officer directly) attract the same prohibition? Secondly, what of the obligations attaching to a judge's staff? Thirdly, what of communications with a court's registry?

*The danger being protected against is that the judicial mind might be coloured by information that has not been subject to open debate with another party...*

One former judge reportedly counselled his associate to be careful of what he communicated by email because it was proper for the parties to regard the associate 'as my amanuensis'. Elsewhere it has been said that in Australia the judge's staff (principally the associate and/or tipstaff) are the judge's public face while the judge presides and decides.<sup>11</sup> Indeed one author suggests that the role of the associate cannot really be divorced from the role of the judge at all. In his view, associates should be afforded a kind of proxy protection as a consequence of the strict separation of powers doctrine. That author said:<sup>12</sup>

... it must be accepted that if judicial independence is to have any real meaning, the principle [of independence] must extend to the associate, to give them some protection from external interference and control.

If those various formulations are accepted, it follows that a communication with the associate is akin to a communication with the court and so is impermissible other than under one of the exceptions to the rule.

It follows that if there is an obligation upon a judge to accept only evidence properly put before the court, and submissions made to the court, there is an obligation also upon judicial staff.<sup>13</sup>

Communications with registry staff are a different matter. They should, of course, ordinarily be conducted by solicitors. That said, communication with the registry is often encouraged from the



bench. Ordinary matters of practice unrelated to the outcome of proceedings are dealt with, daily, efficiently, by those staff, and fall comfortably within the second exception to the rule.

However, no matter of substance that should properly be brought before the court in ordinary session should be raised with the registry. An appropriate test is, if what you are seeking can only be granted by way of an order of a registrar, even if they have the power to deal with it in chambers, then the matter, absent agreement, needs to be relisted. That is because, as some have been reminded, the courts aren't shop counters.

## Endnotes

1. Anecdotal record of an exclamation by a senior New South Wales judicial officer.
2. See: *NSW Barristers' Rules 2014*, r 53. Identical provisions are to be found in the solicitors' *Revised Professional Conduct and Practice Rules 1995*.
3. [2013] NSWSC 1971 esp at [21].
4. *Tugrul* [2013] NSWSC 1971 at [21].
5. *Tugrul* [2013] NSWSC 1971 at [22].
6. *R v Fisher* [2009] VSCA 100 at [37].
7. Explicitly so in *R v Fisher* [2009] VSCA 100 at [39]; less explicitly in *Concrete Pty Limited v Parramatta Design and Development Pty Limited* (2006) 229 CLR 577, per Kirby and Crennan JJ, see *Tugrul v Tarrant's Financial Consultants Pty Ltd (in liq) (No 2)* [2013] NSWSC 1971 at [19].
8. [2008] NSWSC 540, at [46].
9. [2009] VSCA 100 at [20].
10. [1973] VR 122.
11. *Re Altman and the Family Court of Australia* (1992) 27 ALD 369 at 374 (AAT per President O'Connor J).
12. Horton, J, 'Justices' Associates: Some Observations', (2002) 22(1) *University of Queensland Law Journal* 114 at 118.
13. *Fisher* [2009] VSCA 100 at [39].



# Appearing in the coronial jurisdiction<sup>1</sup>

The following paper by Ian Bourke was presented at a New South Wales Bar Association CPD seminar on 12 February 2014.

This paper aims to provide guidance to practitioners briefed to appear in inquests in the NSW Coroner's Court. Although some reference will be made to matters of law<sup>2</sup>, my primary purpose is to focus on matters of practice and procedure which might assist if you are fortunate enough to be briefed to appear in this interesting, and very special jurisdiction.

## The purpose of coronial proceedings and the role of the coroner

It is important at the outset to understand that a coronial inquiry is fundamentally different from ordinary 'litigation'. An inquest is not litigation at all. There are no 'parties' and no 'contest'. No-one sets out to 'prove' any particular allegation or proposition.

Rather, an inquest is an investigation, aimed at discovering the truth. It is an inquisitorial<sup>3</sup> exercise in fact-finding. It is this principle which drives the inquest hearing, and which generally informs the approach taken by coroners to evidentiary and procedural matters, both prior to and during the hearing of an inquest.

In NSW, the coronial process is primarily<sup>4</sup> regulated by the *Coroners Act 2009*. Coroners conduct inquiries into certain types of deaths and fires. Under the *Coroners Act 2009*, an 'inquest' is an inquest into the death or suspected death of a person (s 4). An 'inquiry' is an inquiry into a fire or explosion (s 4). The overwhelming majority of a coroner's work is in relation to deaths (rather than fires). Inquests into deaths are the primary focus of this paper. However, as most of the comments in this paper are about matters of procedure, many will apply equally to the conduct of a fire inquiry.

## When might an inquest be held?

The general jurisdiction to hold an inquest arises if it appears that a person has died (see s 21, s 6):

- a violent or unnatural death; or
- a sudden death the cause of which is unknown; or
- under suspicious or unusual circumstances; or
- having not consulted a doctor in the previous six months; or
- where death was not the reasonably expected outcome of a health-related procedure; or

- while in or temporarily absent from a mental health facility (and while a 'patient' at the facility under mental health legislation); or
- where a doctor has not issued a certificate of cause of death.

Jurisdiction is given (exclusively) to a 'senior coroner'<sup>5</sup> to hold an inquest where it appears that a death has occurred in the following circumstances (see s 23 and s 24):

- while in the custody of police or other lawful custody; or
- while escaping or attempting to escape from police or other lawful custody; or
- as a result of, or in the course of police operations; or
- while in or temporarily absent from an adult correctional centre, lock-up, or children's detention centre (or while en route to such a place); or
- while a 'child in care'; or
- where a report has been made under NSW 'care legislation'<sup>6</sup> about the deceased child (or a sibling) within the previous three years; or
- where a child's death may be due to abuse or neglect or is suspicious; or
- where the person was living in or temporarily absent from residential care (or was in a 'target group' and received assistance to live in the community) under the *Disability Services Act 1993*.

Section 25 confers on coroners a wide discretion to dispense with an inquest. In many cases where jurisdiction arises, an inquest will be dispensed with, because there is no doubt as to the identity of the deceased or the time, place, and manner and cause of death (and there is no public or family interest to be served in holding an inquest). There are however, some deaths in which an inquest must be held.

## When must an inquest be held?

There are some deaths where holding an inquest is mandatory. Section 27 says that an inquest into a death or suspected death *must* be held:

- if it appears that the death was a homicide (and

- not suicide); or
- if the death occurred in police or other lawful custody (or while trying to escape); or
- if the death occurred as a result of or in the course of police operations; or
- if the death occurred while in, or while temporarily absent from an adult correctional centre, lock-up, or children's detention centre (or while en route); or
- if it has not been sufficiently disclosed whether the person has died; or
- if the person's identity and date and place of death have not been sufficiently disclosed; or
- if the manner and cause of death have not been sufficiently disclosed<sup>7</sup>; or
- where the minister or the state coroner directs that an inquest be held (s 28, s 29).

### What are the purposes of an inquest ?

The primary purposes of an inquest are to determine, if possible (see s 81):

- Whether the person has died
- The person's identity
- The date and place of death
- The manner of death
- The cause of death

### Manner and cause of death

The phrase 'manner and cause of death' is not defined in the *Coroners Act 2009*. However there is usually a distinction drawn between 'manner' and 'cause'. Sometimes it can be difficult (on the facts of a particular case) to draw a clear line between the two concepts. This might arguably be because the expression 'manner and cause' is a 'composite phrase': see Campbell JA in *Conway v Jerram* [2011] NSWCA 319, at [39].

However, adopting the generally accepted approach to the meaning of these words, they might be explained as follows<sup>8</sup>:

- *Cause of death* = the physiological event which led to the extinction of life (e.g., gunshot wound to the head)

- *Manner of death* = the means by which, and circumstances in which the death occurred (e.g., Was the shot self-inflicted? If so, was it suicide, or an accident? Or did someone else fire the shot, either intentionally or accidentally?)

The 'cause' of death might be thought of, therefore, as the terminal event which extinguished life (e.g., cardiac arrest due to hypoxia<sup>9</sup>).

The concept of 'manner' of death can sometimes raise interesting issues. How far down the chain of causation can or should the coroner go? In the gunshot example above, does manner of death extend to examining how the deceased came into possession of a gun? (I would say 'yes'). What if the gun fired accidentally because its safety catch was faulty – could this go to manner of death? (I would say 'yes'). If the deceased held a gun licence, does manner of death extend to examining whether that licence should have been granted? (I would say 'that depends on the facts'<sup>10</sup>). Could manner of death extend to examining whether gun licences should ever be issued to civilians? (I would say 'no – too remote').

Determining what is relevant to manner of death will depend on the facts of the case, and requires a practical and commonsense approach. An inquest is not a royal commission. The scope of an inquest is a matter for the coroner, exercising proper discretion and commonsense. In the usual cases, a line must be drawn at some point beyond which, even if relevant, factors which come to light will be considered too remote from the event: Young JA in *Conway v Jerram* (above) at [48-49].

In *Conway v Mary Jerram, Magistrate and State Coroner* [2010] NSWSC 371, (this was the first instance decision which preceded the Court of Appeal decision in *Conway v Jerram* above) Barr AJ said at [52]:

It seems to me...that the phrase 'manner of death' should be given a broad construction so as to enable the coroner to consider by what means and in what circumstances the death occurred.

In that case, the plaintiff was the mother of a 16 year old girl who died from injuries received in a stolen car that crashed. The plaintiff argued that 'manner' of death was not adequately disclosed by reference

to the car crash, and that an inquest should be held, looking at events going back months and years into her daughter's life (in other words the path that led her to get into a stolen car). In dismissing this argument, Barr AJ held that these events were too remote, and said (at [61]):

It seems to me that the means by which and the circumstances in which the death of M occurred are explained by the circumstances set forth in the reports to the coroner made by the police officers and by the pathologist. To go any further back in time than the time at which M became a passenger in the motor vehicle driven by the young man would be to enter upon an inquiry that might never end.

An application for leave to appeal from Barr AJ's decision was dismissed by Campbell & Young JJA in *Conway v Jerram* (noted above).

### Some examples of 'common' inquests

The circumstances in which inquests are held, and the issues arising in them, are infinitely variable. In many inquests, there will be no doubt that the person has died, and no doubt as to their identity and date and place of death. There may still however be doubt as to the manner and/or cause of death, or there might be issues of public safety that the coroner thinks should be examined. Some specific examples of 'common' inquests, and the issues that usually arise in them, are:

**Missing persons** – Is the person dead? When and where did they die? How did they die? What events led to the death? Is the coroner of the opinion (under s 78) that a 'known person' committed an indictable offence in relation to the death?

**Medical mishaps** – Identity, time and place of death are usually not in issue. Questions might remain as to 'cause' of death (e.g., did the deceased suffer a spontaneous cardiac event, or did a cardiac arrest occur due to a blockage of the patient's airway?) Manner of death might also be in question – e.g., if the patient suffered a spontaneous cardiac event, what led to it? Or, if cardiac arrest was due to airway blockage (and resulting hypoxia) what caused the blockage?

**Drownings** – Usually (if the body has been found) there will be no issue that the person has died, nor as

to their identity, or the time, place and cause of death. There might however be unanswered questions as to the 'manner' of death. For example, how did the deceased enter the water? Was it suicide? Did they fall? Were they pushed? There might also be issues of public safety to be examined (e.g., in 2011 a joint inquest was held into multiple drowning deaths involving rock fishing).

**Deaths during police operations or while in custody**<sup>11</sup> – Normally there will be no issue as to identity, time, place or cause of death (e.g. gunshot). Frequently however there will be questions as to the 'manner' of death: Was the use of a firearm justified? Was the fatal shot fired in self defence? Did the police comply with procedures? Relevant to possible recommendations<sup>12</sup> might be the question of whether a police officer received suitable training, or whether there should be a review of policy or procedures as to the use of firearms.

**Child deaths** (where a report of risk of significant harm with respect to the child or a sibling has been made in the three years before the death) – Child deaths involving alleged neglect or abuse will usually raise issues as to the 'manner' of death. For example – Were the child's injuries accidental, or inflicted? Was medical attention sought promptly? If medical attention was given, was it appropriate? Was appropriate action taken by authorities in response to notifications of a child being at risk of significant harm?

**Suicides** – In most cases of suspected suicide, the deceased's body will have been discovered, and the fact of death, identity, and time and place of death will not often be in issue. Questions might remain however as to the 'manner' of death. For example, how did the deceased get access to a gun/tablets/rope? Were appropriate measures taken to restrict access to such means of self-inflicted harm? Should recommendations be made which might reduce the risk in the future? It should also be noted that in cases of apparent or suspected suicide, a common practice is for a coroner (at the start of proceedings) to make a non-publication order (under s 75(1)) as to the identity of the deceased and the relatives of the deceased. Section 75(5) applies after a finding has been made of self-inflicted death, and says that a report of the proceedings must not be published

after the finding, unless the coroner makes an order permitting it.

These are but a few examples of the types of cases that might be encountered in the Coroner's Court. To get a better idea, you can read coronial findings by going to [www.coroners.lawlink.nsw.gov.au](http://www.coroners.lawlink.nsw.gov.au).

In all inquests, an important focus for the coroner (and thus for persons granted leave to appear) will be whether any 'recommendations' should be made in relation to any matter connected with the death (s 82).

### Recommendations

The power to make recommendations is frequently exercised by coroners (see s 82). Recommendations are usually aimed at making improvements to public health and safety. The power to make recommendations however is not open-ended. The recommendation must be 'in relation to any matter *connected with the death*': s 82(1).

Recommendations are usually reserved for cases which involve 'systemic problems'. For example, a recommendation might not be appropriate where it is clear that a death was a 'one-off' mishap involving an error (e.g., a surgeon who leaves a surgical instrument inside a patient's body, leading to fatal septicaemia). However a recommendation might well be appropriate where that error has been caused or contributed to by an inadequate system (e.g., where the hospital has no clear system of conducting an 'inventory' or 'count' of surgical instruments before closing a surgical wound).

In cases where the deceased died while in or under the care of a government agency (e.g., police, a public hospital, a prison, DoCS<sup>13</sup>), it is likely that the coroner will examine the adequacy of policies and procedures of the agency, whether those policies and procedures are sufficiently well known, and whether they (or knowledge of them) should be improved.

In cases where a death has occurred while a person was using a particular piece of equipment, (e.g., an outdoor spa, a car jack), or a particular service (e.g., hot air ballooning, jet-boat riding) coroners may be interested to look at whether recommendations should be made, aimed at improving safety of that equipment or service, or warning of the risks

involved.

If therefore you are briefed to appear for a government agency, a manufacturer of equipment, or a provider of a service (etc) you should give consideration (well before the inquest) to the types of recommendations that the coroner might be likely to entertain. If improvements in safety can or should be made, then it is likely to reflect well on your client at inquest if it can be shown that those improvements have already been carried out (i.e. the coroner does not expect your client to 'sit on their hands'). Contact should also be made, at an early stage, with counsel assisting the coroner, to obtain an idea of the type of recommendations that might be under consideration, so that you and your client can consider them.

### Inquiries into fires and explosions

Part 3.3 (ss 30 to 32) sets out a regime under which inquiries into fires may be held and cases where an inquiry must be held. Section 81(2) sets out the obligation of a coroner to record findings as to the date, place, and circumstances of the fire or explosion. As this paper is primarily focussed on inquests (which represent the majority of coronial cases), it is not proposed to examine the various provisions of the *Coroners Act 2009* which regulate fire inquiries. Suffice to say however that the comments in this paper about practice and procedure in inquests will also apply, in general terms, if you are appearing in a fire inquiry.

### The coronial investigation and preparation of a brief of evidence

#### The OIC

A police officer is assigned to be the officer in charge (OIC) of a coronial investigation. Section 51 of the *Coroners Act 2009* empowers a coroner to give directions to the OIC for the purposes of the coronial investigation. In practice, what usually happens is that an OIC is appointed at an early stage, to conduct the investigation. The OIC, usually in consultation with counsel assisting and the coroner, will then try to obtain statements from all relevant witnesses, and obtain all other material evidence, for the purposes of compiling a brief of evidence for the inquest.



It sometimes occurs that a witness will refuse to cooperate in providing a statement (or a thorough statement) to the OIC. Sometimes also, a witness will refuse to provide a statement to the OIC, but indicate that a statement will be prepared by, or in consultation with their own lawyer. There is no power in the OIC (or the coroner) to compel a witness to provide a statement. However, it should be remembered that if an important witness refuses to provide a statement (or supplies a statement that is not comprehensive) then it is far more likely that the witness will be placed on the witness list and subpoenaed to give oral evidence at the inquest (and is likely to spend more time in the witness box). Clients who are reluctant to cooperate in providing a comprehensive statement should be advised of this risk.

The OIC will ordinarily prepare (some time prior to hearing) an 'OIC statement', which summarises the entire brief, and which usually includes the OIC's conclusions as to manner and cause of death, and sometimes, suggested recommendations. The 'OIC statement' (which appears near the front of the brief) is usually a good place to start when reading into the brief.

Although the original brief given to the coroner will usually include photos of the deceased's body (and of the autopsy), it is standard practice for these to be removed from the copy of the brief that is served. If access to this sensitive material is sought, then a specific application must be made, and a clear explanation provided as to the legitimate forensic purpose in seeking it.

It is standard practice for the OIC to consult with counsel assisting in the lead up to, and during the inquest hearing. The OIC will frequently be provided with 'requisitions' by counsel assisting (on behalf of the coroner), as to lines of inquiry to be followed up. If a person granted leave considers that some further inquiry should be made, then the legal representative for that person should advise counsel assisting (or the instructing solicitor if there is one), rather than approach the OIC directly.

When the inquest hearing commences, it is usual for counsel assisting to call the OIC as the first witness, at which time the brief of evidence is usually tendered and admitted as an exhibit. In lengthier

inquest hearings, it is not uncommon for any cross examination of the OIC (on behalf of persons granted leave to appear) to be deferred until near or at the end of the hearing (this is often a practical step, given the likelihood that, during the hearing, other lines of inquiry, and items of evidence might be suggested, and pursued).

### **Counsel assisting**

Coroners are usually assisted by an advocate, who takes the role of 'counsel assisting the coroner'. In the majority of inquests the role of counsel assisting is performed by police coronial advocates (police prosecutors specially assigned to conduct coronial matters).

However, in more complex cases, and in cases where there is, or may be a conflict of interest for the police, coroners will engage the NSW Crown Solicitor's Office to assist. The crown solicitor maintains an 'Inquiries Team' which consists of solicitors and solicitor advocates who specialise largely in inquest work for the coroner. The Crown Solicitor's Office usually retains either one of its own solicitor advocates, or private counsel, to advise and to appear as counsel assisting.

In cases where the Crown Solicitor's Office perceives there to be a possible conflict of interest (e.g., where the Crown Solicitor's Office has been retained to appear for a government agency which will be seeking leave to appear in the inquest) the NSW Department of Attorney General and Justice will take on the role of assisting the coroner, and (usually) briefing counsel to advise and appear as counsel assisting.

Once a brief of evidence (or a partial one) has been assembled, it is given to counsel assisting, to provide advice as to issues that might be considered by the coroner, and additional evidence (including expert reports) that should be obtained. In cases where the Crown Solicitor's Office (or Attorney General and Justice) is retained, the instructing solicitor, after briefing a solicitor advocate or counsel, will liaise closely with the OIC, the coroner, and counsel assisting, so as to complete all necessary enquiries, with a view to compiling a final brief of evidence.

This process of ongoing consultation between

the coroner and the counsel assisting team is an example of the inquisitorial and investigative nature of a coronial inquest, which was mentioned at the commencement of this paper.

Another of the roles of counsel assisting (in consultation with the instructing solicitor if there is one, and the OIC) is to prepare, for the coroner's consideration, a 'list of issues' to be considered at the inquest, and a draft list of witnesses to be called in the inquest. The list of issues and witness list, once settled by the coroner, are circulated to the legal representatives for persons or organisations seeking leave to appear, shortly before the hearing.

Counsel assisting will give consideration to, and consult with the coroner about the question of which persons/organisations should be informed about the inquest. Once the relevant persons/organisations have been identified, a letter<sup>14</sup> is usually sent on behalf of the coroner, informing them of the inquest, and asking whether they wish to apply for leave to appear. Such applications are often dealt with at a directions hearing.

It is a good idea to make contact with counsel assisting as soon as you are briefed, and to remain in contact throughout the inquest. This provides you a better opportunity to remain informed of the real issues in the inquest, so that you and your client can consider how best to deal with them.

At the commencement of the inquest hearing, it is usual (at least in more complex matters) for counsel assisting to deliver an opening address, touching upon the facts uncovered in the investigation to date, and the issues which are expected to be addressed during the inquest hearing.

It is the role of counsel assisting to call, and to conduct the primary examination of all witnesses on behalf of the coroner. No one else (apart from the coroner) is entitled to call a witness (although a person granted leave to appear may *apply* to the coroner under s 60, to have a particular witness called and examined). But even if such an application is granted, it will be counsel assisting who will call and examine the witness (at least initially). In many cases, if sufficient notice is given, agreement can be reached with counsel assisting (who will consult with the coroner) for the additional witness to be called.

As the inquest is an investigation, with no 'parties' as such, lawyers appearing for an interested person do not have an 'entitlement' to tender evidence, or to make a 'call' for a document. The correct procedure for tendering a document (or other proposed exhibit) is to hand it to counsel assisting (at a convenient time beforehand) and invite counsel assisting to tender it. Similarly, if subpoenas to obtain further evidence are thought necessary, this should be raised as soon as possible with counsel assisting (because, being an investigation with no 'parties', the issuing of subpoenas is a matter for the coroner). If counsel assisting refuses a reasonable request (e.g., to tender a document or to have a subpoena issued) then of course you might need to raise the issue formally with the coroner.

As the rules of procedure and evidence do not apply in coronial proceedings (s 58(1)), the examination of a witness will usually involve leading (as in cross-examination) and non-leading questions. Because the inquest is an investigation by the coroner, it is the expectation that (ideally) all relevant questions will be asked by counsel assisting the coroner (although of course coroners will themselves frequently ask questions too).

Another aspect of inquests (which distinguishes them from ordinary court proceedings) is that counsel assisting will usually consult with the coroner (*ex parte*) at various times both before and during the hearing.

In cases where recommendations are being considered, it is common for counsel assisting to circulate (usually towards the end of the hearing) a draft of the proposed recommendations.

At the conclusion of the evidence, counsel assisting will make submissions first (sometimes in writing as well as orally) with the order of other addresses to be either agreed or directed.

### The inquest hearing

As the Coroner's Court has a very large workload, it is common for hearings to be booked many months in advance, and to be listed for hearing on particular dates. If a hearing does not complete within the allocated days, then it usually will not 'run on' – additional dates will have to be allocated.

Many inquest hearings are conducted at the Coroner's Court at Glebe or Parramatta. However it is also common for inquests to be held in courts out of Sydney – in or near the place where the death occurred (especially where most of the witnesses are located there, or where the death is of particular interest or concern to the local community).

A number of call overs and directions hearings will usually be conducted prior to the commencement of the formal hearing. These are intended to facilitate the giving of directions for service of the brief on interested persons, for interested persons to note their intention to seek leave to appear at the inquest, and to raise any preliminary issues, such as particular witnesses who might be called.

Under s 48, coronial proceedings are conducted without a jury, unless the state coroner directs it (being satisfied there are 'sufficient reasons' to justify a jury). In practice, juries are very rare.

At the start of the hearing, the coroner will often commence by making some preliminary comments to family members who are present. This part of the process is an acknowledgement of the special vulnerability and distress likely to be felt by members of a deceased person's family.

The coroner will then take 'appearances' – that is, hear and determine applications for leave to appear in person or to be represented by a legal practitioner (s 57(1)). Often, the identity of those who will be granted leave will have been sorted out at a directions hearing.

Counsel assisting will usually present an opening address, outlining the facts uncovered by the investigation to date, and referring to the issues which are expected to be addressed in the inquest. As noted above, it is common for a list of issues to have been distributed some time before the hearing.

Counsel assisting tenders the 'formal documents' and they become an exhibit (e.g., 'P79A Report Of Death To The Coroner'; 'Post Mortem (Autopsy) Report'; identification statement; and any certificates of blood or tissue analysis). Counsel assisting will then tender 'the brief' (being the folder or folders of statements, photographs and other evidence gathered during the investigation). Most coroners will have read the brief before the hearing commences.

Any objections to parts of the brief should be raised when it is tendered by counsel assisting and before it becomes an exhibit. The coroner can then determine whether to hear the objection then and there or wait for a more appropriate point in time (e.g., when a particular witness is called). However, given that the rules of evidence do not apply (s 58(1)), taking objections to parts of the brief tends often to be the exception rather than the rule. This does not mean however, that objection should not be taken in an appropriate case. The focus of any such objections should not be on 'technical admissibility' (which usually won't get you far), but on matters of 'relevance' (to the issues in the inquest) and to matters of procedural fairness. There is no doubt that a coroner is required, when conducting an inquest, to comply with the requirements of procedural fairness (natural justice): *Annetts v McCann* (1990) 170 CLR 596; *Musumeci v Attorney-General* (2003) 140 A Crim R 376; [2003] NSWCA 77.

Counsel assisting will then proceed to call witnesses, with the first witness commonly being the OIC. At the completion of questioning by counsel assisting, an opportunity is given to persons granted leave to appear to ask questions of each witness. Any questions must be restricted firstly, to the issues in the inquest (including any suggested recommendations), and secondly, must relate to the 'interests' that the questioner represents. In other words, you are not entitled to cross examine 'at large'. Where a particular witness is legally represented, the usual practice is for the lawyer appearing for that person to 'go last' if he or she wishes to ask any questions.

Another aspect of an inquest that differs from an ordinary court hearing is that witnesses are usually not asked to remain outside court while other witnesses are giving evidence. While this is the general practice, s 74 does give the coroner power to order any person (or all persons) to remain outside the court. Sometimes, notwithstanding the usual practice, it may be appropriate for the coroner to be asked to exercise this power during the evidence of a particular witness. Whether such an application is justified will depend on the circumstances, and whether the integrity of the inquest and the public interest require it.

The family of the deceased person has a right<sup>15</sup> to

appear in the inquest: s 57(3). The family is always given a copy of the brief of evidence. Sometimes the family will be legally represented (often by a lawyer from the Coronial Advocacy Unit at Legal Aid). In cases where the family is not legally represented, they are often invited to inform counsel assisting of any questions or concerns, so that (where appropriate) those matters can be addressed in the evidence.

It is the practice in most inquests for the family to be invited to read (or to have read out) a statement of their feelings about the deceased and their death. Where this opportunity is taken up, such a statement usually is made at the completion of the evidence, sometimes before submissions commence. Such a statement should generally be restricted (as noted already) to 'feelings about the deceased and their death', and should not be seen as an opportunity to traverse issues that should have been dealt with in evidence.

In complex inquests (especially those where manner and/or cause of death are in dispute, or where recommendations are being considered) it is common for the coroner to 'reserve' their decision and to publish findings at a later date.

### Appearing for a 'person of sufficient interest'

As there are no 'parties' in an inquest, a person wishing to take part in the inquest must make an application for leave to appear. Section 57(1) provides that the coroner may grant leave if of the opinion that the person has a 'sufficient interest' in the subject matter of the proceedings. As noted above, the coroner must grant leave to a relative of the deceased (absent exceptional circumstances): s 57(3).

The coroner (in consultation with counsel assisting) will identify, before the inquest hearing, the persons (or entities) who appear to have a sufficient interest in the subject matter of the proceedings. The main guiding principle is procedural fairness. If it is possible that the inquest (or participants in it) will criticize a person (or entity) or if it is possible that adverse findings might be made against them, then the coroner will usually direct that a 'sufficient interest letter' be sent to that person (or entity), informing them of the inquest: see s 54(1)(d). A 'sufficient interest' letter might also be sent where,

although a person or entity had no involvement with the deceased or the death, a recommendation is being considered which may affect their interests or area of operation (e.g., where consideration is being given to recommending an amendment of the road rules, or to introduce a new form of road signage, it might be appropriate to send a sufficient interest letter to police and to the Roads & Maritime Service).

The sufficient interest letter informs the person or entity of the inquest, and of their ability to make an application for leave to appear, under s 57(1). Where leave to appear is to be sought, this can be facilitated by first contacting counsel assisting (or the instructing solicitor if there is one, or the Coroner's Court) and by attending a call over or directions hearing, and requesting a copy of the brief of evidence. The sending of a 'sufficient interest' letter to a person or entity does not mean, however, that the person/entity is obliged to make an application for leave to appear. As coroners are bound by procedural fairness, a sufficient interest letter might sometimes have been sent out of abundant caution. Lawyers may sometimes be asked to provide advice on the question of whether to seek leave. This can be a difficult task if you have not seen the brief of evidence (which may not yet be complete). Making contact with counsel assisting is likely to assist in such cases, in providing a better idea of the likely issues to be considered in the inquest, and whether your client's interests require active participation, no participation, or perhaps attending the inquest on a 'watching brief' basis.

As noted above sometimes a witness will be reluctant to provide a statement (or a comprehensive statement) to the OIC. While there is no obligation to give a statement, the witness might be advised that this makes it more likely that they will be called as a witness (and will spend longer in the witness box).

At the hearing, it is counsel assisting who has the primary task of examining all witnesses (including your client if they are to be called). Any questions asked by other counsel must be relevant to the issues (including recommendations) that affect the interests of their client, and should not repeat questions already dealt with by counsel assisting.

The primary object in appearing for a person granted leave is traditionally described as a protective one.

Your task is to protect your client from any unfairness, and to assist them (so far as you can) in responding to criticism, or to suggested recommendations. Many experienced advocates granted leave to appear in an inquest say very little and ask very few questions.

There are however, occasions where a more proactive approach is beneficial. At the end of an inquest, the coroner will deliver 'findings' in relation to (among other things) the manner and cause of death. These findings will sometimes be critical of the actions of individuals, organisations, policies and procedures etc. It is important therefore, for the client to give consideration, (long before the hearing if possible) to whether steps should be taken to amend systems, policies, procedures (etc) so as to improve safety, and reduce the possibility of a similar fatality occurring in the future. Taking this kind of action (and providing evidence of the action to the coroner through counsel assisting before the hearing) may avoid, or ameliorate adverse findings that might otherwise be made about your client's actions.

Consideration might also be given (in a case where it is apparent that the death was caused or contributed to by some fault of the client) to making an 'apology' to the family of the deceased. In NSW, an apology (even one that implies or admits fault) cannot be used as an admission in civil proceedings: see ss 68-69 *Civil Liability Act 2002*<sup>16</sup>. I have personally seen apologies made to (and appreciatively received by) families in open Court in more than one inquest. As was noted by Deputy State Coroner Hugh Dillon in a paper presented to the NSW Bar in 2010<sup>17</sup> 'There are different ways of protecting a client's interests ... This provision recognises that conciliation is a healing process for all involved in a tragedy'.

There can be no single 'best approach' to representing a client at inquest, as each case will turn upon its circumstances, and each case will involve a balancing of risks. As noted above, it is a good idea to make contact, and to maintain contact, with counsel assisting, as this will provide you a better opportunity to be informed of the live issues in the inquest as it develops.

One of the risks to be assessed when appearing in an inquest is how to advise the client before they give evidence (if they are to be called). Section

58(2) provides that (subject to other provisions in the Act) a witness cannot be compelled to answer a question or produce a document that might tend to incriminate them, or render them liable to a civil penalty. This provision however, is subject to s 61, which empowers a coroner to compel a witness to give evidence if the coroner is satisfied that the interests of justice require it, and giving the evidence will not render the witness liable to a criminal offence or civil penalty under a law of a *foreign country*. This is colloquially known as 'giving the witness a certificate'. Section 61 might be regarded as the coronial version (in a different form) of s 128 of the (NSW) *Evidence Act 1995* (given that the Evidence Act does not apply in the Coroner's Court: *Decker v State Coroner* [1999] NSWSC 369; 46 NSWLR 415).

Advising a client on whether to object to giving evidence (and whether to seek a s 61 certificate) will depend on the circumstances, and will involve an assessment of risk to the client's interests.

It is always important however, to explain to the witness the process of giving evidence. Many (if not most) witnesses called to give evidence in an inquest will have no experience in giving evidence in court, and will usually be very nervous. As with any witness, it is wise to tell them to listen closely to the question, and to answer that question, as shortly and as directly as possible. Although the particular advice to be given to a witness will depend on the circumstances, there will be cases where the evidence makes it obvious that the witness has committed an error or oversight, has failed to comply with procedures, or has fallen below an acceptable standard in some other way. In these cases, it may be in the interests of the witness for some 'frank' advice to be given, pointing out to them (if it is justified) that on the objective facts, their conduct is likely to be the subject of adverse comment. A witness who admits an obvious error is far more likely to receive an 'easier' time in the witness box, and may avoid strong criticism in the coroner's findings. Such a witness is more likely to impress as one who is prepared to acknowledge a mistake, and to learn from it. Of course, the witness might, in some cases, have grounds to seek a certificate under s 61.

Special circumstances might apply in the case of professional persons who are called to give evidence.



Although they may be entitled to take the objection to giving evidence, this might not be a 'good look' for them professionally. As Chester Porter QC observed in a 1993 paper:<sup>18</sup>

...a doctor who refuses to describe how an operation was performed...(might expect that this will)...subject them to considerable criticism within their professional calling...

When appearing for a professional person (e.g., a medical practitioner) it is also important to consider whether there might be grounds for the coroner to refer his or her findings to a disciplinary body (such as the Health Care Complaints Commission). If there may be grounds for such a referral, then this will be another factor to be taken into account when advising the client about giving evidence (and whether to take the objection under s 58 and seek a s 61 certificate). The approach to each case involves a 'judgment call' by the client, after receiving advice of the available options. However there are likely to be cases where a witness will avoid an adverse finding (and a referral to the HCCC etc) by making frank admissions of a failure or shortcoming, and giving evidence which demonstrates that they are ordinarily a trustworthy and competent practitioner, who has learned from an unfortunate mistake (see also the comments above in relation to making an 'apology').

Sometimes (despite the general protection of s 58(2)), a coroner will compel a witness, under s 61(4), to give evidence. This power can be exercised where the coroner is satisfied that it is in the interests of justice to do so. Such certificates are not readily given to 'persons of interest' in homicide cases (see discussion below under this topic). However, different considerations apply where (for example) a police officer takes objection to giving evidence about a shooting death of a civilian (see *Rich v Attorney-General of NSW* [2013] NSWCA 419). In cases of that kind, the coroner may take the view that there is a public interest in a police officer who is permitted to carry a firearm explaining his or her actions.

One area of contention is whether a witness is entitled to take a 'global objection' to being compelled under s 61(4) to answer *any* questions that might tend to incriminate or render them liable to a civil penalty, or whether the objection needs to be taken and ruled

upon question by question. In the Court of Appeal decision in *Rich v Attorney-General* (above) doubt was expressed (at [46]) as to whether a 'global' objection was permitted by the terms of s 61(1), which refers to objection to 'particular' evidence. The Court of Appeal however did not have to finally decide this question (see [47]). In *Decker v State Coroner* [1999] NSWSC 369; 46 NSWLR 415 - Adams J also (at [2]) observed<sup>19</sup> that '...in general, the objection should be taken to each question as it is asked to enable the court to determine whether it be appropriately taken...' (his Honour then went on to observe that the course of action taken by the coroner in standing the witness down, after concluding that *any* question was likely to incriminate him was 'not inappropriate having regard to the nature of coronial inquiries...'). The safer course therefore (for a witness who is required to give evidence under s 61) might be to take particular objection to each question, depending upon what it asks.

The media often takes great interest in inquests (no doubt because of their tragic and often sensational circumstances). Journalists will frequently be present in court, and cameras will often be seen outside and in the vicinity of the court (especially on the first day). It is wise to inform a client of this possibility and of the chances that they may be named, and possibly filmed or photographed. Although the general principle is that inquests are open to the public (s 47, s 74(2)(a)), consideration might be given to whether there is a proper basis to seek a non-publication order under s 74 in relation to particular evidence or particular individuals.

Keep in mind that specialised grief counsellors and other support services are available through the Coroner's Court to assist family and other persons experiencing emotional trauma associated with a death. In an appropriate case, arrangements might even be made for a counsellor to accompany a person or witness in court.

There can be no 'one size fits all' approach to appearing for an interested person at inquest. However, counsel who embraces the issues likely to be raised in an inquest, and who works to advise and assist the client to deal with them in a proactive and cooperative manner, rather than sticking their head in the sand both before and during the inquest, is

more likely to achieve a satisfactory outcome, both for the client, and for others.

### Appearing for a 'person of interest'

The term 'person of interest' is to be contrasted with 'person of *sufficient* interest' (already considered above). The term 'person of interest' (or POI) is normally used to refer to a person whose actions / inactions (amounting to an indictable offence) caused, or may have caused, the death. The term is most commonly applied in homicide cases.

A coroner, when making findings, is not permitted to indicate or in any way suggest that an offence has been committed by any person: s 81(3). This provision is aimed at protecting the rights of a person suspected or accused of committing an offence (given that coronial findings are not subject to the rules of evidence, and do not involve proof beyond reasonable doubt). See also s 74(1)(c) which permits a non-publication order to be made with respect to any submissions concerning whether a 'known person' may have committed an indictable offence.

In addition, s 78(1)(a) requires that a coroner suspend an inquest where indictable charges concerning the death have been laid. The coroner is however, permitted to commence the inquest and take evidence to establish the fact of death, and the identity, date and place of death: s 78(2)(a). Section 78(1)(b) applies if the coroner forms the opinion that there is a reasonable prospect that a 'known person' would be convicted of an indictable offence which raises the issue of whether that person caused the death. Where the coroner forms that opinion (at any stage of the proceedings) the coroner can continue the inquest and record findings under s 81(1), or suspend the inquest. In many cases however, it is common for the coroner to suspend the inquest once 'the opinion'<sup>20</sup> is formed. The coroner is then required to forward to the DPP a copy of the depositions, and a statement specifying the name of the 'known person': s 78(4). The DPP will then consider whether or not to lay charges. Section 79 sets out the circumstances in which a suspended inquest (or an inquest which has not been commenced, because of the operation of s 78) can be resumed or commenced.

In inquests where there is a 'POI' (or more than one) it is usual for that witness to be called (if they are

to be called) as the last witness. As already noted, a witness called in an inquest is entitled to object to giving evidence which might incriminate, or render the witness liable to a civil penalty: s 58(2). An advocate appearing for a POI would no doubt wish to advise the client about this provision, so that an informed decision can be made.

As discussed above, it is possible in some circumstances for a witness to be 'compelled' by the coroner to give evidence (under the protection of a certificate): s 61(4). In practice however, it would be unusual for a POI in a suspected murder or manslaughter case to be granted a certificate by a coroner, where objection is taken by the witness under s 58(2). That is because compelling the witness to give evidence under the protection of a certificate might prejudice any future prosecution: s 61(7)(b) provides that any evidence obtained, even as an *indirect* consequence of evidence given under a s 61 certificate cannot be used in a NSW court. Therefore, if a witness is forced to give incriminating evidence, and is later charged with an offence, problems are likely to be faced by the prosecution in seeking to disprove that the evidence was not obtained as a direct or *indirect* consequence of the person having given evidence under compulsion. In practice therefore, where a POI is placed on the list of witnesses to be called by counsel assisting, the questioning of that witness (if objection is taken under s 58(2)) is in most cases likely to be short. In *Correll v Attorney-General (NSW)* [2007] NSWSC 1385; 180 A Crim R 212, the plaintiff, who was the prime suspect in an alleged murder, sought to challenge a coroner's rulings in relation to self-incrimination. This case is useful because it provides an indication of the scope of evidence which might have a 'tendency to incriminate'. Bell J said (at [36]) that even the answer to the question 'Did you know (the deceased)?' may have had a tendency to incriminate. At [45] her Honour also said:

It is with respect difficult to see how answers by a person who is a prime suspect for the offence of murder concerning his movements in the period surrounding the death of the victim may not possess a tendency to incriminate.

The granting of a s 61 certificate might however be more likely where a witness takes the objection in relation to some peripheral offence (not related to

the death). Note the comments above as to taking a 'global' objection, or objection to 'particular' questions, and the Court of Appeal decision in *Rich v Attorney-General*.

### Finally

Finally, but very importantly. Inquests always involve, by their very nature, traumatic and tragic (and sometimes violent and gruesome) events. For the family of the deceased, this is not just another court case. It is their opportunity (although an emotional and difficult one) to address concerns and questions about a tragic death of a loved one. It is a time of re-visiting or visiting for the first time many (often private) aspects of the life of the deceased. In addition, in many inquests there will be others (friends, bystanders, doctors, nurses, police, child-care workers) who have suffered (or are suffering) emotional trauma as a result of the death, or the questions and issues flowing from it. This should not be forgotten.

When appearing in an inquest, we as lawyers should always act in a manner that pays respect to the special vulnerability of family members and others who may have been affected by the death. This applies not only to the manner of asking questions and making submissions (courteously and respectfully) but also to our conversations and actions while simply waiting in or around court.

Inquests can be quite cathartic for family members and others who have been traumatised by a death. The process of a public ventilation of issues, and answering (at least some) of the family's questions seems to have a healing effect in many cases. We as lawyers have a responsibility, when appearing in coronial proceedings, not only to assist our clients, but also to act in a professional and compassionate manner which promotes the administration of justice - of which coronial inquests are an extremely important part.

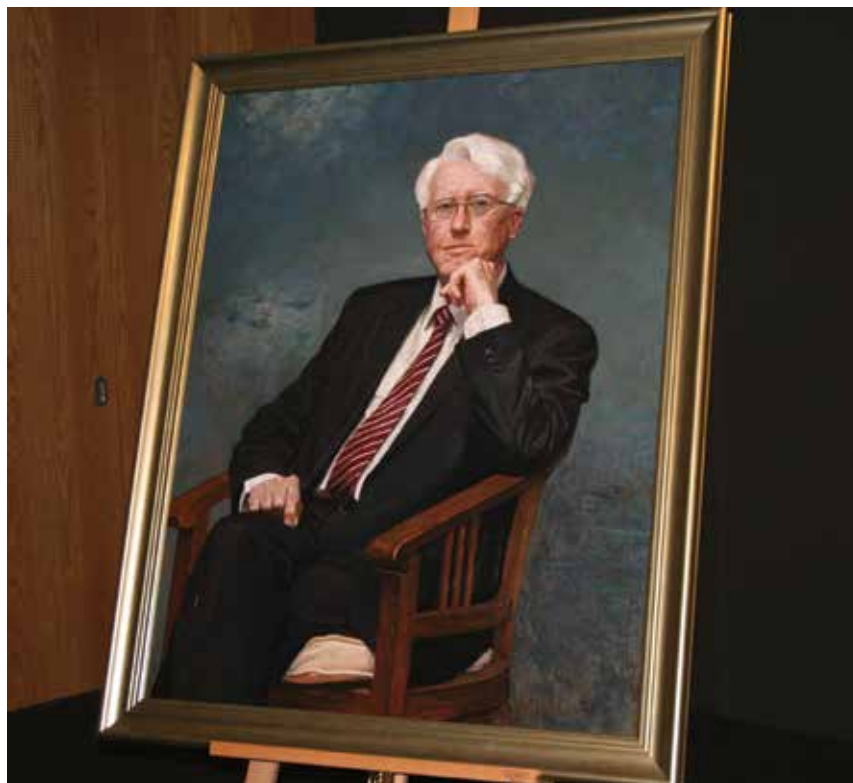
Ian Bourke<sup>21</sup>

### Endnotes

1. Views expressed in this paper are mine, based on my own research, observations and experience, and do not represent any 'standard practice' which applies in all or any coronial proceedings.
2. For a thorough examination of the *Coroners Act 2009* & law

- relating to it, see *Waller's Coronial Law and Practice in NSW* (4<sup>th</sup> Ed) Abernethy, Baker, Dillon & Roberts (Lexis Nexis 2010).
3. It has been said that a coronial inquest is a hybrid of adversarial and inquisitorial elements: *Musumeci v A-G* [2003] NSWCA 77 at [33].
4. It seems that the *Coroners Act 2009* does not amount to a code. The common law continues to have some operation: see Waller at 1.50ff.
5. Senior coroner is defined by s 4 and s 22(1) as the state coroner or a deputy state coroner.
6. That is, a report to *Family and Community Services under Children and Young Persons (Care and Protection) Act 1998*.
7. Unless an inquest has been suspended or continued under s 78.
8. I have referred to 'cause' of death first, because the concept is more narrow than 'manner of death' and usually more easily understood.
9. Hypoxia - A lack of oxygen to the tissues.
10. This might be a relevant issue if, for example, the gun licence had been issued to a person with a known history of mental instability.
11. NSW Police Force refers to a death or serious injury which occurs arising out of the actions of police in the execution of their duty as a 'critical incident'.
12. Recommendations are examined further below.
13. Although the former Department of Community Services (DoCS) is now known as Family and Community Services (FaCS), I have used here the former and better known acronym.
14. Sometimes known as a 'sufficient interest' letter.
15. Section 57(3) says that a coroner must grant leave to a relative unless there are exceptional circumstances that justify refusing leave.
16. An interesting question that might arise, however, is whether an apology made in NSW might be capable of being used as evidence in another state (or country). This might be a relevant question for a manufacturer which markets a product in various places.
17. 'The roles of counsel in the coronial Jurisdiction - A paper for the NSW Bar 7 Sep 2010'.
18. 'Appearing at a Coronial inquest: The Functions of an Advocate' - quoted in Waller at p.49.
19. In relation to s 33 of the (repealed) *Coroners Act 1980*, which contained the protection from self-incrimination (etc).
20. It has been said that this refers to a 'final' rather than a provisional opinion, although there may be cases where the formation of the opinion becomes almost inevitable at an early stage: Young JA in *Musumeci* (above) at [102].
21. I acknowledge the assistance provided by the following articles and texts: (1) *Waller's Coronial Law & Practice in NSW* (4<sup>th</sup> Ed) Abernethy, Baker, Dillon & Roberts (Lexis Nexis 2010); (2) 'The roles of counsel in the Coronial jurisdiction - A paper for the NSW Bar 7 Sep 2010' by Deputy State Coroner Hugh Dillon; (3) 'Coronial Law and Practice in NSW - A Practical Guide for Legal Practitioners', by Deputy State Coroner Dorelle Pinch (Revised 19 August 2005). I also acknowledge the assistance of comments on this paper, which were kindly provided by Donna Ward (barrister) and by Melissa Heris (solicitor).

## Two life memberships and a portrait



The unveiling of Jiawei Shen's portrait of the Hon Keith Mason AC QC, to be donated to the New South Wales Court of Appeal, for display in the area of the President's Court, took place on Friday, 28 February 2014 in the Bar Common Room. Chief Justice Tom Bathurst was present to receive the painting on behalf of the Supreme Court. Funding for the portrait came from members of the Bar Association.

The Bar Association commissioned the portrait. Keith Mason is a former president of the Court of Appeal of New South Wales, solicitor general of New South Wales and chair of the New South Wales Law Reform Commission.

The gift is a symbol of the great esteem in which Keith is held by the Bar in New South Wales.

The artist chosen is Jiawei Shen who painted the portrait of the Hon Tom Hughes AO QC, which hangs in the Bar Association Common Room.

Also on that evening, certificates of life membership to the New South Wales Bar Association were presented to the Hon Chief Justice J L B Allsop AO and the Hon Justice M J Beazley AO.

# The Great Silk Debate

By Daniel Klineberg

Since the commencement of law term, debate over the appointment of queen's counsel has become extremely topical. On 3 February 2014, it was announced that Victorian senior counsel could apply to change their designation from SC to QC. A similar announcement had previously been made in Queensland. Later in February, Bar Council requested comment from members of the New South Wales Bar Association on the desirability of reinstating the use of the term queen's counsel in NSW and it circulated an issues paper on various aspects of the debate. Subsequently, in March Attorney General George Brandis QC announced that the Commonwealth intended to appoint new silks as queen's counsel and would give all existing Commonwealth senior counsel the option of changing their post-nominal to QC.

Bar Council has now established a committee to examine the responses received from members and to report on the suitability of the association seeking support from the NSW attorney general for a system to appoint individuals as queen's counsel, following their appointment as an SC under the existing 'Silk Selection Protocol'. The committee was asked to report by 17 April 2014. This article is intended to bring to the fore in an impartial manner some of the key issues relevant to the debate.

## December 1992: the 'last' NSW QCs

A useful place to begin is a ceremonial sitting of the Court of Appeal held on 14 December 1992. The bench comprised Kirby P, Sheller JA and Cripps JA. On that occasion, Kirby P addressed the then new queen's counsel. Gleeson CJ had welcomed the newly appointed QCs the previous week on 10 December 1992 at a sitting of the Supreme Court in banc. Kirby P stated that he had missed the previous week's ceremony because his Honour already was committed on that day to opening a computer security conference. The addresses of the chief justice and of the president are published in (1994) 68 ALJ at 471-473.

Kirby P noted that as a result of the recent announcement by the Fahey government, the counsel at the bar table would be 'the last persons appointed as her Majesty's counsel in this state'. His Honour proceeded then to comment on certain

aspects of the appointment debate, which remain central to the current discussion. The three key themes of his Honour's remarks were as follows. First, his Honour said that there was:

no doubt that an increased demand will arise for Australian legal services in Asia and elsewhere in the years ahead. The appointment to the rank of Queen's Counsel is an important and professionally valuable step in the life of a barrister. Appointment to a new rank, differently styled and differently chosen, of Senior Counsel would not carry the same respect, at least until it earned it. That would take time.

This reflects the argument, which sometimes is put, that silks appointed as QC rather than SC are more likely to be recognised as eminent counsel, particularly in Asia. This is referred to below.

Interestingly, in this context, Kirby P referred to 'many of the countries of the Commonwealth which are now republics' in which there are senior counsel, as so styled, and his Honour referred also to Sri Lanka, where there are 'President's Counsel' and to Nigeria where senior counsel are 'Senior Advocates of Nigeria'. His Honour noted, that therefore, there was little doubt that in time 'some such ranking would emerge from the profession' if the rank of queen's counsel were abolished.

Secondly, his Honour commented as to the removal of the queen from the appointment title. His Honour's view was that whilst Australia remained a constitutional monarchy, 'that ought not to happen'. This aspect of the debate, which is discussed briefly below, remains a divisive issue. Kirby P continued that 'four centuries of service of distinguished leaders of our profession' lay behind the queen's counsel rank and that such a ranking 'should not be set aside, at least without careful consultation with the judges, the profession, and the community'. In this context, his Honour noted earlier that the announcement by the New South Wales Government had occurred on the same day that his Honour (and other judges) had received a discussion paper issued by the attorney general, which raised for comment whether the office of queen's counsel should be abolished.

Thirdly, in relation to the involvement of the Executive in the appointment of queens's counsel, Kirby P said that 'I unequivocally support that involvement'. This was for two reasons. First, his Honour considered



that it has 'tended to leaven the appointments which would otherwise come from within the profession alone'. Secondly, his Honour said that the Executive plays a part in such appointments because 'in a real sense, the leaders of the inner bar are co-workers with the judges in fashioning the principles of the common law and in the interpretation of ... legislation'. That is why they 'have a special rank and why they hold a public office'.

This issue, namely the involvement of the Executive in the appointment of QCs, remains one of the key issues in the current debate. It is discussed below.

It may be noted that Kirby P's view was that 'I hope that the Executive government of the state will reconsider that decision'. His Honour said that he felt able to make these remarks, which were his personal views, because he did not think it could be said that his Honour was 'an opponent of reform of the legal profession'. His Honour said he was a supporter of reform, but that the abolition of queen's counsel was not a useful reform. In contrast, his Honour said that the reform did not address the key legitimate concerns of the government and the community, namely costs and delay.

The announcement by the Fahey government that no further queen's counsel would be appointed in NSW was made on 3 December 1992. The premier's news release states that issuing of Letters Patent was 'an anachronism' which would 'serve no purpose' and 'I don't believe we really need them'. The news release continued that:

It's the only profession in which the Government is asked to endorse the decisions of the administration of that profession. The Government should not be asked to mark out particular lawyers for special treatment. That doesn't happen with accountants or other professionals – why should it happen with barristers?

I don't believe the Government should be involved in such a process. It simply emphasises how out of date we are.

This news release puts into context the third of the issues of Kirby P identified above which his Honour stated in his remarks a little under two weeks' later, on 14 December 1992. It is, perhaps, the most important topic of substance in the current debate.

#### Involvement of the Executive

A history of the involvement of the Executive in the appointment of QCs was summarised by the chief justice in his remarks to the new silks on 10 December 1992. His Honour concluded his remarks by stating that although the proposed removal of the Executive in the appointment process 'is of great interest, and may give rise to differing opinions' his Honour continued that 'I do not intend on this occasion to express any view on the matter'.

A point sought to be emphasised by those against the reintroduction of queen's counsel is that there is no reason why the Executive should be involved in the appointment process of silks, just as the Executive is not involved in the appointment of senior members of any other profession. For example, the government is not involved in the appointment of individuals to be fellows of the various medical colleges.

It may be noted that Bar Council's consultation process is considering the establishment of a system for the appointment of an individual as QC but, relevantly, only following that person's appointment as SC under the Senior Counsel Protocol. It appears, therefore, that the current consultation being undertaken by Bar Council does not propose that there should be a reversion to the pre-3 December 1992 position where the attorney general had the ability to recommend to the governor such appointments as he or she considered appropriate.

In saying that, the attorney general could recommend such appointments as he or she considered appropriate, it may be accepted that the attorney general received the recommendations of the president of the Bar Association who himself or herself undertook a consultation process. Nevertheless as Gleeson CJ noted in his remarks to the new queen's counsel on 10 December 1992:

The recommendation may or may not be accepted by the Attorney General. Ordinarily it is, but this has not always been so. Frequently, in years past, the Attorney General has added to the list certain officers of the Executive Government, such as Crown Prosecutors or Public Defenders. This was regarded as an important power reposed in the Attorney General.

The NSW pre-3 December 1992 position appears, however, to be the new position in Queensland following the change, initially announced by the Queensland attorney-general's media release on 12

December 2012, that new silks in Queensland would be appointed queen's counsel and existing senior counsel could elect to be commissioned as queen's counsel. The 'Appointment and Consultation Process' as approved by the Council of the Bar Association of Queensland on 15 July 2013 sets out the process for the appointment of queen's counsel. It provides that the Queen's Counsel Consultation Group, which considers applications, shall provide the president with a list of applicants who are considered to satisfy the 'criteria for appointment'. The chief justice is able to consider whether any additional persons should be recommended (after consultation with various other judges). The chief justice, then, is to write to the attorney-general listing those recommended by the chief justice for appointment. The appointment and consultation process is, however, silent as to what factors the attorney-general may consider or take into account in making recommendations for appointment to the governor.

This is to be distinguished from the position in Victoria where the chief justice will continue to appoint silks as senior counsel, with the support of an advisory committee, under the current application and selection process. However, the newly appointed senior counsel may apply to be recommended to the governor for appointment as queen's counsel. The queen's counsel proposed question being considered currently by Bar Council appears to envisage a process similar to the Victorian model.

Nevertheless, as is noted in the Victorian Bar media release dated 3 February 2014, the application for Letters Patent by silks appointed senior counsel is 'by an invitation of the Attorney General'. Thus, even if there is not the same involvement of the Attorney-General in the Victorian process as was the case in NSW before 1993, and as appears to be the case in the newly-instigated process in Queensland, there is, nevertheless, the involvement of the Attorney-General and, hence, the Executive, at least insofar as the issuing of Letters Patent for the appointment of queen's counsel by the governor requires the governor to act on the advice of the Attorney-General.

The issue was stated by one member of the junior bar to *Bar News* (regrettably anonymously, perhaps) as 'if the profession wants to organise its own system

of prefects, that's fine but the government should have no part in it'.

A more traditional summary of the position was set out in a letter dated 10 December 1992 from Sir Garfield Barwick to John Coombs QC, the then President of the Bar Association. Sir Garfield wrote, as 'an antideluvian [sic] member of the Bar' in relation to the recently-announced proposal that there would be no new queen's counsel appointed in NSW. It is worth setting out the text of Sir Garfield's letter in full:

May an antideluvian member of the Bar offer the Council a suggestion about the Premier's intention to abandon the commissioning of Queens' Counsel.

I recall my endeavours to persuade Reg Downing when Attorney General to allow the Bar to participate in the selection of candidates for silk. I have always disliked that choice being made by the Executive.

My suggestion is that you accept the Premier's move. To do so will end the intrusion of the Attorney General into this aspect of the life of the Bar. Of course, one result is that the letter 'Q' drops out of the nomenclature. But we are regularly spoken of as senior counsel. The letter 'S' replacing the 'Q' ought not to matter. But of course, the issue of a commission will no longer take place.

But the Bar can take sole charge of the choice of senior counsel, make its own rules to govern the grant of the senior rank and negotiate with the judiciary its acceptance of the Council's choice and its recognition of the rank and precedence of senior counsel.

One final suggestion. In laying down the Bar's own rules for the selection of Senior Counsel, there would be room to limit the grant to experienced and outstanding advocates. Specialising in a branch of the law without experience and reputation as an advocate ought not to be a sufficient qualification. The two counsel rule can be better defended if the leader being a general advocate needs the assistance of a specialist to aid him through the intricacies of some particular branch of the law.

A critical issue to be considered in connection with the potential for Executive involvement in the appointment of queen's counsel in NSW is section 90 of the *Legal Profession Act 2004* ('LPA 2004').

### Section 90 of the LPA 2004

A hurdle to be overcome in achieving the

appointment of queen's counsel in NSW is section 90 of the LPA 2004. That section, which is entitled 'Prohibition of official schemes for recognition of seniority or status', provides as follows:

- (1) Any prerogative right or power of the Crown to appoint persons as Queen's Counsel or to grant letters patent of precedence to counsel remains abrogated.
- (2) Nothing in this section affects the appointment of a person who was appointed as Queen's Counsel before the commencement of this section.
- (3) Nothing in this section abrogates any prerogative right or power of the Crown to revoke such an appointment.
- (4) No law or practice prevents a person who was Queen's Counsel immediately before the commencement of this section from continuing to be Queen's Counsel while a barrister or solicitor.
- (5) Executive or judicial officers of the State have no authority to conduct a scheme for the recognition or assignment of seniority or status among legal practitioners.
- (6) Nothing in subsection (5) prevents the publication of a list of legal practitioners in the order of the dates of their admission, or a list of barristers or solicitors in the order of the dates of their becoming barristers or solicitors, or a list of Queen's Counsel in their order of seniority.

- (7) In this section:

executive or judicial officers includes the Governor, Ministers of the Crown, Parliamentary Secretaries, statutory office holders, persons employed in the Public Service or by the State, an authority of the State or another public employer, and also includes judicial office holders or persons acting under the direction of the chief justice of New South Wales or other judicial office holder.

Queen's Counsel means one of Her Majesty's Counsel learned in the law for the State of New South Wales and extends to King's Counsel where appropriate.

That section reflects section 380 of the *Legal Profession Act 1987* ('LPA 1987'), which was introduced into the LPA 1987 in due course following the 3 December 1992 announcement, save that section 380(1) provided that any prerogative right or power of the Crown to appoint persons as queen's counsel or to grant letters patent of precedence to counsel 'is abrogated', rather than 'remains

abrogated'.

The effect is that section 90 acts as a bar to the appointment of further queen's counsel in NSW. Is legislative change possible? It may be stated that quite apart from any other considerations which may arise, any attempt to repeal section 90 is likely to face difficulty. The recent media release from the shadow attorney general, Paul Lynch, states that the NSW state opposition 'will not support legislative change to allow senior barristers in the state to be appointed as a 'QC''. Mr Lynch commented that NSW has no role in the appointment of senior counsel and he does not support the government 'reclaiming a role in the appointment' process.

It is unclear if there will be enough willpower, particularly in the lead-up to the NSW state election in 2015, for the government to seek to amend section 90 in light of the stated position of the opposition on any proposed legislative change.

#### Overseas markets

It is stated often in the context of seeking to reintroduce queen's counsel that the title has a prestige in overseas markets, particularly in Asia, that the senior counsel title simply does not have. Thus, for example, the Queensland attorney-general's media release dated 12 December 2012 concerning the reintroduction of queen's counsel stated that:

It is important that Queensland silks are competitive internationally particularly in Singapore and Hong Kong where the use of QCs is preferred.

Asian countries employ QCs from as far as the United Kingdom and this change will give Queensland leverage over other Australian states competing for a share of this market.

The same sentiment was repeated in the attorney-general's subsequent media release on 7 June 2013. Similarly, the Victorian attorney-general's media release on 3 February 2014 stated that:

Allowing senior Victorian barristers the option to be appointed as QCs will help Victorian barristers to ensure full recognition of their experience, skills and expertise both within the Asia-Pacific region and within Australia ...

At present, barristers from the UK or other jurisdictions who have the title QC are often regarded by non-lawyer clients as being more senior than Victorian SCs, and many

senior Victorian barristers consider this has placed them at a competitive disadvantage.

In an article published in *Lawyers Weekly* dated 10 March 2014, Jeffrey Phillips SC and Andrew Martin argued to the same effect and stated that 'QCs are also internationally recognised in the former British colonies of Hong Kong, Malaysia, and Singapore'. The authors referred to comments from Dr Patrick Lau, managing director and head of the Mergers and Acquisitions Department for CCB International, who is quoted as saying that 'My experience is that certain sectors of Asians view royal connections favourably' and 'In my view, I would think QC sounds better to Asians than SC'.

Against these arguments is the fact that queen's counsel are not appointed in Singapore, Malaysia or Hong Kong or China. It is difficult to assess the validity of any assertions that suggest that Australian senior counsel are at a disadvantage in working in such jurisdictions particularly in circumstances where the locally-appointed silks are themselves senior counsel and, therefore, presumably the title is both recognised and understood.

Bruce McClintock SC, who is quoted in an article in the *Sydney Morning Herald* on 12 March 2014 in relation to the issue of potential reinstatement of queen's counsel in NSW, spoke to *Bar News*. In his view, an Australian silk will be briefed in Asia or in Australia or elsewhere because of their reputation and not because of whether they are a queen's counsel as opposed to a senior counsel. McClintock said that due to historical connections as between the United Kingdom on the one hand and certain Asian countries on the other such as Hong Kong, a London silk may have an advantage over an Australian silk. However, in McClintock's view, that advantage arises because of the history of London silks doing work in Asia. That is, any advantage which exists in favour of a London silk over an Australian silk arises irrespective of whether the Australian silk is a senior counsel or a queen's counsel.

### Confusion

Proponents of reinstating of queen's counsel point out that some solicitors now use titles such as 'Special Counsel' which, when considered with the title of senior counsel, may cause confusion to the

public. This was noted in the media releases of the Queensland attorney-general of 7 June 2013 and of the Victorian attorney-general of 3 February 2014. That may be so. However, presumably the solicitors who brief barristers are aware of the difference between their colleagues and senior counsel.

The Queensland Attorney-General's media release of 7 June 2013 went further. The Attorney said that the 're-introduction of QCs will also help to clear up confusion because a number of other titles are abbreviated to SC, including Special Counsel and the Star of Courage'. *Bar News* is not aware that the public is generally aware of the Star of Courage at all or that a member of the public will be confused about whether a person to whom they are speaking and who has such post-nominals is a person who shows conspicuous courage in circumstances of great peril or is a senior barrister.

What may be accepted, however, is that there are two factors which can lead to misunderstanding, if not to confusion, to the public. They are related factors.

The first concerns NSW. There is no uniformity within NSW as to the position of silks. Sections 38O(2) and (4) of the LPA 1987 (now sections 90(2) and (4) of the LPA 2004) preserved the position of queen's counsel appointed prior to the enactment of section 38O. Although it appears that, following the introduction of section 38O, there may have been discussions about whether existing queen's counsel should have the right to instead choose to use the title of senior counsel, *Bar News* has not identified any queen's counsel who elected to give up their title as queen's counsel in favour of senior counsel.

Thus, the legislation sowed the seed for confusion at least insofar as from after 1993, there was, and remains, both queen's counsel and senior counsel practising as silks in NSW. Indeed, from 1993 and for many years, the number of practising silks who were senior counsel were a minority compared with the number of practicing silks who were queen's counsel.

Thus, the public's ability to appreciate fully the position and title of senior counsel from after 1993 was not assisted by the fact that, notwithstanding the legislative change, there remained practising silks who were queen's counsel. As recently as November

2012, when his term ended, the then president of the Bar Association was Bernard Coles QC.

The second issue is related to the first. There is no uniformity within Australia as a whole concerning the title for silks. In fact, following the changes to reintroduce the position of queen's counsel in Queensland, Victoria and the Commonwealth there is now considerable variation Australia-wide as to the position of senior counsel versus queen's counsel.

The changes have effected additional intra-state variations. For example, the position in Victoria is that it is optional for senior counsel, as appointed pursuant to the established senior counsel appointment process, to apply to the attorney-general for Letters Patent. Thus, although it appears that a significant majority of senior counsel have sought Letters Patent, not all have done so. A post to the 'News & Resources' page of the Victorian Bar webpage (<http://www.vicbar.com.au/news-resources/news-resources>) on 28 February 2014 stated that:

Over 85% of the Bar's SCs who are eligible have applied for letters patent to change their title to QC. If any eligible people still wish to apply, please forward your application and we will see if the Attorney will receive them in the next week. Otherwise, the next opportunity will fall in November when the new Silks are announced.

I remind everyone that the decision to change to QC or to retain the SC title is a personal one and that the Bar respects every individual's choice.

It is unclear what perception the Victorian public will have of those senior counsel who elect not to apply for Letters Patent. In contrast, in Queensland from 2013 all appointments are of queen's counsel and it appears that the significant majority of existing senior counsel have elected to be issued with Letters Patent.

A suggestion put to *Bar News* was that it may be that any confusion of the public would be diminished if there was some national appointment body not of senior counsel, which should remain the purview of the states, but of queen's counsel. The profession within each jurisdiction would continue to make

arrangements for the recognition of senior barristers who would be appointed as senior counsel. Following this, the state bar associations, or some other national association, would pass a resolution to petition the governor-general to issue Letters Patent creating the new senior counsel as queen's counsel (for those who wished to be so created). The governor-general would then act on this advice in a similar way as he or she acts on the advice of the Council of the Order of Australia in making appointments to the Order.

Such a suggestion raises various additional issues which it is unnecessary to explore in this article. Needless to say, it is likely that any Australia-wide development will be complicated to implement.

#### QCs appointed in other states

It may be noted that the LPA 2004 recognises silks appointed as queen's counsel in other states. Sections 16(2) of the LPA 2004 provides that the 'regulations may specify the kind of persons who are entitled, and the circumstances in which they are entitled, to take or use a name, title or description to which this section applies'. By virtue of section 16(1), the section applies to the following 'names, titles and descriptions':

lawyer, legal practitioner, barrister, solicitor, attorney, counsel, queen's counsel, King's Counsel, Her Majesty's Counsel, His Majesty's Counsel, senior counsel

Section 8(1) of the *Legal Profession Regulation 2005* contains a table in which, for the purposes of section 16(2) of the 2004 Act, the 'kinds of persons specified in the third column of the table to this subclause are persons who are entitled, in the circumstances specified opposite in the fourth column, to take or use a name, title or description specified opposite in the second column'. The table which is set out, includes the following:



First column	Second column	Third column	Fourth column
Item No	Name, title or description	Kinds of persons who are entitled to take or use name, title or description	Circumstances in which the persons are entitled to take or use name, title or description
11	Senior Counsel or SC	Australian lawyer	when the Australian lawyer currently holds the status of Senior Counsel, as recognised by the High Court or a Supreme Court of any jurisdiction
12	Queen's Counsel or QC, or King's Counsel or KC, or Her Majesty's Counsel, or His Majesty's Counsel	Australian lawyer	when the Australian lawyer currently holds the appropriate status, as conferred by the Crown in any capacity or as recognised by the High Court or a Supreme Court of any jurisdiction

Thus, it appears that a person appointed as a queen's counsel in Victoria could use that title in New South Wales.

Before the recognition of interstate practitioners, it was not uncommon for NSW counsel to seek admission in states other than NSW (and in addition to the Commonwealth). Thus, for example, there are senior counsel appointed as such in NSW who sought and obtained admission in Western Australia as a queen's counsel before the change occurred in that state from queen's counsel to senior counsel. However, given the current state recognition of interstate practitioners, there is likely to be limited need for NSW barristers to seek admission in other states.

If a NSW barrister were to seek admission in, say, Victoria or Queensland, with the intention then of using in NSW the queen's counsel title subsequently obtained, it would appear that the barrister would have to apply in the ordinary way in those jurisdictions. It may be that an inability to identify a practice in such a jurisdiction which would warrant the barrister's appointment as a silk in that jurisdiction would result in an unsuccessful application. The reality appears to be that it is likely not to be common for NSW based barristers to apply for and to obtain silk in a jurisdiction which appoints queen's counsel either directly (such as Queensland) or on application (such as Victoria).

#### Queen's counsel not king's counsel

In the context of the suggestion that queen's counsel has a cachet which senior counsel does not, one fact that is sometimes overlooked is that since the accession to the throne of Queen Elizabeth II on 6 February 1952, there has been only queen's counsel and no king's counsel appointed. No one under 62 years of age will have had any dealings with a KC. The number of dealings by persons over 62 with king's counsel is, on any view, likely to be limited and, obviously, to have occurred before 6 February 1952.

The point to highlight is that if QC has a prestige which SC does not, it may be that a large part of that comes from the fact that, for over 60 years, there has been only queen's counsel. However, Queen Elizabeth II will not live forever. Upon her death, queen's counsel will become king's counsel (although see below in this regard). The appointment of a person as a KC is unlikely to have the same perception or prestige as QC for the simple reason that there has not been a king's counsel during the lifetime of most people; the expression simply will likely appear unfamiliar.

Thus, members of the public might associate the expression 'queen's counsel' as meaning an eminent barrister without knowing precisely (or at all) that it means a silk with Letters Patent from the current monarch. It remains to be seen whether the public will connect the same association of pre-eminence with the expression 'king's counsel'.

In the context of the change in monarch, it is not immediately apparent what the effect of section 90 of the LPA 2004 will be on the current NSW-appointed QCs. Historically, the appointment by the monarch of an individual, by Letters Patent, as one of the monarch's counsel was personal in character to the monarch. Thus, upon the death of the monarch, there would need to be issued new Letters Patent from the new monarch for the existing silks. This may be seen when examining volume [1901] AC. There is a 'Memorandum' at the commencement of the volume which notes as follows:

On Tuesday, January 22, 1901, it pleased Almighty God to take to His mercy our late Sovereign Lady Queen Victoria of blessed memory.

[There is then a record of the re-swearing of the judicial oath of allegiance to King Edward VII.]

Feb. 15. The King was pleased by several Letters Patent under the Great Seal to appoint and declare—

That the persons who were appointed by Her late Majesty to be of Her Majesty's Counsel learned in the law should be of His present Majesty's Counsel learned in the law, with all such precedence, power, and authority as were originally granted to them.

Thus, upon the issue of the 'several Letters Patent', the former queen's counsel became king's counsel. After 1901, the position changed. *Bar News* has not located the complete documentary chain however it appears that there was no need for new Letters Patent to be issued upon the death of King George VI in 1952 for the then existing KCs to become QCs upon the accession of Queen Elizabeth II.

It is not clear what will occur to the title of NSW queen's counsel upon the death of Queen Elizabeth II. If the position had remained as it was in 1901 when King Edward VII was required to issue new Letters Patent, section 90 would appear to have the effect that such Letters Patent would not be effective in NSW. However, as it appears that the reissuing of Letters Patent no longer is required for the appointment of an individual as one of the monarch's counsel to continue upon the death of the monarch, it may be that section 90 will have no effect to the position of NSW queen's counsel upon the death of Queen Elizabeth II.

## Monarchy and republic Influences

In an article in the *Sydney Morning Herald* article on 12 March 2014, McClintock described the moves to reintroduce queen's counsel as 'ridiculous', 'disingenuous' and 'dishonest'. He asked, rhetorically, in what sense are QCs counsel of, or to, Queen Elizabeth II? McClintock continued that the changes were 'disingenuous and mask a reactionary political agenda'. The same article quotes the Commonwealth attorney-general criticising the New South Wales Bar as 'a bastion of Keating-era republican sentiment'. Thus, it is difficult to separate the issues concerning the reintroduction of queen's counsel discussed above from the broader debate involving the monarchy within Australia. That latter issue is not the subject of this article.

What may be noted, however, returning to the comments from Kirby P referred to above, is that his Honour was of the view that whilst Australia remained a constitutional monarchy the monarch should not be removed from the appointment process of silks. Nevertheless, the change envisaged in December 1992 occurred and, since then, there have been no appointments of QCs in NSW. Thus, assuming one accepted the view expressed by Kirby P, given that the change occurred, the proposed reintroduction of the monarch into the appointment process of silks may be seen by some to be demonstrative in whole or in part of monarchical tendencies.

## Conclusions

*Bar News* looks forward with interest to Bar Council's assessment of the consultation process concerning the proposal to establish a system for the appointment of queen's counsel following the appointment of senior counsel under the existing Senior Counsel Protocol.

### Garfield Barwick

The following is an edited version of an oration given by the Hon Tom Hughes AO QC at the 2012 Garfield Barwick Address.

Any memoir of Garfield John Edward Barwick should begin with a brief description of his family background. He was born on 22 June 1903, the eldest of three sons of Jabez Edward and Lily Grace Barwick. Both parents were of English stock; each of them had a rural background. After marriage they settled in Sydney, first at Stanmore, where Barwick was born; and then at Paddington, in a rented terrace house situated in Glenview Street.

Barwick was born into a stable marriage. His father was a printer, an occupation requiring close proximity to lead so that he later suffered incapacity for work from lead poisoning. Barwick's mother was an Ellicott. She was probably the stronger partner in the marriage. They were practising Methodists, a non-dogmatic religion that sets great store on the importance of hard work as a pathway to salvation. Barwick attended Sunday school. He showed brilliance as a student at primary school and obtained a scholarship to Fort Street Boys High, a selective high school that was a seedbed for the later development of professional skills. His career at Fort Street won him a scholarship to the University of Sydney in Arts/Law where he graduated in 1925 with first class Honours, sharing the University Medal for law with Simon Isaacs, who later became a silk and then Supreme Court judge. Early in his school career, Barwick formed a firm ambition to become a barrister.

While at the Sydney Law School of the University of Sydney, Barwick served articles of clerkship; to HW Waddell, an experienced and competent solicitor with a mixed practice whose quite frequent absences to run a country property owned by him created many opportunities for his articulated clerk to exercise initiative. He took advantage of these opportunities. In the later stages of his articles Barwick's weekly earnings reached nearly 10 pounds, in those days an enormous stipend for an articulated clerk. Waddell offered him a partnership without payment of a premium but his mind was set on admission to the bar. He suffered a setback on this journey because he forgot to register as a student-at-law. There was a formalistic requirement of two years 'service' as such as a condition of admission to the bar. He filled



Picture by Steven Siewert / Fairfax.

this gap by working as a managing clerk in a firm of solicitors run by Roy Booth, also an old boy of Fort Street.

Barwick was admitted to the bar on 1 June 1927. Then he had to find chambers in which to establish a practice. This was no easy task. If found, they would be shabby in appearance. It was generally necessary for newly admitted counsel to share any available accommodation. Barwick's first, temporary, perch in Phillip Street became available through the kindness of Sybil Greenwood, who was the only woman in practice at the bar. While there, he met WA Holman KC, a former Labor premier who had split from his party on the issue of conscription during the First World War. His chambers had separate secretarial space, which he made available to Barwick. Holman's interest meant much to this young man of 24 embarking on a risky career. In those days there was no requirement of pupillage.

Barwick had to decide for himself how to develop forensic skills. There was then a clear division between the common law bar and the equity bar. Many of the common lawyers were given to loud-voiced declamation in the hope that this technique would prove persuasive to juries, by whom nearly all common law cases were tried. The equity lawyers were not noisy. Their demeanour was quiet and

understated. They were known as equity whisperers. A leading exponent of their style was CA Weston, who became a busy silk and made his submissions in a sibilant undertone, addressing the judge as 'Honour' instead of 'your Honour'. Sir Frederick Jordan once described Weston's argument in an appeal as 'enveloping the court in a cloud of algebra'. Barwick wisely decided to develop his own style of advocacy.

In his autobiographical memoir *A Radical Tory*<sup>1</sup> Barwick described his own choice of forensic technique:

I came to think that as an advocate I should adopt a quiet presentation, leaving room for raising the voice and for gesture when emphasis was needed, but concentrating on reducing to simple terms the issues to be decided and the principles of law to be applied. I thought I should act on the footing that the jury were intelligent, honest and capable of being instructed in even the most complicated matters of fact and that they could apply principles of law if these were simply expressed; that in general they would listen closely to what counsel and the judge had to say. I thought that my task would be to persuade them by logic and good sense. I realised that there is room in appropriate cases to press the jury to give effect to human values where the law seemed not to do so.

This was a judicious choice. He had many possible role models in the, then, not very crowded ranks of the New South Wales Bar (about 100 members). There was GE Flannery KC, a master of the art of simply framed submissions, who once addressed the High Court by confining his citation of authority to a passage in *Anson on Contracts*. Then there was WF Curtis KC (clever but with a mischievous mind), who was in the habit of pulling the leg of Andrew Watt KC when they were opposed to each other. AV Maxwell KC, was a planet in the common law firmament. He thought well of Barwick and was responsible for getting some work for him.

By 1929, when in his second year at the bar, Barwick was making sufficient progress to enable him to ask Norma Mountier Symons to marry him; she accepted. Shortly after their marriage, near-disaster struck. 'Times were turning down and recession was upon us'.<sup>2</sup> Barwick's brother, Douglas, was conducting a

*Barwick's misjudgment in deciding to sue Atlantic Union resembled the conduct of an escapee from a lion's den in re-entering it to recover his hat.*

service station business. Because Douglas was a minor, Barwick had assumed primary responsibility to the oil companies supplying the service station to pay debts owing to them by his brother. The business failed and Barwick was in trouble. Atlantic Union Oil, a client of my father, who was a well-renowned solicitor, acted for that company, which issued a bankruptcy petition against Barwick. The petition was dismissed on the ground that Barwick and Atlantic had reached an accommodation for deferred payment of the debt. Then Barwick ill-advisedly sued Atlantic for defamation arising from words published about him during the course of the dispute that had culminated on the dismissal of the petition. This prompted Atlantic to seek a re-hearing of the dismissed petition, for which purpose my father briefed LS Abrahams KC – a redoubtable silk with a fearsome court manner. A re-hearing ensued. A sequestration order was made. A period of crushing penury ensued for the young married couple. The bankruptcy had an adverse effect on his practice; but he managed to survive with the aid of his ever-devoted wife, who returned to her former employment as a seamstress to plug the deep hole in their finances. Barwick's misjudgment in deciding to sue Atlantic Union resembled the conduct of an escapee from a lion's den in re-entering it to recover his hat. When I came to the bar, Barwick well knew that I was the son of the solicitor who had procured his bankruptcy. This knowledge did not colour his attitude to me. We became friends. He made a public speech supporting my candidature when I stood as a Liberal candidate for Parkes in the federal election in 1963.

When in 1971 I was down and out after William McMahon had terminated my office as attorney-general, the Barwicks asked me to their Pittwater residence for a luncheon to meet Lord Diplock,

*Although Barwick's rather subdued method of advocacy worked well, it took a long time for the big end of town to flock to him with briefs.*

before whom I later appeared in two Privy Council appeals.

Barwick's method of tackling the tasks of advocacy was successful. After his discharge from bankruptcy, his practice went ahead by leaps and bounds. He and Frank Kitto, who were contemporaries, became opponents in a case that Barwick lost. This was the case arising from the award in 1943 of the Archibald Prize for portraiture to William Dobell for his painting of a fellow artist, Joshua Smith. Two artists, dissatisfied with the award, obtained a fiat from the attorney general of NSW to sue the Trustees of the Art Gallery for breach of trust on the ground that the painting to which they had awarded the prize was not a portrait because it represented the subject as a grotesque figure quite unlike him in reality. The case became a cause célèbre: the public gallery of the court was full to overflowing with spectators. The trial judge dismissed the claim on the simple ground that the painting was a portrait in the opinion of the gallery trustees. There was no challenge to the good faith of the trustees in deciding that the painting was a portrait. Barwick was self-critical of his advocacy in that case, but that was a harsh judgment. As sometimes happens in the career of counsel, a notable loss advances the career of the loser. Both Kitto and Barwick gained acclaim for their performance in that piece of litigation. Each of them had taken silk in 1942.

In the development of his practice as a silk, Barwick preferred work in the Supreme Court to the uncertainties of the High Court listing system and the idiosyncrasies of some of the justices. In 1943, EM (Ernest) Mitchell KC, who had a very large High Court practice, died. His work then flowed to Barwick's table, where, as he recorded it grew to almost unmanageable size.<sup>3</sup> In one High Court list he was in every appeal save one.

Although Barwick's rather subdued method of

advocacy worked well, it took a long time for the big end of town to flock to him with briefs. All this changed with the *Bank Nationalisation Case* in 1947 when Norman Cowper of Allen Allen & Hemsley selected him to take the leading brief for the Australian Banks in the High Court and later in the Privy Council. An important task in that momentous litigation was to prepare, in conjunction with Frank Kitto, the argument that s 92 invalidated the legislation. Kitto was a superb equity draftsman, as Barwick acknowledged to me when, while working as his junior in London in 1955 in a s 92 case, I asked him to assess the weight of Kitto's contribution to the *Bank* case. Barwick was seldom given to praising the work of colleagues or opponents; nor was he given to boasting about himself. So this verbal accolade was praise indeed, and well earned. My own view is that Kitto's verbal and written skills were slightly superior to Barwick's. Barwick's use of language was rugged and clear; Kitto's writing had a crystal quality of its own. Their work, and the result, in the *Bank* case was a crowning achievement of their forensic careers. But when in April 1964, Barwick was appointed chief justice of Australia, dissension between them developed. This culminated in a letter received by me in August 1970, in which Kitto notified his resignation. Each of them was well fitted in every respect for the office held. It is probable, however, that Kitto became disenchanted with what he may have regarded as a somewhat autocratic tendency on Barwick's part in the administration of the court's business. They certainly did not see eye to eye with respect to the scope of s 92.

The *Bank* case left much room for future disagreement on this subject because of the Privy Council's selection of the concept of 'direct and immediate operation of a legislative or executive act' ('infringement') as opposed to 'indirect or consequential impediment which may be regarded as remote' (non-infringement). This formulation, based on ever controversial questions of causation opened up a can of worms which wriggled incessantly until the decision in *Cole v Whitfield* put an end to their writhing.<sup>4</sup> Barwick regarded that decision as 'tosh'. *Mowbray v Mead* was a rubicon in the judicial treatment of s 92. That was a case



*The most controversial action ever taken by Barwick was his decision, implemented by a letter dated 10 November 1975, to advise Sir John Kerr that, in the circumstances existing at that time, the dismissal of the Whitlam government would be compatible with the proper exercise of the governor-general's executive powers under sections 61 and 64 of the Commonwealth Constitution.*

concerning Tasmanian legislation that prohibited the use, in the manufacture or sale of cooking margarine sold in Tasmania, of flavouring or colouring matter that made the product taste or look like butter. The case concerned margarine containing the prohibited substances, imported from NSW into Tasmania and sold there in the appellant's retail shop. The whole purpose of the importation was the sale of the imported product in Tasmania. To Barwick's mind, the relevant interstate trade included, as an essential and inseparable element, the sale of the imported product in Tasmania. That sale was therefore protected by s 92 because the prohibition was not regulatory in character. Owen and Walsh JJ agreed with Barwick in separate judgments. The other four members of the court disagreed, also in separate judgments.<sup>5</sup> The majority judgments proceeded on the basis that the sale of the imported product was either an exercise in reasonable regulation or not directly connected with interstate trade.

Barwick's entry into politics in March 1958 as member for Parramatta in the House of Representatives was the result of persuasion by Menzies and, preceded by a specific request from Senator Eric Spooner, government leader in the Senate and minister for national development. Initially he rejected Spooner's request; but Menzies then intervened, displaying his legendary powers of persuasion. Barwick received a visit from him in chambers on a Saturday morning early in January 1958. He urged Barwick to nominate in the Liberal interest for a by-election in Parramatta, an electorate vacated by Howard Beale QC on his appointment as ambassador to the United States. Beale had been but a moderate performer at the bar and as a minister; but he found his appropriate niche in that new role which he filled with considerable distinction and success.

The decision to go into politics was a difficult one for Barwick. He was 54. He suffered from diabetes, a condition that he did not then disclose to Menzies or to anyone outside his immediate family. He had much work in hand and in prospect both in Australia and in London.

At this time his practice was to spend several months each year in London on cases in the Privy Council. This work was enjoyable. He enjoyed friendships with numerous members of the English bench and bar. He was highly regarded in London. In 1955, when I was working there, he arranged a dinner at Claridge's where his guests were prominent English judges invited to meet Australian counsel then working in London. At this dinner I sat next to a great Chancery judge, Lord Morton of Henryton. I was only a junior in my seventh year of practice.

Barwick, yielding to the persuasive charm of Menzies, won pre-selection, stood in the by-election and won. The only speech he made in the House as a backbencher was his maiden speech. Shortly afterwards there was a general election, which the government won in November 1958. Barwick then became attorney-general of the Commonwealth and a member of Cabinet.

One of the first problems he had to confront concerned the interception of telephone calls for security purposes. This activity was occurring and had occurred without any statutory authority. This was a haphazard state of affairs. He considered it necessary that someone should have such authority. He considered whether it would be appropriate to confer it on a judge. At the inception of ASIO, its first director had been a judge of the Supreme Court of South Australia, Mr Justice Reed. He had undertaken the task of authorising telephone interception. Should that practice be continued?

*It is fortunate that there was no legal challenge to the governor-general's withdrawal of Whitlam's commission. Had there been such a challenge, Barwick would have been disqualified from adjudicating upon it*

Barwick's answer was 'no'. No doubt he had in mind that the judicial power of the Commonwealth was vested in the court of which Reed J was a member. Barwick's view as expressed in *A Radical Tory* was that such a judge should not be given what is in fact an executive function unassociated with the exercise of judicial power. No doubt Barwick had in mind the strict separation of executive and judicial power ordained by the Commonwealth Constitution. He said 'Security and judicial work do not comfortably mix'.<sup>6</sup> So he resolved that power to intercept telephones for security purposes should be conferred on the Commonwealth attorney-general. This resulted in the enactment of the Telephonic Communications Interception Act, which I administered during my brief period of office.

The most controversial action ever taken by Barwick was his decision, implemented by a letter dated 10 November 1975, to advise Sir John Kerr that, in the circumstances existing at that time, the dismissal of the Whitlam government would be compatible with the proper exercise of the governor-general's executive powers under sections 61 and 64 of the Commonwealth Constitution.

It is my view that, in giving that advice, Barwick erred in principle. For in doing so he participated, in an adjunctive role, in the exercise of the executive power of the Commonwealth. No judge in whom the judicial power of the Commonwealth is vested should participate in any way in the exercise of its executive power. If Barwick had adhered to the principle he had applied in the case of Mr Justice Reed, there would have been no basis for the criticism, much of it the product of politically inspired malice, to which he was exposed in and after November 1975.

There is no doubt that the advice was legally unimpeachable. It is fortunate that there was no legal challenge to the governor-general's withdrawal of Whitlam's commission. Had there been such a

challenge, Barwick would have been disqualified from adjudicating upon it. We now know that such a course was under active consideration by counsel on the morning of 11 November 1975.<sup>7</sup> Barwick's letter of advice to Sir John stated in substance that the existing situation was *unlikely* to come before the High Court. The problem that would face those wishing to mount a legal challenge to a vice-regal withdrawal of Whitlam's commission was to find a plaintiff with the requisite standing to sue. But there must have been a risk that someone might commence proceedings challenging the dismissal. If that had happened, the question of standing would have been justiciable.

Barwick did not adjust easily to the atmosphere of the House of Representatives, probably because he was of mature age with settled habits of forensic behaviour. Not surprisingly, he encountered hostility from the Hon EJ Ward, member for East Sydney, in whom wells of bitterness were deep. Nevertheless his legislative work as attorney-general was of enormous value in the fields of criminal law, trade practices, marriage and divorce. Each of these subjects would justify very substantial individual treatment for which there is presently no time. The title of his memoir *A Radical Tory* is very apt. He was, over a wide spectrum of legislative action, a reforming attorney-general who deserves a place of honour in our political pantheon.

One of the many significant achievements of Barwick's political career was his successful promotion of the concept of establishing a permanent seat in Canberra for the High Court of Australia. While Harold Holt was prime minister, Barwick instigated a cabinet decision to that effect. Neither Dixon nor Menzies would have supported the proposal. Had Barwick's visionary outlook not prevailed, culminating in the opening of the new court complex on 26 May 1980, our High Court, albeit standing at the apex of Commonwealth judicial power may well have remained relegated

*As chief justice, Barwick's methods of dealing with counsel's arguments meant that working in his court was not a task for the faint-hearted.*

physically to the status of a circuit court, dependent on the use of borrowed facilities for the exercise of its judicial functions.

As foreign minister he had tried to cultivate good relations with Indonesia, opposing colonialist bias that he thought was prejudicial to Australia's long term interests. He was therefore opposed to supporting the Dutch in relation to the problems of West New Guinea, which erupted in 1962–1963.

As chief justice, Barwick's methods of dealing with counsel's arguments meant that working in his court was not a task for the faint-hearted. He subjected counsel to searching questions designed to probe what he regarded as possible weaknesses in the structure or content of their submissions. He believed in the value of dialogue between bench and bar. To my mind, there is nothing wrong with this technique. If one holds oneself out as qualified to participate in the appellate work of the High Court of Australia, an ability to face fast judicial bowling, including short pitched bumpers, should be part of one's forensic equipment. Barwick's treatment of counsel appearing before him very seldom exceeded the bounds of what they should expect. Kitto's treatment of counsel was sometimes more brutal than any treatment meted out by Barwick. I greatly admired each of them.

Barwick served two terms of office as president of the New South Wales Bar Association; December 1949–November 1952; November 1954–November 1956. In this office he was a mover and shaker. He had the valuable support of JK Manning QC, (later an effective commercial judge) in the complicated negotiations that culminated in the establishment of chambers owned by the bar in Phillip Street. When that project was on the point of collapse, due to the uninspiring timidity of practising barristers, he rallied a group of silks to guarantee the minimum subscription necessary to float the company, thus avoiding the failure of the enterprise.

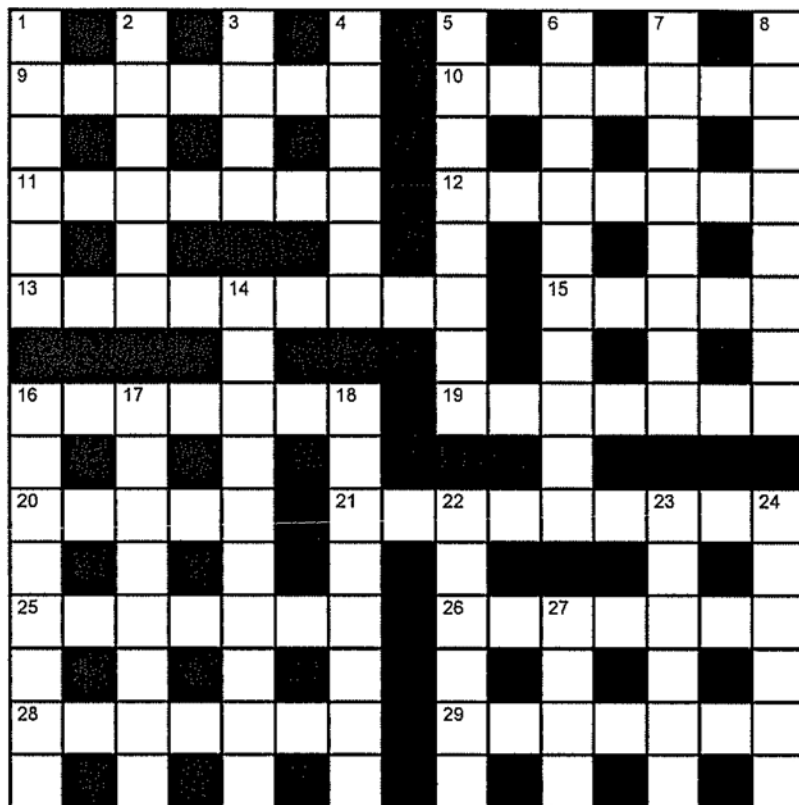
Barwick was a good and faithful servant of the law, starting with nothing but his inborn talents, rising to the pinnacle in practice, then becoming a great law reformer before 17 years in office as chief justice of Australia, where his tenure of office was efficient but at times controversial. By any acceptable standard, he was a truly great Australian.

#### Endnotes

1. Barwick, Garfield, *A Radical Tory* (Federation Press, 1995), p.19.
2. Ibid., p.26.
3. Ibid., p.33.
4. See (1987–1988) 165 CLR 360.
5. See 124 CLR 529.
6. Barwick, *A Radical Tory*, p.137.
7. *Oxford Companion to the High Court of Australia*, p.213.

# Crossword

By Rapunzel



## Across

- 9 Bar leader. One mixes around the last Latin. (Bar leader) (7)
- 10 Hidden drops cover (or open drops junction), and the amateur makes for cover? (7)
- 11 Idle mam created problem? (7)
- 12 Enraged grandee angered grenade? (Made mad, of the French variety?) (7)
- 13 Abnormally large cell becomes Tory mecca? (9)
- 15 An English mobile face drops the heart of England from facial. (5)
- 16 Lear rep provides an Aussie surpassing excellence. (7)
- 19 'Bitter!' rent the little strumpet. (7)
- 20 Out and about, or over the top? (5)
- 21 Mad notary mashed a harsh sentence? (9)
- 25 Old German medical man? Middlemen? 500? Fivescore! (7)
- 26 Opaque uncle? (Answer right!) (7)
- 28 Virtuoso display, around about A to Z, around about a muddled end. (7)
- 29 A late style Redcoat reconvenes (3,4)

## Down

- 1 I'm around. Remain in the same place. (6)
- 2 A general of this type is open to all. (6)
- 3 A thing, a measure, a segment on the news? (4)
- 4 Well aboveground (and around a northeast confusion), yet underhand. (6)
- 5 Bare legs in the Arctic? Not for a person with this condition! (4,4)
- 6 Dread harder? Sound land! (5,5)
- 7 Remote yet methodical, medical centre for Mr Whitlam's immigration minister? (8)
- 8 Kind actors risk being stereotyped. (8)
- 14 Boiling ear relieved by such a dish? (3-7)
- 16 Foretelling for 'the acid test'? Percy drops communication skills! (8)
- 17 Roughly indicate a group of elements? (8)
- 18 Drunkenly derail me about my face? Redressing! (8)
- 22 Sweet negative? Yuck! (About time ...) (6)
- 23 English academic achievement? Ring even? (1,5)
- 24 Yeomanry shaft creates nosebleed. (6)
- 27 'It is within our time' (quote). (4)

### His Honour Judge Nicholas Manousaridis

Nicholas Manousaridis was sworn in as a judge of the Federal Circuit Court on 29 July 2013.

His Honour Judge Nicholas Manousaridis was born in 1959. His parents had left behind the Greek Civil War by migrating to Australia in the early 1950s and had settled in Balmain.

His Honour attended Fort Street High School where, in addition to his scholastic ability, his Honour was a member of the first grade hockey side, the zone premier softball team, the Hume Barber debating team and was an accomplished flautist and winner of the school prize for music.

His Honour graduated from the University of Sydney with a Bachelor of Arts in 1981 and a Bachelor of Laws in 1983. At university he met his wife Sue (also a successful lawyer) to whom he has been married for 29 years.

His Honour worked at Gadens, later Mallesons, and subsequently Baker & McKenzie where he became a partner in 1989. That same year his Honour completed a Master of Laws degree.

His Honour commenced practice as a barrister in 1993 at Nigel Bowen Chambers and read with the Hon Justice Lindsay Foster. His Honour remained at Nigel Bowen for 19 years and developed his practice in equity, competition law, economic regulation, general commercial litigation, building and construction, as well as federal and state administrative law.

Among the many significant cases in which his Honour appeared was the insolvency matter of *Equiticorp Industries v The Crown* in New Zealand, in which he was led by Hon Justice Peter Woodhouse of the High Court of New Zealand and which was one of the largest matters at the time – and perhaps since – in the New Zealand courts.

The Commonwealth solicitor-general, Justin Gleeson SC, who spoke for the Commonwealth at his Honour's swearing-in, in particular praised his Honour's appearance in the High Court matter of *East Australian Pipeline Pty Limited v Australian Competition and Consumer Commission* in which Mr Gleeson led his Honour. Mr Gleeson said that his Honour mastered through a first principles analysis a rather difficult and arcane subject of jurisdictional error.

Mr Street SC, speaking for the New South Wales Bar, said that, having led his Honour in a long-

running Trade Practices Act Pt IV matter for a telecommunications entity, he could personally vouch for his Honour's 'assiduity and clear, crisp approach to the presentation of oral and written material'.

His Honour is known as a wide reader with an extensive library. His Honour made his own contribution to publishing with a valuable chapter entitled 'The Common Law Courts: Origins, Writs and Procedure' in the series of essays entitled *Historical Foundations of the Australian Law* published in July 2013.

His Honour is an avid walker and practises yoga. He has diverse tastes in music ranging through Mozart, South American music, Greek folk music and gospel tracks.

Importantly, his Honour has been known for his contribution to the encouragement of new members at Nigel Bowen Chambers and, more generally, the bar.

His Honour offered some astute thoughts, which must be understood to underlie every judicial appointment:

But today's ceremony is not about me or about my family or about my friends; it is about the court. It is about whether my appointment to this court, as with any other judicial appointment, is one that has been wisely made. That, however, can only be answered for certain by what I will do, not by what I have done in the past or by what has been said about me today. And what I will do cannot be known until time is given its due. Yet one can negotiate with the future. That is done by resolution. By resolving, moment by moment, to be clear in your mind about what it is you are supposed to be doing and fashioning your conduct accordingly. What it is I am supposed to do, as a judge, is crystal clear. It is contained in the affirmation I made before some of my fellow judges and my family on the morning of 1 July 2013. The words of the affirmation are a thing of beauty. I will repeat them for you:

I will well and truly serve in the office of judge of this court and do right to all manner of people, according to law, without fear or favour, affection or ill will.



## APPOINTMENTS

### Other appointments of note

On 10 February 2014 the prime minister announced his recommendation to the governor-general that the Hon JD Heydon QC AC conduct the Royal Commission into Trade Union Governance and Corruption.

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On 11 December 2014 Attorney General Greg Smith SC announced the appointment of Magistrate Michael Barnes as the state coroner of New South Wales. Magistrate Barnes began his five year term

on 6 January 2014. Magistrate Barnes was previously the Queensland state coroner for 10 years before moving to NSW and being sworn in as a magistrate of the Local Court of NSW and as an industrial magistrate in August 2013.

\*\*\*

On 21 November 2014 Attorney General Greg Smith SC announced the appointment of the Hon James Wood AO QC as the chair of the NSW State Parole Authority for a term of three years.

### Childcare Services Launch



The Bar Association's new Childcare Service was launched in the Common Room on 3 April 2014. The association has entered into an agreement with Jigsaw Corporate Childcare to underwrite the cost of a number of childcare placements in Jigsaw's first class facilities in the CBD.

## Bullfry and the witchcraft trial

By Lee Aitken

The Madame Recamier beckoned. Bullfry picked up his well-thumbed copy of *Mostly Murder* (a first edition of Sir Sydney Smith's popular autobiography) and settled back, waiting for slumber to arrive, and knit up his ravelled sleeve of care. What a terrible morning it had been: sixty paragraphs struck out of the plaintiff's affidavit with only the jurat left – Ms Blatly deserting him for another younger leader – forced in the end to offer far too much to settle the matter against a solicitor opponent!

In his youth, Bullfry had aspired to become a forensic scientist but his habit of dissecting rats and mice and other small deer, and performing electrolysis off the mains, in his bedroom, had attracted too much maternal reproof. What chapter would he revisit today? Buck Ruxton and the decapitated cadavers? – Norman Birkett (unusually) prosecuting? – or perhaps 'Brighton Trunk Murder No 2'? – Orwell was right – there had been a severe decline in the quality of the English Murder.

And now it was possible, in England, to 'review' any case, however ancient, to demonstrate that the original verdict was wrong by *applying the standards as to substantive law, evidence, and a jury direction, which applied in 2014, not 1936!* But one might as well complain about the procurator of Judaea's conduct of proceedings on the basis that the accused was mistreated. And whom, in any event, did the 'new verdict' benefit? Could Timothy Evans be restored to life? Did a posthumous pardon provide balm to a purgatorial soul? The

same vice seemed to be infecting the Victorians – should Jean Lee be exonerated now because (undoubtedly) she had had a hard childhood? Past criminal trials were in another country, and were better left there, undisturbed.

What of trials by a judge alone? The great thing about a jury verdict was that it was a general verdict. 'How say you, is the accused guilty or not guilty?' – no reasoning was vouchsafed for the decision – the meditations of the jury room were inviolable – the verdict was unappealable, except in so far as it was perverse. Compare a judge-alone decision – every aspect of the evidence had to be analysed in detail, and the reasoning on basic facts exposed, explored, and explained – in such a situation was it not inevitable that there was a tendency always to give the accused, quite properly, the benefit of the doubt? No wonder that a judge sitting alone, on the bare statistics, seemed to produce more acquittals.

Bullfry thought back thirty years to his east African days – Bateyunga & Co of Azimio School Street, Mbeya, Tanzania had been one of the town's leading defence firms. In fact, all six firms in Mbeya (pop 25,000) were 'leading defence firms', because anyone facing a capital charge under the Criminal Code (section 206) was entitled to a free legal defence – there was a lot of misdirected local killing, chiefly because of the erroneous, but deeply entrenched, popular belief that pigs and ducks and, sometimes, spouses, could be killed by witchcraft, and the easiest way to control the random deaths was (*pace The Crucible*) to kill all

witches.

Bullfry had once raised the question of presidential pardon for those convicted of murder with the diminutive Crown prosecutor as they walked together back from court. 'Well', the Crown had said, 'the president would, of course, like to commute as many capital sentences as possible but to keep a prisoner in gaol for life costs us too much *mealie* – this poor country just can't afford it'.

Murder trials were conducted before the judge who had travelled up from Dar and who was assisted by two lay 'assessor', sitting *qua* jurors. But with this important difference from our own system – after all the evidence was heard (and this was usually in short compass, involving as it did, the death of the accused's pig, the suspicion of witchcraft, the fixing of that suspicion upon an older neighbour, the vigorous use of the hoe, or mattock, the cry of '*Piga, piga*' (Kiswahili for 'hit!' or 'strike!') as related by the eyewitness) – the assessors would 'sum up the evidence' for perhaps half an hour to the large crowd which had been attentively following proceedings.

The assessors were inevitably representative of the populace – say one Muslim headman, and an animist woman – both elderly, since at that time (and even now, in Africa) to have survived to be old in a hostile environment, is usually to be wise. (How unlike our own society, where to be young (except at the Sydney Bar) is to be everything – Mammon, and his insatiable desire to sell as many useless things as possible to younger people, seemed to be

behind this – it was now, by way of contrast, almost impossible to sell Bullfry anything at all).

Thus, the reasoning of the assessors was exposed to the crowd – often it would involve the unhappy acknowledgement that there was a widespread community misconception about the existence of witches and their alleged powers. After hearing the assessors' summation in detail, the judge would direct himself and give a verdict which would usually, but not necessarily, largely conform to the facts as indicated by his assistants. He would also take the occasion to add a homily for the benefit of the audience:

The prisoner is convicted of manslaughter of the deceased and sentenced to six years in gaol. Despite that verdict, you must all be aware that there is no such thing as witchcraft, and that a pig cannot die

*The assessors were inevitably representative of the populace – say one Muslim headman, and an animist woman – both elderly ...*

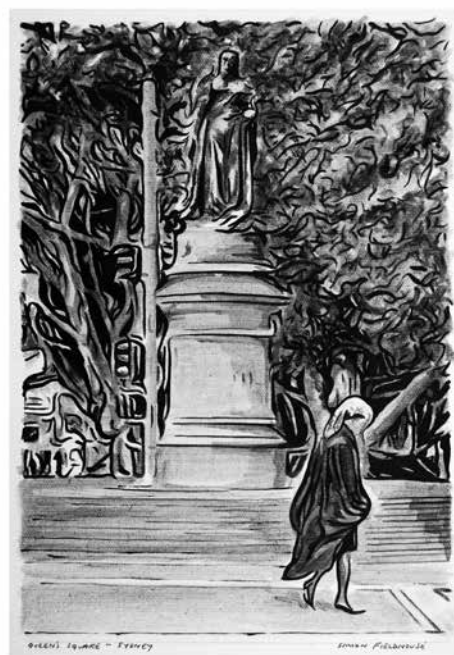
because someone is said to have put a spell on it. It is unlawful to kill or harm anyone – any suggestion that it is right to harm someone said to be a witch is completely wrong, and anyone who does so will be prosecuted, convicted and punished.

Would not our own system be so much the better if the reasoning of common jurors was thus revealed, as was the assessors' in Africa? It would disarm, in a moment, the 'tabloid' frenzy evoked whenever some general verdict was reached that did not accord with the editor's, or broadcaster's,

self-righteous view of crime and punishment. The judge would have a much better basis upon which to decide the appropriate sentence that would be rendered almost impervious to popular attack.

Bullfry turned back to Buck Ruxton – the insanely jealous Parsee medico, the buckets of bloodied water from sanguinous carpets said by the accused to have been caused by a finger he had cut on a fruit tin! The headless corpses ....

From Bullfry a suspirious snore escaped, and he tossed and turned on the Recamier uneasily as the bloody facts of *Rex v Ruxton* percolated slowly through a subconscious made perfervid after the double chocolate gelato for his lunchtime dessert.





## The Bar Book Club

Fred Uhlman was a Jew, a lawyer, a painter and a writer. He dropped law, and found himself a refugee in prewar England. Love came in the form of the daughter of Sir Henry Croft. 'Sir Henry, a passionate supporter of the British Empire who had conceived a hatred of all things German during the First World War, was less than pleased at acquiring a penniless German Jew as a son-in-law.'<sup>1</sup>

The couple was happily married 50 years, and anyway, Diana was great great great niece of Denman LCJ. Uhlman's legacy is the novella *Reunion*. Pinter wrote a screenplay and Koestler wrote in the 1976 edition's foreword:

When I first read Fred Uhlman's *Reunion* some years ago, I wrote to the author (whom I only knew by reputation as a painter) and told him I considered it a minor masterpiece. The qualifying adjective needs perhaps a word of explanation. It was meant to refer to the small size of the book, and to the impression that although its theme was the ugliest tragedy in man's history, it was written in a nostalgic minor key.

Koestler was spot-on, and the book and one of Katherine Mansfield's short stories were the end for the club's 2012.

First for the year of the snake and an Australian election year? What better than an enjoyable poke at village politics? JK Rowling's *The Casual Vacancy* was a good tale with good writing, although in need of some severe editing. The two recent detective novels have been well-received, so a return visit will be in order.

The club read Nicole Moore's *The Censor's Library* and Janet

*For our Christmas dinner, we returned to an American male, David Foster Wallace, Consider the Lobster. I thought the collection in which this essay was found was some of the best writing I have seen. I was alone, and most of us had the crab.*

Evanovich's *Notorious Nineteen* before embarking on Richard Beasley's *Me & Rory Macbeath*. Wikipedia has two persons named Richard Beasley. The other is a convicted murderer who lured persons to their deaths via an Internet classifieds site. Ours is a Sydney silk who has changed pace with his third book, earning strong reviews, such as this in the *Herald*:

A major departure from the comic energy and pace of his previous *Hell Has Harbour Views*, Beasley has worked here with a more muted palette, fashioning a sobering portrait of sacrifice and lost innocence, a look at the cost of standing up to those who abuse their power.

James Salter's *All That Is* fell on gender lines. I confess I was loyal to mine, enjoying the work muchly. That much admitted, there is more to commend in Roxana Robinson's 'The Cold Heart of James Salter':<sup>2</sup>

Why do we read great fiction? For many reasons, and one of them is the beauty of the prose. For that we read Salter: His grave and sonorous descriptions, of landscape, of weather and of sex, are almost unmatched. But another reason we read it is to expand our understanding of the human heart, and for that we need someone who offers an expansive vision, someone who understands the human heart in all its spaciousness and reach. Salter doesn't seem to be such a writer; he doesn't seem to understand the vastness and the heat

of the deep interior spaces. He moves only through the cold outer chambers, and, though beautifully observed, this is bleak territory, and what is written there is only half the truth.

After Nadeem Aslam's *The Blind Man's Garden*, the chastened males among us agreed to two great women writers, Margaret Atwood (*Oryx and Crake*) and Alice Munro (*The Bear Came Over the Mountain*).

For our Christmas dinner, we returned to an American male, David Foster Wallace, *Consider the Lobster*. I thought the collection in which this essay was found was some of the best writing I have seen. I was alone, and most of us had the crab.

Let's end with an extract from one of Wallace's other essays. First published in the *Observer* in 1997, its original heading was 'Twilight of the Great Literary Beasts: John Updike, Champion Literary Phallocrat, Drops One; Is This Finally the End for the Magnificent Narcissist?' It opens:

'Of nothing but me ... I sing, lacking another song.'

-John Updike, 'Midpoint,' 1969

Mailer, Updike, Roth-the Great Male Narcissists who've dominated postwar realist fiction are now in their senescence, and it must seem to them

no coincidence that the prospect of their own deaths appears backlit by the approaching millennium and on-line predictions of the death of the novel as we know it. When a solipsist dies, after all, everything goes with him. And no U.S. novelist has mapped the solipsist's terrain better than John Updike, whose rise in the 60s and 70s established him as both chronicler and voice of probably the single most self-absorbed generation since Louis XIV. As were Freud's, Mr. Updike's big preoccupations have always been with death and sex (not necessarily in that order), and the fact that the mood of his books has gotten more wintry in recent years is understandable-Mr. Updike has always written largely about himself, and since the surprisingly moving *Rabbit at Rest* he's been exploring, more and more overtly, the apocalyptic prospect of his own death.

*Toward the End of Time* concerns an incredibly erudite, articulate, successful, narcissistic and sex-obsessed retired guy who's keeping a one-year journal in which he explores

the apocalyptic prospect of his own death. It is, of the total 25 Updike books I've read, far and away the worst, a novel so mind-bendingly clunky and self-indulgent that it's hard to believe the author let it be published in this kind of shape.

I'm afraid the preceding sentence is this review's upshot, and most of the balance here will consist of presenting evidence/ justification for such a disrespectful assessment. First, though, if I may poke the critical head into the frame for just one moment, I'd like to offer assurances that your reviewer is not one of these spleen-venting, spittle-spattering Updike-haters one encounters among literary readers under 40. The fact is that I am probably classifiable as one of very few actual sub-40 Updike fans. Not as rabid a fan as, say, Nicholson Baker, but I do think that *The Poorhouse Fair*, *Of the Farm* and *The Centaur* are all great books, maybe classics. And even since *Rabbit Is Rich* - as his characters seemed to become more and more repellent, and without any corresponding indication that the author understood that they were

repellent-I've continued to read Mr. Updike's novels and to admire the sheer gorgeousness of his descriptive prose.

And so will gender continue to be heard in our chosen writers and in our own opinions of them. Meanwhile, Kalfas SC leads the club into its fourth year, and Lisa Allen keeps it organised. The rest of us thank them both. Being challenged for one's views over a red wine is an excellent antidote for advocatistical angst. All are welcome, with dates and works appearing regularly in *In Brief*.

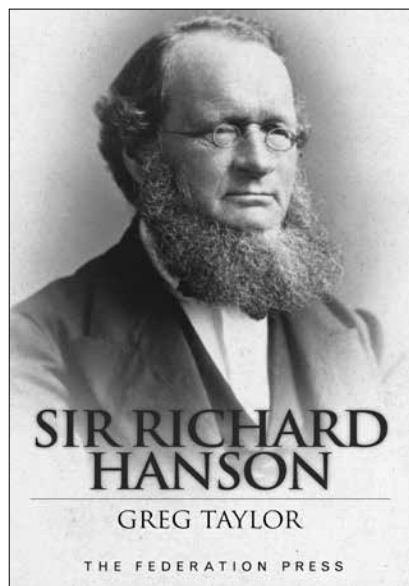
#### Endnotes

1. <http://www.ajr.org.uk/index.cfm/section.journal/issue.Jun09/article=2823> [accessed 24 Feb 2014].
2. [http://www.slate.com/articles/double\\_x/doublex/2013/06/james\\_salter\\_author\\_of\\_all\\_that\\_is\\_is\\_a\\_sexist.html](http://www.slate.com/articles/double_x/doublex/2013/06/james_salter_author_of_all_that_is_is_a_sexist.html) [accessed 24 Feb 2014].



## Sir Richard Hanson

By Greg Taylor | Federation Press | 2013



Any member of the Sydney Bar can be forgiven for thinking Dr Bennett is the sole conscience of that part of our collective mind which turns itself to the judicial lives of our colonial past. His monumental series is now well into double figures; a study of Sir Charles Lilley, premier and chief justice of Queensland, is slated for imminent release.

The publication of *Sir Richard Hanson*, premier and chief justice of South Australia, heralds the arrival of a new entrant in the field. Dr Greg Taylor is an associate professor of law at Monash, and *Honorarprofessur für Common Law und Rechtsvergleichung* at Marburg.

And what better evidence can we have of Taylor's expertise in matters South Australian, German and colonial than the words of Lord Walker of Gestingthorpe hearing a matter from the St Lucia Court of Appeal? As early as paragraph 2 of the Privy Council's opinion, reference is made to – and reliance laid upon – 'Professor

Greg Taylor, Is the Torrens system German? (2008) 29 JLH 253': *Louisien v Jacob (St Lucia)* [2009] UKPC 3 (9 February 2009). (And yes, according to the online report, an opinion of the council is now a judgment.)

Marburg is the home of Savigny. Among his many achievements was the legal teaching of the brothers Grimm. Whatever the ratio of their output, more relevant is the university's assertion that it is 'the oldest university in the world that was founded as a Protestant institution in 1527'.

Richard Hansen was schooled in Melbourn [no 'e' please, subed], Cambridgeshire, under the tutelage of the Rev Mr Carver. The school was one 'in which the sons of many opulent Dissenters received their education'.

But what to do afterwards? We are apt to recall the Tests Act in the framework of their injustice to Roman Catholics. It should also be recalled that Dissenters such as Hanson were unable to enter Oxford or Cambridge until 1871, unless they were willing 'to simulate membership of the Church of England'. It would be profane to suggest that simulation has proved the *sine qua non* of such membership on more than one occasion, but in Hanson's case, he was not willing to jettison his principles. Too young, perhaps.

Fortunately, then as now, study at a university was not a prerequisite to practice in the practical world of the law, and Hanson found himself articulated in 1822 for a period of six years. He took his

*Hanson arrived in Adelaide in mid-1846, aged 40. It must have been something of a thrill to walk for the first time down Hanson Street, the 1837 Street Naming Committee's recognition of his work in London for the proto-colony.*

exam before Lord Tenterden, the great jurist who had risen – as Taylor notes – from even greater obscurity than Hanson. Tenterden, it will be recalled, died in harness; his last words were 'and now, gentlemen of the jury, you will consider of your verdict'. A Dworkinian end?

While in London, Hanson was involved intimately with the Wakefield project soon to bear fruit in South Australia. However, he got no gig, and ended up, via Canada, in New Zealand, where his first boss turned out to be Colonel William Wakefield, Edward Gibbon's brother!

There is relatively scant material about Hanson's time in our neighbour nation. Taylor does some recreation and hypothesis, but his approach is a lawyerly one, sceptically questioning his own conclusions. This method is dryer than the methods chosen by many modern biographers, but one which is I think justified.

Hanson arrived in Adelaide in mid-1846, aged 40. It must have been something of a thrill to walk for the first time down Hanson Street, the 1837 Street Naming Committee's recognition of his

work in London for the proto-colony.

Hanson Street no longer exists, but Taylor informs us that it is the lower half of Pulteney Street, that is, I infer, the part running south from Wakefield Street. And there I was thinking you started with the premise that everything in Adelaide was named 'Torrens' and sought the exception.

I confess I can't find when the name was changed. As Pulteney Grammar School's site records:

The original trustees met in May 1847 to establish a school for the children of Adelaide and after 12 months, on Monday, May 29, 1848, Pulteney Street School opened its doors.

As only a school in the city of fine food can note:

Town Acre No 228 at the corner of Pulteney and Flinders Streets was purchased and a school building was erected immediately north of the present St Paul's Restaurant.

Flinders Street is to the north of Wakefield Street. We cannot therefore infer that the Street Naming Committee had resiled from one of its objects and deprived him of his fame.

It would have been to Hanson's limited satisfaction that 'The School was a foundation of the Church of England but was open to those of all faiths and denominations.'

I say 'limited', because Hanson's major political concern was that of state aid:

But Dissenters such as Hanson did not merely object to state support for religion in England on the grounds

that it went to the wrong type of religion; they were also committed to the view that state support was bad for religion, of whatever type, and thus the grant was to be resisted as not merely potentially, but actually dangerous.

### *Hanson's achievements included dealing with the notorious Justice Boothby.*

Jeffrey Smart, one of the school's students, abandoned Christianity while a chorister at St Peter's Cathedral. Hanson's own abandonment came at the end of his life, and was based on scholarship. Doubtless – or is that faithless? – Hanson's intellectual rigour founded his most well-known work, *Jesus of History*.

With the faith still held in earlier writings gone, what he 'was really writing [was] history rather than theology – indeed, the project of stripping away the accretions of faith and writing a secular history of Jesus' life might even be called anti-theology'. When we think of Barbara Thiering's *Jesus the Man*, we conclude 'Yay verily the life of the exegete never easy'.

Hanson's achievements included dealing with the notorious Mr Justice Boothby. For the many of us who have had to meet arguments about the illegitimacy of Australia, of the state, or of the court in which we are appearing, I set out for comfort a report of Hanson's arrival:

The Commission [of Hanson as Chief Justice] being read, Mr Justice Boothby made objection thereto, that the same had no legal validity,

and is void and of no effect, as being contrary to law. Mr Justice Gwynne declared his opinion to the contrary.

Whereupon Richard Davies Hanson, Esquire, claimed to give a judicial voice on the same question, to which Mr Justice Boothby objected and declared his opinion to be that he was not so entitled. Mr Justice Gwynne pronounced his opinion that Richard Davies Hanson, Esquire, was entitled to a voice in deciding on the validity of the Commission he had laid before the Court.

Thereupon Richard Davies Hanson, Esquire, declared his opinion in agreement with Mr Justice Gwynne on both questions, and in opposition to the opinion of Mr Justice Boothby, and claimed to preside over the Court by virtue of the Commission he had laid before the Court.

Mr Justice Boothby gave his opinion that Richard Davies Hanson, Esquire, had no right so to preside. Mr Justice Gwynne declared his opinion to the contrary, and that Richard Davies Hanson, Esquire, had such right.

Mr Justice Boothby declared his intention to appeal to Her Majesty in Council on each of the several matters whereon he had declared an opinion contrary to that of Mr Justice Gwynne.

So there. By the bye, was either Mr Justice Gwynne or the reporter correct to nominate Hanson as 'Esquire'? By the time the subject of the second paragraph came to pass, was he not, too, 'Mr Justice'?

And so with pre- and post-nominals in question, we close with reference to knighthoods, an issue made relevant by

recent amendments to Letters Patent of our sovereign queen countersigned by Prime Minister Whitlam in February 1975.

Hanson's much-loved wife Ann was herself an émigré from New Zealand. There, as a 15-year-old member of a very poor family, she may have fenced some shoes stolen by her sister. She was not jailed, but a report of the event led some 15 or 20 years later to the Anglican Archbishop of Adelaide asking the governor to exclude Mrs Hanson from a ball.

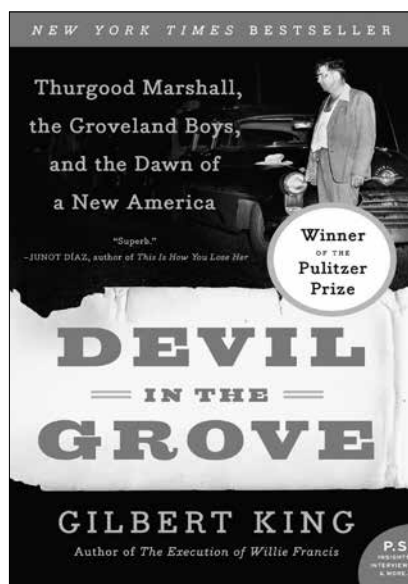
The governor, possibly not at one with this expression of Christian forgiveness, disagreed. However, his own recommendation of a gong for Hanson got nowhere. The end of the story is the real delight. Taylor records that Hanson, doubtless with the governor's encouragement, applied directly to the Colonial Office, with the result that it had to put up, and procure the knighthood, or shut up but – a bureaucrat's nightmare – do so with an explicit and public snub. Hanson got his gong.

I enjoyed this study. It reminds us that the image of superfluous English and Irish barristers flooding the colonial bars is at best misleading, and that many many fine legal minds also had wide life experiences elsewhere in the Empire before taking up the posts for which we now remember them. In Australia, Francis Forbes is only one among many examples, and now we have an excellent life of another.

**Reviewed by David Ash**

## Devil in the Grove: Thurgood Marshall, the Groveland Boys and the Dawn of a New America

By Gilbert King | Harper | 2012



*Devil in the Grove*, awarded the 2013 Pulitzer Prize (General Nonfiction) is the dramatic account of a little known but very significant sexual assault case that

unfolded in Florida in late 1949.

In 1949, Lake County, Florida was a dangerous place to be a young black man. Segregationist 'Jim Crow laws' ensured the continued suppression of black Americans. The Ku Klux Klan was active, well organised and well represented in every echelon of public life – the governor of Florida, Fuller Warren, was a Klan member prior to taking office, as was local sheriff Willis V McCall, a man renowned for his brutal treatment of blacks. The lynching of black men and boys was common, as was the rape of black women and girls by white men. During his 28-year tenure as sheriff, Willis V McCall was investigated numerous times for civil rights violations including the abuse and murder of black prisoners.

This was the South of *To Kill A Mockingbird*, where white juries tried black defendants on racially motivated charges in segregated courts.

In New York, the National Association for the Advancement of Coloured People (NAACP) was making progress toward securing greater equality for African Americans. The NAACP's star attorney, Thurgood Marshall ('Mr Civil Rights') was making his name mounting constitutional challenges to Jim Crow laws, culminating in *Brown v Board of Education of Topeka*, 347 U.S. 483 (1954), which led to the desegregation of public schools across the United States and the eventual dismantling of institutional segregation through the *Civil Rights Act* 1964 and the

*Voting Rights Act 1965.*

Marshall was later to become the first African-American US solicitor-general and the first black appointee to the US Supreme Court.

*This was the South of To Kill A Mockingbird, where white juries tried black defendants on racially motivated charges in segregated courts.*

In addition to its constitutional advocacy, the NAACP represented black defendants in criminal trials where it considered that the charges were racially motivated. Part of the NAACP's strategy was to demonstrate the impossibility of a black defendant receiving a fair trial in certain states. Marshall was an inspired criminal lawyer who understood the importance of publicising the systemic inequality and racial prejudice routinely suffered by black defendants in criminal trials in the South.

When a 17 year old white girl claimed she was raped by four black men in Lake County, Sheriff McCall was determined to administer swift Southern justice. He arrested three young men later that day - Sammy Shepherd, Walter Irwin and Charles Greenlee. A few days later, the fourth suspect, Ernest Thomas, was shot in the back by a posse led by Sheriff McCall as Thomas 'evaded arrest'. The three remaining suspects became known as 'the Groveland Boys'.

On news of the arrests, a lynch

mob of 500 men led by the Ku Klux Klan formed outside the police station. They swept through the town, shooting at and burning the homes of black residents. This marked the start of the 'Florida Terror' - six days of uncontrolled rioting and violence against blacks ultimately quelled only through the intervention of the National Guard.

*Devil in the Grove* recounts the involvement of Marshall and the NAACP in the trial and appeal of the Groveland Boys. King, a legal historian, obtained access to unedited and previously unseen FBI files on the case and to the tightly guarded files of the Legal Defense Fund of the NAACP. These extraordinary sources are skilfully woven together by King to create a gripping and meticulously researched account of the NAACP's campaign to seek justice for three young men in America's heartland of bigotry and racial hatred.

One of the many fascinating aspects of the book is King's detailed description of the legal strategies developed by the defence team at trial and on appeal and his insightful description of the trial process, drawing on transcripts and the first hand accounts of lawyers, journalists and witnesses. His description of the police and prosecution treatment of the three accused, both prior to and during their trial, is shocking.

King adroitly contextualises the trials within the broader battle for racial equality fought by Thurgood Marshall and his colleagues at the NAACP, gracefully weaving in absorbing accounts of the

constitutional cases pursued at the time by the NAACP. King also examines in detail state and federal government responses to the trial, including ongoing FBI suspicions that the NAACP was a communist organisation and Thurgood Marshall's efforts to dispel those rumours. Through his examination of media coverage of the case, King reveals the true horror of the environment in which the trial was conducted - on the day the jury was empanelled the major local newspaper ran a front page colour cartoon depicting three electric chairs and the caption, 'No Compromise'. One of the many interesting themes in the book is the shift in the attitude of the local media toward the accused men and their lawyers as the gross corruption of the police and prosecution became clear.

Tightly written and suspenseful, King combines historical accuracy with well-drawn character studies to create a fascinating insight into this horrifying chapter of American legal history. Every player in this tragic story is vividly brought to life by King - the sordid and corrupt Sheriff McCall; the dishonest State Prosecutor Jesse Hunter; the racist 'whittlin judge' Truman Futch; the vitriolic local reporter who fanned the flames of racism in her editorials; and most importantly, the heroic lawyers of the NAACP who risked their lives to represent the Groveland Boys.

The story of how this small group of underfunded lawyers played a pivotal role in American history is inspiring. *Devil in the Grove* is essential reading.

**Reviewed by Sally Dowling**



# For the True Believers: Great Labor Speeches that Shaped History

Troy Bramston (ed) | Federation Press | 2013



First, the basics. *For the True Believers: Great Labor Speeches that Shaped History* is an anthology of speeches made by leading figures in the Australian Labor Party. The book includes eighty-nine speeches, reproduced in whole or in part. The speeches are organised in seven parts: Reconciling Australia; Reform, Progress and the Future; the Campaign Trail; History, Tradition and Ideology; War and Conflict; Australia and the World; and Victory, Defeat, Love and Loss. The earliest speech in the anthology is one made in the NSW Legislative Assembly by George Ryan on 16 July 1891 ('to make and unmake social conditions'), when a Labor electoral league had – for the first time – gained seats in an Australian parliament. The most recent are speeches by Julia Gillard, made in 2009 and 2011.

Within that span, the speeches have a diverse subject matter. One little gem which Mr Bramston has retrieved from the NSW

ALP's archives is a speech by Premier Joe Cahill at the Sydney Town Hall on 15 June 1957. In that speech, at a NSW ALP Annual Conference, Mr Cahill – a man who had never seen an opera, a ballet or a symphony – spoke forcefully against a resolution opposed to the building of the Sydney Opera House and the 'homes before opera' cry then resounding.

There are speeches that call for change, action or steadfastness in response to most of the great issues that have faced the nation. The challenges posed by free trade or protectionism, world war, conscription, the White Australia policy, the equality of men and women, reconciliation between Aboriginal and non-Aboriginal Australians, native title, Australia's place in the world and her 'great power' alliances, the dissolution of the Communist Party of Australia, the Vietnam War and the 1975 Constitutional crisis, are all addressed in the course of this anthology. There are speeches relevant to Labor's great schism of the 1950s, the Split.

Mr Bramston, the editor of the collection, is an opinion writer for *The Australian* newspaper and was the principal speechwriter in 2007 for Kevin Rudd. Mr Bramston introduces each speech with a short explanation he provides of the context of the speech. These short explanations are usually informative and, on occasion, rather evocative. Gough Whitlam's speech at Wattie Creek on 16 August 1975 is introduced with:

At Wattie Creek, as the sun radiated its warmth from above, Prime

Minister Gough Whitlam and Gurindji Chief Vincent Lingiari stood together on the red earth under a clear blue sky. Whitlam bent down and scooped up a handful of dirt and then poured it into Lingiari's hand, symbolising the transfer of that land into traditional ownership.

Sometimes the editor contrasts the immediate reception or contemporary assessment of the particular speech with its subsequent, different reception or assessment.

There is a foreword by leading ALP speechwriter Graham Freudenberg, as well as both a preface and an introduction by Mr Bramston. The theme of these three pieces seems to be that speeches are of particular significance to the ALP as a political party with a 'continuing quest for practical idealism' (Freudenberg) and as a party which agitates for change.

What then might be the relevance of 'political' speeches to members of the Bar Association? Perhaps there is none. Mr Bramston quotes from an interview with Bob Hawke conducted for this book. Mr Hawke said that speeches in parliament did not matter because the decisions had already been made in the government party room. Mr Hawke contrasted the charade (his word) of parliament with his previous experience as an advocate in industrial tribunals: 'in my experience as an advocate, I was used to a situation where the outcome depended on the quality of your argument.' Nonetheless, looking at some of the 'political'



speeches collected in this work, it is hard not to appreciate some fine examples of the art of persuasion and to see how the skilful use of phrase, rhythm and style, can be employed to change minds.

Three of the speeches in the anthology were, for me, particularly impressive.

There is Gough Whitlam's speech in Melbourne on 9 June 1967 at the Victorian ALP State Conference ('Certainly the impotent are pure'). The speech is a bold, unvarnished attack against members of Mr Whitlam's audience, calling for change in the federal ALP's organisational structure and urging the ALP to be a party of national government and legislative change rather than ideological purity. The arguments wielded are wide-ranging. What is striking about the speech is that it is so richly-laden with technique and the devices of the art of persuasion. Among other devices, there is epiphora with tricolon ('The party was not conceived in failure, brought forth by failure or consecrated to failure.') that would be at home in Latin or Classical Greek literature. There is the use of a version of anthypophora or erotoma ('Some think that ... If this view is meant to be complimentary to me, it is a compliment I refuse to accept ...' and 'So let us have none of this nonsense that defeat is in some ways more moral than victory.') that has strong resemblance to the style adopted by Paul, in articulating his arguments in his first century AD epistles to the churches of Greece and Asia Minor.

Next, there are twin speeches by Billy Hughes in the House of Representatives on 27 and 28 May 1909. Mr Bramston describes Hughes' presentation:

Politicians and journalists raced into the chamber to watch Hughes in full flight. Few had heard anything like this before. The face of Hughes was red hot with anger. The veins in his hands were bulging. His mind was calculating the most venomous invective to unleash. His voice was high-pitched, shrill and excitable.

These two speeches involved a denunciation of Alfred Deakin who had withdrawn support from Fisher's Labor government and created a new Fusion Party, thus sweeping Deakin into the premiership for the third and final time. Hughes' language was searing and pitiless:

... I heard from this side of the House some mention of Judas. I do not agree with that; it is not fair – to Judas, for whom there is this to be said, that he did not gag the man whom he betrayed, nor did he fail to hang himself afterwards.

To realise this noble ideal he has assassinated governments, abandoned friends to the wolves, deserted principles and deceived the people ... He will lead any party – he will follow none! He is faithful to only one thing – himself.

This speech by Hughes, the former tinker, union leader and barrister, was made at a time when the standing orders in the House of Representatives prohibited the reading of prepared speeches. It is a speech memorable for its delivery, in its use of satire and hyperbole and it is as coruscating as any

of the famous speeches of Cicero against Catiline or Verres, or Charles James Fox against George III. Reflecting on it, a question arises. How important is the truth or accuracy of a speech's content in persuading the listener? Was Hughes' attack on Deakin so effective in damaging Deakin's credibility (as it was widely-acknowledged to have been) because there was, at very least, some truth in Hughes' brutal words?

The third speech I want to highlight is a speech by Paul Keating to the Dail Eireann, the Irish Parliament, in Dublin on 20 September 1993. Towards the beginning of the speech, Keating says:

It would not surprise me if you are thinking – here we go again, he is going to tell us about our Irish past or our literary tradition; he is bound to quote Yeats at us; tell us about 1798 again or give us his views on our character. I would dearly like to spare you this and I will.

The contrast between this speech and the speech of Julia Gillard to the US Congress on 9 March 2011 is marked:

I firmly believe you are the same people who amazed me when I was a small girl by landing on the moon. On that great day I believed Americans could do anything. I believe that still. You can do anything today.

Having introduced his speech by telling his Irish audience what he was not going to do, Keating then proceeds to deliver a speech which is effortless in its prose and inspiring in its sentiment. The speech celebrates much

of what is the best of Australia. Keating depicts the great promise of Australia and the opportunity and liberty which Australia has delivered. Keating celebrates the 'lesson of the emigrant' while at the same time informing his audience that the great casualty of immigration was Aboriginal Australia: 'the destruction of this extraordinary ancient culture, and the brutality and injustice inflicted on the first Australians can never really be set right.' The speech simply is a thing of beauty.

There are many other memorable

speeches in the anthology. Western Australian Senator Dorothy Tagney's speech to the Senate on 24 September 1943, with its optimism for, and vision of, post-war Australia, the power and logic of 'Doc' Evatt's 'No man should be deprived of civil rights' speech against the bill to dissolve the Communist Party, Keating's splendid eulogy to the Unknown Australian Soldier at the Australian War Memorial on 11 November 1993 and several famous speeches by John Curtin and Ben Chifley, are among the highlights.

It is hard not to notice too, in our age of individualism, how the early speeches by leading Labor figures appealed so frequently to collectivism, and the values of community and the social.

The book is most likely to be enjoyed by those with an interest in the techniques of persuasion, Australian history or the Australian Labor Party.

**Reviewed by MR Tyson**

## The Whitlam Legacy

Troy Bramston (ed) | Federation Press | 2013



The second book which I have been asked to review is *The Whitlam Legacy*. It features thirty-eight essays about Mr Whitlam and his government. Among other things, there are essays about the Whitlam government's political style, its relationship with key

institutions, and its achievements in discrete areas of public policy. There are other chapters which look at the legacy of the Whitlam government. Gerard Henderson, Bob Carr, Frank Brennan, Susan Ryan, Peter van Onselen and Malcolm Mackerras are just some of the contributors. Mr Whitlam has written a foreword to the volume.

There has been so much written about the Whitlam prime-ministership and Mr Whitlam himself that I am not entirely convinced about the need for this book. However, I did enjoy reading Michael Kirby's chapter 'Gough Whitlam: In His Father's Shadow' which surveys the legal career of Gough Whitlam's father, Fred Whitlam, a distinguished lawyer and dedicated public servant. Fred Whitlam, *inter alia*, served as Commonwealth

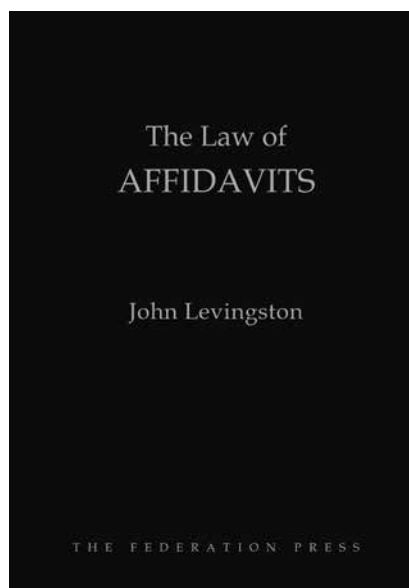
crown solicitor for 12 years from December 1936. Michael Sexton, then an adviser to the Attorney-General Kep Enderby, has contributed an intriguing chapter: 'The Dismissal'; which starts from about 8.00am on 11 November 1975 and then describes from Mr Sexton's perspective, how the events of that momentous day unfolded.

This book will be most appreciated by those unfamiliar with the Whitlam years or those who have an interest in revisiting that time. It is a volume which is fairly comprehensive in its coverage of its topic and does offer some fresh perspectives.

**Reviewed by MR Tyson**

## The Law of Affidavits

By John Levingston | The Federation Press | 2013



*The Law of Affidavits* states that its object is to 'draw together the sources of the law of affidavits and to identify the many elements which together should result in an affidavit of an acceptable standard, and assist the inexperienced practitioner in reaching an appropriate standard'.<sup>1</sup>

The poorly prepared affidavit is an all too common phenomenon and the aim of improving standards is admirable. However, it is an ambitious task for a book, considering that it is often a lack of care and adequate preparation, rather than a lack of knowledge or experience, that causes the most egregious problems with affidavits. A practitioner sufficiently assiduous to consult

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a book on the law of affidavits is unlikely to be among the worst culprits when it comes to these abuses.

The challenge of raising standards is heightened by the ease with which one can set out the principles of good affidavit drafting, which stands in stark contrast to the difficulty of putting those principles in practice. It is straightforward to advise practitioners to avoid problems such as a story that is 'too long and complicated' or prose that is 'obscure and obtuse'.<sup>2</sup> However, even the most experienced practitioner will find themselves falling foul of such rules, albeit unintentionally.

Nonetheless, the book goes some way to pulling together the various tips, advice, rules and principles that provide a framework for drafting a good affidavit.

The book has three parts. The first part is an eclectic discourse on the history, law and practice of affidavits, covering everything from the earliest uses of affidavits (some 800 years ago) to whether a requirement in the rules for clear, sharp and legible contents implies a font of not less than 12-point. The topics range from the basics (Chapter 2, What is an affidavit?) and a range of practicalities (use, form, oaths),

*Of the three sections, the second is basic but comprehensive and is by far the most useful aspect of the book.*

to the treatment of an affidavit in court (cross examination, objections). Those topics are dealt with at varying levels of detail – to illustrate, the chapters range from half a page in length (Chapter 23, False statements and contempt) to some fourteen pages setting out how an affidavit is used (Chapter 6, Use of an affidavit).

The second part is entitled 'Jurisdiction Summaries'. It sets out the rules, and detailed requirements, that apply in each of the High Court, Federal Court, Federal Circuit Court, each of the state supreme courts and New Zealand.

The third part consists of precedents, listed in alphabetical order, starting with 'Abbreviations' ('In this affidavit I will refer to [long form] as [abbreviation].') and ending with 'Statement of truth' ('I believe that the facts stated in this witness statement are true'.) As is evident from those two examples, not all of the examples are 'precedents' per se but rather provide illustrative examples of language or phrasing to use in particular contexts.

Unfortunately, the tome does not have an index. While the book is sufficiently short to flick through

quickly, a short index would have made the book significantly more usable for a practitioner, who may wish to look specifically for topics of concern (for instance dealing with bankruptcy rules or interlocutory matters).

Of the three sections, the second is basic but comprehensive and is by far the most useful aspect of the book. It sets out in comprehensive lists all of the relevant sources of rules in each of the different states, the Commonwealth and New Zealand. It also sets out the detailed requirements for form, style, content etc. Thus, a practitioner drafting an urgent affidavit in a new or different jurisdiction can look quickly at this part to determine details ranging from the correct spacing or font to whether amendments or alterations are permitted (for instance, in South Australia, alterations are not permitted after the affidavit is certified,<sup>3</sup> whereas in Queensland an alteration is permitted where the witness initials it.<sup>4</sup>) It may be that this section is, on its own, of sufficient practical value to justify its acquisition, at least for the interstate practitioner.

In contrast, the precedents in the third section are of limited usefulness. Some of the precedents are extremely basic (for instance, a 'footer' precedent advises that the words 'Deponent:

.....' and 'Witness: .....' can be added to the foot of each page of the affidavit by using a word processing program).<sup>5</sup> Other precedents are so specific as to be of no or very limited utility (for instance, a precedent setting out the words that can be used to verify a photograph taken by a photographer).<sup>6</sup> Affidavits for default judgment and security for costs are generally helpful in setting out the basic information that should be present in such documents, and may serve as useful reference points for the sole practitioner or small firm that does not have ready access to more sophisticated precedents.

However, the first part of the book suffers from a number of difficulties, not the least of which is the disjunct discussed above between, on the one hand, a focus on rules and, on the other, the very practical problems that plague the affidavit drafter (or reader). Little thought appears to have been given to the actual audience – thus, for instance, the book explains to the reader that there are 'two types of pleading'<sup>7</sup> and that '[k]nowledge of the relevant law includes the law and cases concerning the cause of action, issues in dispute, and general common law rules...'.<sup>8</sup> Neither gives any insight into the actual challenges of drafting affidavits – the former because it is too basic,

*The book is not an essential text, and suffers from the very practical nature of the subject matter.*

and the latter because it is too high level. Of course, one must know the substantive and procedural rules. Yet knowing that does not bring a practitioner a step closer to applying that substance or procedure correctly.

The book is not an essential text, and suffers from the very practical nature of the subject matter. However, there are aspects of this book – particularly the second section – that are educative or useful for a ready point of reference.

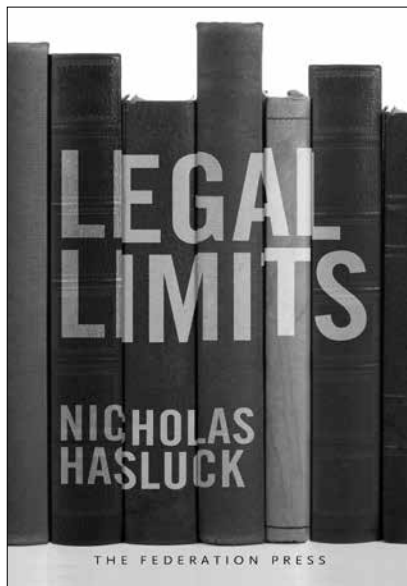
**Reviewed by Natalie Zerial**

#### Endnotes

1. Levingston, J., *The Law of Affidavits* (Sydney, The Federation Press, 2013), p.2.
2. *Ibid.*, p.28.
3. *Ibid.*, p.240.
4. *Ibid.*, p.233.
5. *Ibid.*, p.289.
6. *Ibid.*, p.299.
7. *Ibid.*, p.10.
8. *Ibid.*, p.69.

## Legal Limits

By Nicholas Hasluck | Federation Pres | 2013



In the opening chapter of his latest book, Nicholas Hasluck, a former judge of the Supreme Court of Western Australia, remarks that our legal system depends upon stories being well told. For this reason, among others that Hasluck goes on to explore in the chapters that follow, literature has much to teach lawyers, and especially advocates.

*Hasluck reflects on the lessons a lawyer can draw from literature.*

Hasluck has been exploring the relationship between law and literature for some time, both in his works of non-fiction and in his novels. Throughout this book, which might most accurately be described as a collection of essays, Hasluck reflects on the lessons a lawyer can draw from

literature. However, the book also has the air of a memoir about it. While Hasluck touches on the nexus between law and literature in each chapter, he also covers an eclectic array of other subjects, including the question of mediation and its place within our legal system, the preventive detention of sex offenders, the dismissal of Gough Whitlam, his own writing, and the writing of others.

In Chapter 1 ('Legal Limits'), Hasluck demonstrates that the insights offered by fiction to those working within the legal system are many. It is a rich area for exploration and Hasluck paints with a broad brush, briefly examining the works of a number of authors, including Borges, Kafka, Orwell and Dickens. Perhaps the most important insight which Hasluck identifies in this chapter is that literature, in casting light on the complexities of any given contentious situation, reminds us of the importance of paying attention to the individuality of litigants' stories. It is our task as advocates, says Hasluck, to ensure that the 'small, personal voice of the litigant' is heard and understood.

Chapter 2 ('Thought Crimes in Post-colonial Literature') is a discussion of how fiction illuminates our understanding of human rights, via an examination of a selection of post-colonial novels. Again, Hasluck casts his net wide. Adopting a freewheeling, discursive style, Hasluck commences his survey

with Alan Paton's *Cry, The Beloved Country*, a novel written about the injustices of South African society in the 1940s, which was published immediately prior to the passage of laws that institutionalised Apartheid in 1948. Hasluck comments that Paton's novel not only provides a graphic illustration of the workings (and shortcomings) of the legal system but also brings a 'sense of reality to the abstractions known as human rights'. More recent works by South African novelists are discussed, such as JM Coetzee's *Waiting for the Barbarians*, an allegorical novel about imperial power and Apartheid (published in 1980), and Shaun Johnson's *The Native Commissioner* (published in 2006). Hasluck then goes on to examine the works of post-colonial writers from other areas, including Australia's Peter Carey and Kate Grenville.

The chapters that follow are more memoir and political commentary than literary analysis. In Chapter 4 ('Other Customs'), Hasluck reminisces about a trip he and his wife took to Peru. In Chapter 6 ('Seeing What Happened'), Hasluck shares some of his experiences and observations from his time spent as president of the Equal Opportunity Tribunal of Western Australia. Chapter 8 ('Should Judges be Mediators?') is a confined inquiry into the increasing popularity of mediation and its place within our legal system, in which Hasluck canvasses other extra-judicial writing on this topic. Chapter 9



*... the book is a collection of reflections and reminiscences from a life cunningly – and successfully – spent in both disciplines.*

(‘Beyond the High Court’) is, in essence, a review of Ian Callinan’s first novel *The Lawyer and the Libertine*, published in 1997.

It is in Chapter 10 (‘The Whitlam Dismissal Revisited’) where Hasluck is at his best. In this chapter, Hasluck explains why he wrote his most recent novel, *Dismissal*, a fictionalised account of the constitutional crisis preceding Gough Whitlam’s

dismissal as prime minister. Even more interestingly, Hasluck uses this chapter to explain the choices he made as a novelist in recounting a story already so familiar to Australians. With a light and endearingly modest touch Hasluck reveals aspects about his personal history that led him to write *Dismissal*. The story behind Hasluck’s decision to tell this particular tale makes for fascinating reading in and of itself.

In Chapter 9, Hasluck admits that Callinan’s *The Lawyer and the Libertine* ‘passes the essential test...of being readable.’ Happily, *Legal Limits* also passes that essential test. But the book is not what it purports to be. Regarded as a whole, rather than being a discussion about the relationship between law and literature, the book is a collection of reflections and reminiscences from a life cunningly – and successfully – spent in both disciplines.

**Reviewed by Juliet Curtin**

## Crossword solution



## Queensland Legal Yearbook 2012

John McKenna and Helen Jeffcoat (eds) | Supreme Court Library Queensland | 2013

From 2005, the Queensland Supreme Court Library published its History Program Yearbook. 2012 marked a consolidation with the publication of a Legal Yearbook.

Of course, the Year Books – two words, capitalised – have a special meaning for common lawyers. They are the books of reports from the English courts published annually from the reign of one of the first Edwards (I or II?) to the reign of Henry VIII. The Selden Society has a particular interest in publishing and consolidating them: [www.law.harvard.edu/programs/selden\\_society/pub.html#ovps](http://www.law.harvard.edu/programs/selden_society/pub.html#ovps).

The yearbook – one word, lower case – is a recent phenomenon, the annual publication of a society, school or suchlike. It has a particular relevance for final year school students.

The yearbook thus described is under threat. In our world, constant updating is not an Orwellian dictate from above, but the choice of us all. What is more suspicious than an out-of-date blog or homepage?

But for the more discriminating – nay, the more concerned – among us, constant updating is not an unalloyed good. There is purpose and importance in a regular snapshot. It gives us reference, it gives us pause, it allows us to reflect, and most importantly it gives us perspective.

These things understood, the yearbook is not an anachronism. To the contrary, it is a map of past and present with an eye to the future, and this particular yearbook

is self-consciously and successfully a very specific map.

The theme is the creation of the new (state) courthouse in Brisbane. It draws upon all perspectives: the chief justice, the architect, the committee members, the librarians, the curator, the person responsible for the safe transport and custody of detainees, the persons responsible for the move itself.

I was particularly drawn to the essay by John McKenna QC, 'The Courthouse in Operation – A Perspective from the Bar'. The author is optimistic and frank, at pains to spell out what he calls 'seven main topics of debate', two of which are complements as much as opposites. The first – a classic, if not conservative, view – is that '[f]or some, it is a matter of regret that the external artwork appears to serve only an aesthetic role and that the familiar statue of Themis has been relegated to a position of non-importance'. The second is a delicate rhetorical question as to whether the naming of the courthouse for a sovereign, no matter how well-loved, is not 'an unusual choice in modern Australia'. The author duly notes that controversies of this nature were inevitable and that the building is a significant improvement upon its predecessor in almost all respects.

There is a comprehensive collection of speeches and lectures as well as tributes and ceremonies. From experience as a member of the editorial committee of this journal, I have become aware

of how important a permanent and consolidated record of these things – the changing of the guard – are to all members, and not just the old.

There is then a large number of book reviews, reviews written by notable practitioners. If the most recent Queensland appointment to the High Court is finishing a review of *The Byers Lectures 2000–2012* with the admonition that any practitioner 'interested in constitutional law, administrative law or advocacy should read this book: otherwise he or she may be left behind', you are getting a hint worth your consideration.

Finally, there is a lengthy section headed 'Legal Personalia', covering not only the judiciary, the state's law officers and the professional associations, but appointments and admissions and, I think vitally, the various law schools. I suppose this information can be gleaned from the relevant body's website, but this for me is a real example of perspective. I cannot count the number of times over my years of practice where for some professional reason or merely – and is it 'merely'? – because I am curious, I have wanted to know something particular about the 'who?' or the 'when?' This is the sort of publication which both whets and sates.

This book is a valuable and necessary record for Queensland practitioners. Outsiders will benefit from it too. For details about this publication, go to [www.sclqld.org.au/publications](http://www.sclqld.org.au/publications).

**Reviewed by David Ash**