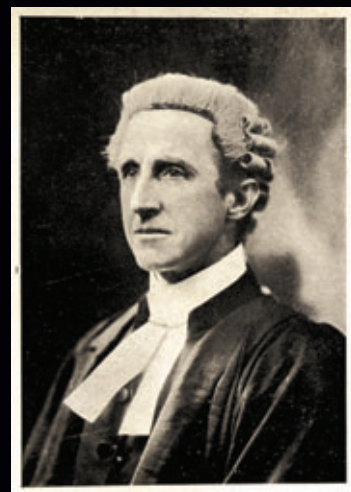


THE JOURNAL OF THE NSW BAR ASSOCIATION

| SUMMER 2009/2010

# barnews



## The Mahatma and the High Court judge

The missing constitutional cog:  
the omission of the Inter-State Commission

Shadow Attorney General Smith on sentencing

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# barnews

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Cover: Indian leader Mahatma (Mohandas) Gandhi, circa 1948. Photo: Topical Press Agency / Getty Images. AB Piddington KC. Photo: State Library of NSW

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### Bar governance

As this issue is put to press, a new Bar Council has been elected. There is an unwritten convention that, although members of the council are elected on an annual basis, members of the executive of the council, or at least the president and vice-presidents, hold office for two years assuming their re-election to the council, which is invariably the case.

So long as the individuals concerned are willing to do so, that may well be a good thing in terms of continuity of leadership although if there is a 'progression' from junior vice-president to senior vice-president to president, as also seems to be a convention, this argument may be doubted. On the other hand, one's impression is that the burdens and workload of these three most senior positions within our governance structure are incredibly onerous and call for a massive contribution of time from (and income foregone by) the individuals concerned. Whilst the high degree of public service which such office-holding entails is laudable, it may be more – and even far more – than it is reasonable to expect. The long 'lead time' in relation to senior positions may operate to deter highly capable members of the Bar Association who may otherwise have a great deal to contribute and otherwise be disposed to offer themselves for service from seeking election. The current

conventions may also operate to restrict the inflow and turnover of 'fresh blood' and ideas on bar councils.

It goes without saying that none of these thoughts represents a criticism, express or implied, of any current or past senior office holders of the Bar Association; on the contrary, I hold them in the highest esteem and admire enormously their dedicated contribution and public service. That having been said, however, the growth in both the size of the association and the breadth of the tasks and corresponding time involved which members of the executive of the council appear to have to devote to the association at the very least calls for some reflection and questioning of the convention that the three most senior offices of the association are held for two year periods rather than one year, which is the term of office of the president of the Law Society of New South Wales, for example.

*The long 'lead time' in relation to senior positions may operate to deter highly capable members of the Bar Association who may otherwise have a great deal to contribute and otherwise be disposed to offer themselves for service from seeking election.*

### This issue

I am pleased to be able to thank the shadow state attorney general and member of the Bar Association, Greg Smith SC, for his excellent and politically courageous but eminently sensible contribution to the issue of sentencing and so-called 'law and order auctions'. The *Bar News* policy has been to invite contributions from both sides of politics and previous issues have seen the publication of contributions from the current state attorney and his predecessor, as well as contributions from Commonwealth attorneys from both the Coalition and Labor sides of politics.

This issue includes many useful notes on recent cases and current developments

and I thank the respective authors – typically younger members of the Bar – for their contributions. Youth is balanced by the sage reflections of Ian Barker QC in his opinion piece, styled 'A geriatric barrister's yearning for the good old days'. (Barker was never a member of the late Paul Lynham's band 'Pace-maker and the Gerries'.)

This issue also continues our commitment to the exploration of matters of historical legal interest with what are, in one sense, companion pieces. David Ash has prepared the third of his features on members of the NSW Bar to have been appointed to the High Court, this time focussing on AB Piddington, the judge who famously never took up his seat but who is, nonetheless, a figure of significant historical interest. It is a superb and fascinating piece of work. (For Ash's earlier portraits of Barton and O'Connor, see *Bar News* Summer 2007–2008 and Summer

2008–2009 respectively). Piddington followed his resignation from the High Court by accepting an appointment as the inaugural president of the Inter-State Commission, a body few will have heard of but whose existence is mandated by section 101 Commonwealth Constitution. I have taken the opportunity to reprise research I undertook into this body while an economic history student (some time ago) which is reproduced in this issue, in edited form, under the heading 'The Missing Constitutional Cog – the Omission of the Inter-State Commission'. The third substantive article is Justice Allsop's recent paper entitled 'Judicial Disposition of Cases', which considers and questions the manner in which technical expert

evidence is received and assessed. In this context, the juxtaposition of this article with the piece concerning the Inter-State Commission is deliberate, as the latter body was intended to have been an economic High Court expert in the determination of, inter alia, issues of interstate protectionism.

The Hon Leslie Katz SC continues to muse on literary allusions in Australian judgments, in this case tracking Sherlock Holmes's appearances in Australian law reports. Ian Temby QC draws on

his own forensic techniques to identify Australia's first civil litigants. Members can also catch up with a host of judicial appointments and also read of the honour conferred on Bret Walker SC through the award of the Law Council's Presidential Medal. Quite apart from being the most outstanding appellate lawyer in the country, dominating the High Court Bar across both civil and criminal matters, he has made unstinting and herculean contributions to the governance of the profession both at a state and national level. His award is richly deserved.

#### Acknowledgements

I thank Anna Katzmann SC for her support of *Bar News* through the two years of her presidency. I also thank this year's *Bar News* committee which has shared the heavy load of producing what I hope has become a very high quality publication with a mix of the current, the interesting, the practical, the historical, the personal and the social life of the vital institution that is the New South Wales Bar.

Andrew Bell SC

Editor



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I have come to the office of president with a degree of trepidation. This is in no small part due to the outstanding work done by my predecessor. I do not know if I will be able to emulate her but I certainly will try.

First and foremost I would like to express my thanks both personally and on behalf of the bar to Anna. Anna worked tirelessly during her term as president for all members of the bar. She will be particularly remembered for the work she did in bringing forward the physical and mental stresses inherent in this profession and to encourage members to deal with them rather than to pretend they did not exist. This has led to a number of barristers receiving prompt assistance for problems which may otherwise have overcome them and helped them to live their lives and carry out their profession in a happy and productive manner. She had one failure – despite her best endeavours she was unable to get me to attend a yoga class.

As you are all aware Anna, along with John Nicholas and David Yates, has been appointed to the Federal Court. The appointments are all truly deserved and will relieve the pressure on an overburdened court.

The other reason that I have some trepidation in assuming the role of president is that I believe the bar as an institution and all of us as individual barristers face significant challenges over the next couple of years. In particular, the

proposed national legal profession reforms have the potential to significantly affect the structure of the bar and the way we practise. An example of this is the proposal to appoint a national legal ombudsman who would have effective oversight over disciplinary matters concerning all practitioners, barristers or solicitors. This proposal is being considered along with the establishment of a national standards body which would have the power to set admission requirements and to impose standards of practice, compliance with which, presumably, would be mandatory. The problems which would arise for the bar if these bodies were staffed with people ignorant of or unsympathetic to the bar and to its traditions are self-evident.

*...it is generally accepted that the bar's control over admission to practice has been in the interest of members, the courts and the community.*

We certainly should not oppose reforms, particularly reforms which increase the efficiency with which we deliver our services or improve the efficiency of the courts and hence access to justice. That being said, I remain of the view that an independent referral bar operating in accordance with the cab rank rule provides substantial benefits in providing quality legal advice and representation to persons who would otherwise not have access to it; and provides a vital role in the administration of a fair and efficient system of justice. The willingness of members to do personal injury cases on a speculative basis, to appear pro bono and provide advice in immigration and other matters and to carry out extensive legal aid work are just examples which demonstrate the commitment of the bar to ensuring as best it can that quality representation is available to all members of the community. It is not in the interests of the community that any reforms compromise the independence of the bar or its ability

to provide these services.

Further, although it is apparent that it is desirable to have national standards of practice, there does not seem to be any reason that the bar does not continue to be responsible for the regulatory functions, which it currently performs. So far as I am aware, it is generally accepted that the bar's control over admission to practice has been in the interest of members, the courts and the community. The bar, through volunteers, conducts a bar practice course which ensures that new barristers have quality advocacy training and are familiar with the requirements and traditions of the bar. Further, the bar's handling of professional conduct matters through committees of barristers

and lay members, all of whom have given up their time to conduct a thankless task, has proved successful as evidenced by the absence of any successful request over the past five years for the review of a decision by the Bar Council to dismiss a complaint. Centralisation of such work in a national bureaucracy would be more expensive, less efficient and would lose the benefit of matters being considered by persons familiar with the professional and personal standards required of practitioners.

The Bar Council and the executive director of the Bar Association will continue to press these views on the Commonwealth attorney and do all it can to ensure that any legislation that emerges as a result of the reform process takes account of the desirability of maintaining the bar as an independent institution and ensuring that it continues to play a significant role, both in the issue and control over practising certificates and in matters concerning professional conduct.



Laura Wells SC and Dina Yehia SC, soon after their appointment as senior counsel. Photo: Jane Dempster / Newspix

There are two other matters I would like to mention. First, the question of the silk protocol, which has generated some heat recently. The Bar Council is presently carrying out an extensive review of the protocol and its administration and is seeking information not only from members of the association but from other bars which use different methods to select silk. The object of the review is to

seek to improve our processes to ensure the selection committee has sufficient information to judge any candidate and one which is as fair and transparent as possible. Any suggestion from members as to how improvements might be effected are most welcome.

Second, there may be a perception in some members that the Bar Council is

either remote from or not interested in their particular concerns. Nothing could be further from the truth. In that regard the council welcomes the views of members on matters which they believe are important or are of particular concern to them. For my part, whilst I am president any member should feel free to contact me to discuss any issue they wish. I can assure you I am thick skinned, so don't hold back. Further, can I remind members that if they wish to request the Bar Council to bring forward any special business at a general meeting, they should make a request to the council about six weeks prior to the date of the meeting to have the matter included in the notice of meeting. Although it is a matter for the council as to whether it includes it or not, I can assure you that any proposal with significant support will be put forward even if the council does not agree with it, unless the proposal is quite outlandish or vexatious.

It remains to me to wish you all the best for the holiday season. Try and get a break and forget about work for a while.

Tom Bathurst QC

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Dear Sir

I found the Winter 2009 edition of *Bar News* most interesting because of its historical content – the Hughes tribute and the legal history articles, in particular.

Brian Herron's article on the District Court brought back so many memories for me of my early days in the former Department of the Attorney General and of Justice in the 1950s and 60s. There were two branches of the department in those days: the Attorney General's Branch and the Justice Branch, with an administrative office in between. The entire body was called The Ministerial Office, not Head Office! The branches served the needs of the attorney general and the minister of justice, principally with policy and legal advice and legislation. The AGB also attended to the appointment and retirement of judges, crown prosecutors, defenders and other statutory office holders, and maintained their records in an obsolete card filing system.

The mention of BFF Telfer, or 'Buck', as he was known, led me to recall that wonderful old gentleman. He had been a crown prosecutor for so many years that his records were not at all accurate. Apparently, in the days of his appointment there was no retiring age set for crown prosecutors, and hence no need to record a date of birth. Tedeschi QC, as mentioned by Herron, covered the history of crown prosecutors in an excellent article published in the Autumn 2006 edition of the *Forbes Flyer*, the newsletter of the

Francis Forbes Society. Tedeschi made mention of Buck Telfer and that other fine gentleman, Rod Kidston, both of whom were treated in an unfortunate manner by the Executive.

When crown prosecutors travelled to a country circuit they obtained from the then Office of the Clerk of the Peace a voucher for train travel. Somehow or other Buck had acquired, not a gold pass, as suggested by Tedeschi, but an annual book of vouchers (travel warrants), or possibly a metal pass. To my knowledge he was the only holder of such a means of travel. Indeed, once he called on me and sheepishly confessed he had lost the item whilst at Redleaf Pool. I recall organising a replacement without advising my senior officers, as at that stage the move had commenced to persuade older crown prosecutors to retire, and Buck was being looked upon unfavourably.

What on earth he was doing with it at Redleaf Pool one does not know. I do know, though, that he was immensely proud of being the holder of the pass, which no other crown prosecutor had. He regularly told me that 'an attorney had given it to him', and since he had been appointed in the dark distant past, there was no record, of course, of such largess on the part of the Crown!

In the late 1950s the pressure was on Buck to retire. There was much sympathy and support for him in the branch, at the Clerk of the Peace and amongst other crown

prosecutors. However, senior departmental officers were endeavouring to regulate and unify conditions of appointment, and the bushy-eyebrowed gentleman did not deserve the action being taken which in the end would affect him.

It has been asserted that it was the attorney of the day who moved against Buck. I doubt very much this was the situation. It was the senior members of the ministerial office, who were endeavouring to regulate the retiring age of crown prosecutors and others, who planned the operation. If the attorney were involved (as Tedeschi has written) it would have been as a result of departmental pressure. Based on my experience of him, the late RR Downing QC would have found it difficult, powerful though he was, personally to suggest to a man such as Buck Telfer that he should retire. A later attorney once advised me, when I was the under-secretary of justice, that Mr Downing invariably left such unpleasant issues to be attended to by the department. And this was a bad news decision. 'I am the minister for good news – you attend to this!' Attorneys of either political status did tend to follow this course of action where matters affected office holders and the profession.

Buck, ever the gentleman, retired in due course. I, for one, have missed our chats and gossip about what happened on circuit!

**Trevor Haines AO**

Dear Sir

I was surprised to read the attorney-general's article on Magna Carta in the winter issue of *Bar News*. Approbation of Magna Carta can only be based on a selective reading of it. Three of its less attractive provisions were:

10 If anyone who has borrowed a sum of money from Jews dies before the debt has been repaid, his heir shall pay no interest on the debt for so long as he remains underage ...

11 If a man dies owing money to Jews, his wife may have her dower and pay nothing of the debt from it ...

34 No-one is to be taken or imprisoned on the appeal of a woman for the death of anyone save for the death of that woman's husband.

It is interesting to note that the so-called Bill of Rights of 1688 contained the following provisions:

IX Papists debarred the crown

And whereas it has been found by experience that it is inconsistent with the safety and welfare of this protestant kingdom to be governed by a popish prince or by any King or Queen marrying a papist the said lords spiritual and temporal and commons do further pray that it may be enacted that all and every person and persons that is, are or shall be reconciled to or shall hold communion with the see or church of Rome and shall profess the popish religion or shall marry a papist shall be excluded and be for ever incapable to inherit, possess or enjoy the crown and government of this realm and Ireland and the dominions thereunto belonging or any part of the same or to have, use or exercise any regal power, authority or jurisdiction within the same.

For good measure, section 7 of the Act provided:

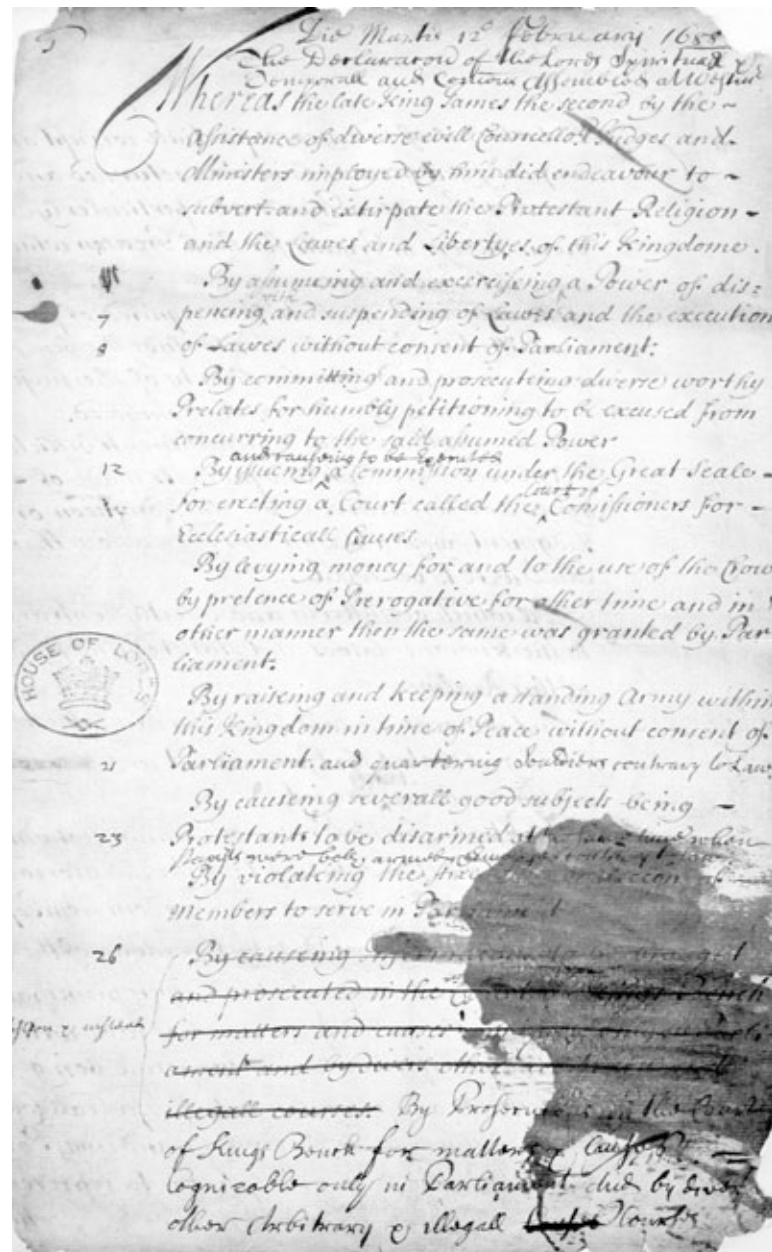
VII Subjects' arms

That the subjects which are protestants may have arms for their defence suitable to their conditions and as allowed by law.

Although we love to praise the odd 'feel-good' generalisation in these statutes, we should see them for what they were – examples of religious bigotry and, in the case of Magna Carta, sexism.

They stand as a warning against attempts to bind future generations to the morality of the times by means of entrenched bills of rights.

David Bennett AO QC



'Whereas the late King James the Second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of the kingdom.' The Declaration of Rights: February 1688. The declaration was later embodied in the Bill of Rights passed by parliament in December 1688. This further stipulated that the throne must be occupied by a Protestant. Image: Photolibrary.com



## Hard line fine for dangerous criminals, but what about the rest?

By Greg Smith SC MLA, Shadow Attorney General and Minister for Justice

### Introduction

I have worked as a lawyer in prosecution and criminal justice agencies for most of my career, since the mid 1970s. This included working in Commonwealth Government agencies in Sydney from 1975 to 1987 and New South Wales Government agencies from 1987 to February 2007, as a crown prosecutor; a secondment to the Independent Commission Against Corruption as general counsel assisting in the Milloo inquiry into police corruption; deputy senior crown prosecutor; and finally, as deputy director of public prosecutions for almost five years before resigning to run for election as the member for Epping in the New South Wales Parliament.

During that period, I witnessed many changes to the criminal justice system by the enactment of legislation and changes to practice and procedure dealing with such things as: the establishment of Offices of Director of Public Prosecutions in each jurisdiction; the Uniform Evidence Act; sentencing laws; guideline judgments; and standard non-parole periods. In that period I appeared for the Crown in hundreds of criminal trials and many appeals in the Court of Criminal Appeal, and full court appeals in the High Court of Australia. I became very uneasy with the law and order auctions, as they tended to make the law – particularly the sentencing laws – more complex and more susceptible to error.

### Law and order auctions

Remarkably, law and order did not feature as a major issue in the 2007 NSW state elections. This totally contrasted with the previous five elections held between 1988 and 2003. The lemma government and Coalition nevertheless continued policies with a 'tougher approach' to crime and criminals.

In January 2003, journalist Paola Totaro predicted that 'Bob Carr and John Brogden share an unstated hope – that crime does pay. In the March 22 election, they



expect a dividend of votes from their efforts to exploit community anxiety about criminals.<sup>1</sup>

She opined 'law and order' auctions in New South Wales probably had their genesis in the lead-up to the 1988 state election, in the wake of disastrous revelations about Labor's corrupted early-release prison scheme.

She said Liberal Opposition leader, Nick Greiner, built a powerful election policy platform on significant anti-corruption and criminal justice reforms. The early-release scheme, which allowed prisoners to earn time off for good behaviour, spawned what Greiner called 'truth in sentencing' legislation.

Law and order issues featured prominently in the March 1995 election campaign, prompting 'widespread criticism of both sides of politics for conducting a law-and-order 'auction' in a bid to win votes on the crime issue'.<sup>2</sup>

The Fahey government proposed life imprisonment for serious offenders, such as murderers, rapists, drug traffickers and robbers who repeatedly broke the law. John Fahey stated in his campaign launch, 'It is three strikes and you are in. In gaol. And in gaol to stay.'

Labor's policy in 1995 included mandatory life sentences following conviction for

dealing in large commercial quantities of hard drugs and for a new offence of 'horrific crime' (multiple murder, contract killing and murder or attempted murder in conjunction with violent sexual assault).

Both sides promised greater victims' rights.

The ALP won that election and the following three elections. Many policies were not honoured or watered down. Gratefully, no mandatory sentences have ever been enacted.

In the 1999 election campaign, the Opposition's policy included reforming the justice system with a new set of sentencing guidelines, described as 'grid sentencing', which would set a mandatory minimum sentence, with rare exceptions. Judges could depart from the guidelines in particular circumstances.<sup>3</sup>

The Carr government labelled the plan a 'disaster', claiming the proposal mirrored grid sentencing, which they claimed had failed spectacularly in the United States. Attorney General Shaw said it would take away judges' powers to sentence and hand them over to politicians and in practice, would not lead to tougher sentences.<sup>4</sup>

In the 2003 election both sides proposed to abolish double jeopardy laws, to allow re-trials for homicide and other serious offences. A restricted law was enacted

in late 2006. A further amendment has recently been enacted.<sup>5</sup>

In 2007 the Opposition promised a parliamentary committee to monitor the DPP; increasing frontline police numbers; increasing police powers; mandatory life sentences for those who murder police; tougher bail laws and tougher laws against young offenders; and giving juries a say in sentencing. The lemma government promised to build more gaols; to increase penalties and to introduce new offences. Both sides also promised to modify the right to silence.

*Building more prisons to house the growing number of prisoners, many of whom are recidivists who have had little genuine rehabilitation, is expensive and does little to make a better society. Harsher sentencing is leading to more, not less, recidivism.*

#### Changes to the laws of sentencing

In addition to the many changes to the NSW criminal law in the last 20 years, particularly in the creation of aggravated offences, the following changes have prompted tougher sentences, with much confusion: s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) has been criticised by judges, prosecutors and defence counsel alike. Aggravating factors spelt out include: offences involving police, health workers and judicial officers; the use of violence or weapons; and where the victim is very young or old and frail. Many of the categories are based on the common law in sentencing. Section 21A warns courts not to use an aggravating factor in sentencing if it is an element of the offence. When the warning is overlooked, error in sentencing is found by appeal courts.

Section 54 of the *Crimes (Sentencing Procedure) Act* enacts a table of standard non-parole periods for common serious offences. The Carr government introduced these amendments with great fanfare and after a slow start and a number of

successful Crown appeals, more tough sentences are being imposed.

#### UK has changed tack on tough sentencing

The law and order auction was replicated in the UK. In 1997, Tony Blair's election manifesto stated: 'We propose a new approach to law and order: tough on crime and tough on the causes of crime.'

As in New South Wales, for some years the British Government pushed the first part, tough on crime, but neglected the

second, tough on the causes of crime. But as gaols filled and sentences increased, the Blair Labour government was seen to have failed on the second. By 2007, the Brown Labour government was changing its position, with the Commission on English Prisons Today being established. In the final report, released in July 2009, Commissioner Cherie Booth QC said that a significant cut is needed in the 84,000 prison population, with community based punishments replacing short-term prison sentences. Effectively criticising the policies of her husband's government, she said that the 'unrestrained and irresponsible penal excess' over the past 15 years, during which prison numbers had nearly doubled from 45,000 was no longer sustainable in the face of the public spending squeeze.<sup>6</sup>

#### Tougher sentences, greater costs, don't deter recidivism

In New South Wales, total government expenditure on the justice system has grown at an average annual rate of 3.4 per cent since 2003, but Corrective Services'

annual spending has increased by an average of 5.1 per cent in that period.<sup>7</sup>

The Corrective Services' budget allocation has increased from 21.2 per cent of justice budgets in 2003–2004 to 22.7 per cent in 2007–2008. Governments across Australia in 2007–2008 spent \$2.435 billion on corrective services (NSW alone spent over \$1 billion on prisons alone). In 1997–1998 only \$1.141 billion was spent on corrective services, so there has been more than a doubling of government spending in ten years. Corrective services funding across Australia occupied 19.6 per cent of governments' justice budget in 1997–1998.<sup>8</sup>

NSW has traditionally had a higher rate of recidivism (that is, released prisoners returning to prison within two years) than the national average. Over the last ten years the state's recidivism rate has increased as well as the national average. It has been at about 43 per cent for the last three years with our prison population now over 10,000 and steadily rising. Victoria has only about 4,400 prisoners and a recidivism rate of about 36 per cent and falling.<sup>9</sup> Their sentences are lower and rehabilitation more effective. Be assured that I strenuously support protecting the community from dangerous offenders, but most of those imprisoned could not be so described. They are sentenced to less than 12 months imprisonment and there is a strong case for non-custodial punishment.

In my view the same realisation reached by Cherie Booth should be reached in Australia, especially in NSW. Building more prisons to house the growing number of prisoners, many of whom are recidivists who have had little genuine rehabilitation, is expensive and does little to make a better society. Harsher sentencing is leading to more, not less, recidivism.

We have come to a point in time when the theory of 'lock them up and throw away the key' just doesn't work. Governments all over the world have to contend with more pressures on limited resources. Greater funding of health, education and

public transport infrastructure is sorely needed and has significantly more public support than prison funding.

In looking for better value propositions in corrective services, government will be looking not just at short-term cost-savings (i.e., outsourcing new or existing prisons), but long-term savings. If the NSW prison population continued to increase at the same rate it has over the last 10 years we would need to build a new 500 bed prison every two years. Based on the cost of 500-bed Wellington Correctional Centre the cost would be \$125.5 million every two years.

This state cannot afford to keep incarcerating more people, and spending will have to shift to reducing incarceration rates. Non-custodial punishments will inevitably become more prevalent and far more work must be done on rehabilitation

before, during and after incarceration.

I invite suggestions as to how we may best achieve improvements. I may be contacted at [epping@parliament.nsw.gov.au](mailto:epping@parliament.nsw.gov.au) or ph: (02) 9877 0266.

#### Endnotes

1. The *Sydney Morning Herald*, 'Scaring up the votes', 27 January 2003.
2. 'Crime Debate in NSW Out of Order' *Weekend Australian*, 11-12 March 1995, at 22, referred to in Law Reform Commission Discussion Paper 33 (1996) *Sentencing*, Chapter 2, fn 55.
3. Parliamentary Library Briefing Paper 18/98
4. <http://www.abc.net.au/news/nsw99/diary/990318diary.htm>
5. *Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2009* (NSW), which also removes double jeopardy in sentencing after a successful Crown Appeal
6. <http://www.guardian.co.uk/society/2009/jul/02/cherie-booth-prison-reform>
7. Productivity Commission, *Reports on*

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# Constituting Law

## Law's Dependence on Social Values

### A series of lectures in 2010

In 2007 the Bar Association hosted the very successful Rhetoric series, which drew strong interest from members and the judiciary. Justin Gleeson SC and Ruth Higgins are organising a follow up series for the association in 2010. It is hoped that the topics will be of practical and intellectual interest to members and to the judiciary. An eminent panel of speakers has been arranged on a range of topics. The intent is to explore the links between law and a range of complementary disciplines. One aim is to explore how barristers can make better use of such disciplines in the presentation of their advocacy. The proposed timetable, topics and speakers follow.



#### Law and the Relevance of Values

Tuesday, 16 March

Stephen Gageler SC, Commonwealth Solicitor General (chair)  
The Honourable Justice Virginia Bell  
Professor Denis Dutton, University of Canterbury



#### Law and the Uses of History

Tuesday, 23 March

Justin Gleeson SC (chair)  
The Honourable Justice WMC Gummow AC  
Emeritus Professor Wilfrid Prest, University of Adelaide



#### Law, Economics and Regulation

Tuesday, 13 April

Ruth Higgins (chair)  
The Honourable Ian Callinan AC QC  
Dr Clive L Splash, CSIRO



#### Law and the Uses of Expertise

Tuesday, 27 April

Geoff Lindsay SC (chair)  
The Honourable Justice JD Heydon AC  
Professor Gary Edmond, University of New South Wales



#### Law and the Uses of International Thought

Tuesday, 11 May\*

Dr Andrew Bell SC (chair)  
Professor Gillian Triggs, University of Sydney  
The Honourable Justice J Basten



#### Law, Justice and Human Rights

Tuesday, 1 June

The Honourable Robert Carr (chair)  
Professor Hilary Charlesworth, Australian National University  
Julian Leaser, Executive Director, Menzies Research Centre



#### Law and International Commerce

Tuesday, 22 June

Noel Hutley SC (chair)  
Chief Justice James Spigelman AC  
The Honourable Justice Emmett

\* In Banco Court.  
Otherwise Bar Association  
Common Room.



## A geriatric barrister's yearning for the good old days

The following is an edited version of a paper delivered by Ian Barker QC at the Criminal Lawyers Association of the Northern Territory Conference, held in Bali in July

I seem to have practised law from a time beyond which the memory of man runneth not. In the criminal law, things in the 1960s were considerably different than now. Partly this is because of the enormous intrusion of federal criminal laws, really starting with the Crimes Act amendments in 1960 followed by the expansion of the Customs Act to deal with narcotic importations, the transformation of the Commonwealth Police by the *Australian Federal Police Act 1979*, the *National Crime Authority Act 1984*, the *Director of Public Prosecutions Act 1983* and the *Criminal Code Act 1995*, to say nothing of the Corporations Law or the Tax Acts. Whilst trying to stay afloat in this legislative morass, the practitioner on the defence side, in New South Wales at least, has seen what used to be hallowed concepts fade away or be forcibly removed by parliament passing bad laws. They might be attractive to voters, but they have severely eroded old principles such as the right to silence, freedom of speech, freedom of assembly, freedom from arbitrary arrest, the right of privacy, the right to see evidence led against one, the right to confront one's accuser, and the freedom of the judiciary from executive intrusion, to name some.

The events of 11 September 2001 led to the absurdly harsh counter-terrorism laws enshrined in Part 5.3 Division 100 of the Criminal Code Act (with similar legislation in the states) and a re-statement of sedition in s 80 of the Criminal Code Act (in case you were thinking of saying something disloyal).

The latest legislative nightmare (said by the New South Wales premier to be tough but fair and well balanced – you have heard it all before) – is the *Crimes (Criminal Organisations Control) Act 2009*, directed at motorcyclist organisations usually called bkie gangs.

It is impossible in an article of this nature to adequately deal with all these failings in the law. Much has already been said and written about the Commonwealth terrorist laws and I will not repeat it here at



NSW Police on duty during APEC. Photo: Newspix

length, except to look at sedition. This is a rather superficial look at what seem to me to be some problems in criminal law and procedure, particularly in NSW.

Certainly there have been some improvements, notably the introduction of the electronically recorded interview, but this article is concerned with the erosion of rights. I do not see improvements

those concerned with the investigation of crime and the enforcement of law will eventually abuse their powers. It is a fact largely ignored by governments, at least by the Commonwealth and in NSW. The legislative rule seems to be: keep giving them what they ask for; don't be troubled by how they have behaved in the past.

A fine example of the abuse of executive

*It is a melancholy fact of life that some of those concerned with the investigation of crime and the enforcement of law will eventually abuse their powers. It is a fact largely ignored by governments, at least by the Commonwealth and in NSW.*

and regressions in some sort of balance. Neither do I suggest a remedy. I merely draw attention to what seems to me to be an unhealthy move to authoritarianism coupled with a trend towards making easier the conviction of those tried for crime. Much of what I write is relevant to New South Wales. It might resonate elsewhere.

### **Abuse and potential abuse of power**

It is a melancholy fact of life that some of

power in Australia was the flagrant misuse of the powers conferred on the NSW Police Special Branch in the 1980s and 1990s. The branch was formed in 1948 to meet the communist threat and to liaise with 'D' Branch, which later became ASIO.

In 1996 and 1997 Wood J examined the activities of the Special Branch and found (amongst other things) they operated under a cloak of secrecy and they adopted a seemingly indiscriminate approach to gathering information on people such as barristers and public figures, whose

activities were no business of Special Branch.

After the branch was disbanded, the Police Integrity Commission supervised the audit of its records and found that:

- the branch's activities bore little resemblance to its charter;
- information gathering on people who posed no threat of politically motivated violence or similar matters was rife;
- the branch kept secret dossiers, including dirt files, which were used for political advantage and which were collected and updated on a diverse range of individuals; and
- there were some 26,800 index cards relating to information kept on individuals, *including 6930 cards on people described as terrorists.*

In December 1998 the Protective Security Group was formed in the NSW Police Service to gather and analyse intelligence in relation to people who presented a risk of politically motivated violence or terrorism activity. The group was subject to stringent statutory restrictions, to overcome the risk of abuse, but in 2003 it was disbanded and replaced by the new Counter Terrorism Co-ordinate Command.

A much larger organisation, it is not subject to the oversight under which its predecessor worked. Its members have the clear potential to act in the way Special Branch acted and to abuse their powers in the way Special Branch did.

But throughout, the public has been exhorted to trust the police because they had the confidence of government.

Look at the amendments to the Commonwealth Crimes Act in light of the *Haneef* case. Part 1C permits police to detain a lawfully arrested person for the purpose of investigation. It thereby made a grave departure from the common law. The period for which the person may be held is four hours, unless extended. But the period is subject to down time such as during travel, or breaks in questioning when the suspect is talking to his lawyer.

The investigation period for a terrorist offence may be extended any number of times, but the total cannot be more than 20 hours. Somehow the AFP in Queensland were able to use their powers of detention and investigation to keep Dr Haneef in custody for some 12 days, a clear and gross abuse of their powers (followed by no apology or even acknowledgement of any failing in the system).

## ASIO

ASIO can apply for a warrant the effect of which would be to detain a person without charge or even suspicion for up to seven days on the ground that the warrant 'will substantially assist the collection of intelligence that is important in relation to a terrorism offence'. A person so detained may be interrogated in increments of eight hours at a time, up to 24 hours; there is no bar to a further warrant for the same purpose against the same person and it is all in secret. The Act inhibits recourse to lawyers for people so detained. ASIO may object to the choice of lawyer. The first meeting between a detained person and a lawyer must be monitored by ASIO, and the lawyer subsequently is given only the warrant and no other documents. There is little useful a lawyer can do to help.

The most odious feature of all is that a citizen, about whom there is not even suspicion of any inclination to terrorism, may be arrested and interrogated in secret imprisonment for seven days and would thereafter commit a criminal offence if before the end of the period specified in the warrant the citizen told anyone why he or she had disappeared for a week (unless specifically permitted to do so).

If the disclosure is of 'operational information' it would be illegal if made within two years from the end of the period of the warrant. This may be thought to have the potential to create some difficulties between for example, husband and wife. Assume, again, for example, that a wife happens to notice her husband has not been home for a week. That is because he has been arrested for interrogation by ASIO. When he turns up, she may be inclined to seek some explanation. But if he gives a true explanation, he will make himself liable to prosecution. It is a very strange law for any government that holds itself out as concerned to preserve marriages and families.

It is truly amazing that this sort of nonsense found its way into serious



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Then New South Wales Premier Bob Carr in the vault containing the files of the Police Special Branch. Photo: Pip Blackwood / Newspix

penal legislation. ASIO has shown its readiness to abuse its power of search and interrogation, in its treatment of Izhar Ul Haque, strongly condemned in the NSW Supreme Court by Adams J. There has been not the hint of an apology from ASIO.

#### **National Security Information (Criminal and Civil Proceedings) Act**

One of the more frightening aspects of federal criminal law is the *National Security Information (Criminal and Civil Proceedings) Act 2004*. It requires lawyers to obtain security clearances to have access to information concerning national security, amongst other insults. It puts an onus on lawyers to notify the attorney-general if they believe evidence which relates to national security will be disclosed. The attorney-general can effectively run the court system in any trial by issuing a certificate directing that information not be revealed. He may even prohibit a witness being called. His certificate is conclusive evidence that disclosure of the information is likely to prejudice national security. And so on. We have all had some experience of this Act. It effectively

takes from the court and gives to the executive the power to determine whether a claim for public interest community has been made out. So far it has survived constitutional challenge.

#### **Sedition**

The recommendation of the Law Council, various bar associations and the Australian Law Reform Commission that sedition be abolished as a crime was ignored by the federal government in 2006, so we still have this anachronism along with its ancient sibling, treason.<sup>1</sup>

The essential problem with sedition, however defined, is that it is to be found in mere words, always susceptible of different construction and interpretation by different minds, and always dangerous to the individual who offends someone in high office, (or a member of ASIO). The offences, created by s 80.2 of the Criminal Code Act, are made no less problematical by the introduction of the notion of recklessness into the equation. A person is reckless with respect to a *circumstance* or a *result* if aware of a *substantial risk* that one or the other will exist, and if, having regard to the known circumstances, it is unjustifiable to take the risk. Robust political commentators may have a fragile hold on freedom if their writings or utterances are to be judged by whether they were 'justifiable' in 'taking a risk'. What is meant by 'it is unjustifiable'? Is the test objective, or subjective to the person on trial? The Australian cases and the early English cases all bespeak the great danger to a free society of having public discourse measured against a scale of things which might upset government sufficiently to prosecute, and of having such discourse constantly examined through the ever suspicious prism of ASIO or police.

The history of sedition prosecutions reveals a tendency of government to misuse the offence for political ends or to just over-react. Against this, it may be said, there has not been a prosecution in Australia since 1960 which of course lends support to the proposition that we do not need

the law at all. Whether frequently used or not, it is dangerous to have such laws remaining in the statute books.

The Commonwealth, the states, and the pre-federation colonies of Australia, have an unlovely history of the misuse of the law of sedition, largely to stifle freedom of expression, for political ends. It is difficult to track down all the cases, some of which were disposed of at summary level and few of which were reported. They stand as a warning.

Seditious libel found its way to the colony of New South Wales early in the 19th century and was used as a blunt instrument to deter the early newspaper editors from publicly criticising the governor. Governor Darling's persecution of Dr Wardell, a joint owner with W C Wentworth of *The Australian*, and Edward Smith Hall, owner and editor of *The Sydney Monitor*, is a disgraceful bit of history. Each prosecution – and there were many, particularly against Hall – had much more to do with the governor's wounded dignity than the security of the colony.

It is well known that some of the Eureka Stockade rioters were tried, and acquitted, of treason. It is perhaps less well known that in 1855 Henry Seekamp, the editor of the *Ballarat Times* was convicted and sent to prison for six months for sedition, for calling on 'his fellow-countrymen, on nature and on Heaven itself for a 'vengeance deep and terrible' for 'the foul massacre' of human beings (by the military at the Stockade). His deeply felt emotions as expressed in the words were scarcely calculated to cause a serious insurrection in Victoria.

In 1896 John Norton was tried for seditious libel for publishing an article in *Truth* highly insulting of four monarchs – George III, George IV, William IV and Victoria – but which did not invite violence or insurrection or anything of the sort. The jury failed to agree.

There have been various state prosecutions. In 1930 F W Paterson was charged in Queensland for uttering

sedition words saying, amongst other things, 'if the workers shed a little blood in their own interests as they did for the capitalists in the war they will be emancipated'. The words seem no more than colourful communist rhetoric. He was acquitted.

In 1960 Rohan Rivett, the editor of the South Australian 'News', was prosecuted for seditious libel for injuring the feelings of the chief justice and three other judges by giving prominence to criticism of them during the Stuart Royal Commission. Rivett's offence was to publish headlines such as:

Shand QC indicts Sir Mellis Napier  
These Commissioners cannot do the job  
Commission Breaks up Shand Blasts  
Napier  
Shand Quits 'you won't give Stuart Fair  
Go'

The jury acquitted Rivett of eight of the nine charges and could not agree on the ninth.

Early in the Cold War there were three federal prosecutions in Sydney, all of communists. The first was against Gilbert Burns in 1949 because, in response to a hypothetical question at a public meeting, he gave a hypothetical answer beginning 'If Australia was involved in such a war (between Soviet Russia and the West) it would be between Soviet Russia and America and British Imperialism... we would oppose the war'. He was convicted and sentenced to six months imprisonment. In the subsequent High Court hearing Dixon and McTiernan JJ held the words were merely expressive of a hypothesis; the majority held the case had been made out.

The second was against Lance Sharkey also in 1949, who was convicted and sentenced to three years imprisonment for articulating what seems no more than an unlikely hypothesis, that is (in part) 'If Soviet Forces in pursuit of aggression entered Australia, Australian workers would welcome them'. The High Court held the

words were capable of being expressive of a seditious intent. *Burns* and *Sharkey* were not products of the High Court's finest hour.

In 1950 William Burns was tried before a magistrate in Sydney, charged with publishing seditious words published in *Tribune* when he urged resistance to Australian involvement in the Korean War. After a convoluted summary trial and an appeal before a famously eccentric judge (Berne J) and then Lloyd J he was sentenced to six months imprisonment. It is difficult to see in the words published any more than robust criticism of government policy. Burns was again prosecuted in 1953 because ASIO took affront to an article in the *Communist Review* critical of the monarchy. He was acquitted.

The last sedition case before the High Court was *Cooper* in 1961, which went on appeal from the Supreme Court of Papua New Guinea. Cooper had spoken to 'a number of natives' urging them, amongst other things, to expel all the white people. He seems to have been a little mad. The case was marked by the reception of hopelessly irrelevant evidence introduced from ASIO to the effect that Cooper was a communist, an atheist, and disliked missionaries. He received six months imprisonment, confirmed on appeal.

The law of sedition is anachronistic and should be discarded entirely. An indication of its real antiquity lies in its close relation to treason, both being in Chapter 5, Part 5.1, Division 80. It remains treason to kill or kidnap the governor-general or the prime minister; to do the same to anyone else is merely murder or abduction but the punishment for intentionally killing the prime minister is the same as for intentionally killing the leader of the Opposition. One can only assume that in this context the references to the governor-general and the prime minister remain because of the very special penalties treason once attracted, that is, hanging, drawing and quartering and, if a man, having one's bowels and genitals

burned as one watched (not having any longer much interest in either). Women were spared this immodest indignity by being totally burned alive. Also, of course, a sentence of death for treason once also required attainder and its consequences, forfeiture and corruption of blood. It is unlikely such penalties will reappear on the statute books, at least in Australia. Why do we retain such anachronisms?

I have seen little interest by the present federal government in amending the worst of so-called counter-terrorist legislation. One can only hope.

#### DPP

No doubt it is because of my intellectual infirmity, but I cannot escape the conclusion that in enacting the Criminal Code Act the Parliament of the Commonwealth did its utmost to make federal criminal law an unattainable mystery. Regrettably however, the Commonwealth DPP seems to be intent on widening the reach of the Act by attempting, for example, to charge conspiracy *by recklessness*. Such an indictment resulted in a directed verdict and an unsuccessful Commonwealth appeal in a recent NSW case.<sup>2</sup>

The effect of the indictment and particulars was to bring a charge that some people recklessly entered a conspiracy to launder money, reckless as to whether it was illegally obtained. The offence alleged seemed to be that they agreed to deal with money upon the basis that at some future time they might come to the collective view that there was a substantial risk it was illegally obtained. It was a very curious indictment; the worry of it is an increasingly gung ho approach by the Commonwealth DPP to prosecutions. Let us go to New South Wales legislation.

#### Committal proceedings

The right to test evidence on committal has, in NSW, been severely eroded. The High Court's view of the procedure as a necessary part of the criminal process

has been largely ignored. In *Barton v The Queen* (1980) 147 CLR 75 Gibbs ACJ and Mason J expressed agreement with Lord Devlin in describing committal proceedings as ‘an essential safeguard against wanton or misconceived prosecutions’. The deprivation of the advantages of testing evidence before trial was ‘a serious departure from the ordinary course of criminal justice’. And in *Grassby v The Queen* (1980) 168 CLR 1 Dawson J examined the history of committal proceedings from Sir John Jervis’s Act in 1848, concluding along the way that the importance of the committal in the criminal process should not be underrated. In 1986 an advisory committee on criminal proceedings in Victoria was unanimous in their view that properly constituted committal proceedings are a vital cog in the machinery of the criminal law and should be maintained.

We still have committal proceedings, but in an emasculated form. They do not require the attendance of witnesses unless:

1. the accused person and the prosecutor agree the witness should be called; or
2. the accused person applies to have a witness called and the magistrate is satisfied there are *substantial reasons* why, in the interests of justice, the witness should attend to give oral evidence (the accused person having given notice of the application).

The magistrate cannot direct the attendance of an alleged victim in a case in which an accused person is charged with an offence involving violence (agreement notwithstanding) unless the magistrate is satisfied there are *special reasons* why the alleged victim should in the interests of justice give oral evidence. No direction at all can be given in a sexual assault case where the complainant was under 16 at the time of the offence and is under 18 at the time of committal.

Committal proceedings still have some use but their importance in the criminal process is seriously diminished. What

was once a right is now subject to a circumscribed judicial discretion and in the case of a young complainant has gone altogether. The rationale for the change was they took too long and lawyers cross-examined witnesses at unnecessary length. That may have been so, but if magistrates had exercised proper control over proceedings the problem could largely have been avoided.

### The unsworn statement

Whatever happened to the dock statement? I remember once pondering its utility to an accused person when I represented a man in Darwin charged with shooting another man during a quarrel of some kind. He was tried for malicious wounding. I urged upon him the view that he should dress neatly for the trial. He took my advice and came to court wearing a dark suit, a white shirt, and tie. On his feet he wore rubber thongs. As it happened, the jury could not see his feet in the dock, which he did not leave during the trial. He was acquitted. In my opinion the case still stands as an argument for the retention of the unsworn statement, at least in Darwin. The jury can’t see your client’s feet.

The evolution of the right to make an unsworn statement to a jury was a process far more complex than its arbitrary and mindless abolition, in NSW, in 1994. Ancient English practice allowed the accused to plead his or her case orally, in person, but the accused person was not allowed counsel in treason trials until 1695 or felony trials until 1836. The effect of this was that the person on trial was able to say whatever he or she wanted about the evidence and the law, but not on oath. The accused was not permitted to give evidence. Neither was a party to a civil cause.

The rule, Starkie had said, ‘was founded on the known infirmities of human nature’. In 1843 Lord Denman’s Act enabled all persons previously disqualified by crime or interest to give evidence, except parties on the record or their spouses. The right was extended to the parties to a civil

action in 1846 (county courts) and in 1851 (superior courts) and by 1869 the parties to a civil action, and their spouses, were competent witnesses in the action. Such changes found their way into New South Wales law by the Evidence Law Act of 1852 and the Evidence Law Act of 1858.

But an accused person and his or her spouse continued incompetent as witnesses in the accused’s own defence (with some exceptions) until 1898 in England. In New South Wales the right was first conferred in 1882 by the *Evidence in Summary Convictions Act* which permitted a defendant in a summary case to be sworn as a witness. Then in 1883 s 351 of the Criminal Law Amendment Act enabled an accused person on indictment to give evidence in his or her defence on an issue where the burden of proof was on the accused. The defect was cured altogether in 1891 by s 6 of the Criminal Law and Evidence Amendment Act which made an accused person and the spouse of an accused person competent witnesses. This was repeated in the *Crimes Act 1900* (NSW), s 407.

The right of the accused to make an unsworn statement was as old as the prohibition against the accused giving sworn evidence. Old procedure dictated that, if the person was represented by counsel, the statement could be made at the conclusion of counsel’s speech, subject to a right of reply by the Crown.

The right to make an unsworn statement appeared in New South Wales legislative form in 1883 in the Criminal Law Amendment Act. It was re-enacted in 1900 in s 405 of the Crimes Act. The practice in New South Wales was for the accused person to make the statement before counsel’s address. The law remained unchanged until 1994, when the right was taken away in respect of all people charged after 10 June 1994.

In 1985 the New South Wales Law Reform Commission recommended that the unsworn statement be retained, subject to qualifications. The commission’s view was

the right should be extended to summary proceedings. But by 1994 the government was under increasing pressure by victims' lobby groups, and the dock statement was an easy political target. The Hon John Hannaford MLC, then attorney general, homed in on it saying:

The testing of evidence in cross-examination is the basis of all criminal trials in our adversarial system of law. However, the truth of assertions made by an accused to the jury in a dock statement cannot be tested by cross-examination. In abolishing the right to make dock statements, it is aimed to remove the existing unchecked process whereby an accused can make unchallenged allegations and attacks on the character of witnesses and victims. The accused will be prevented from ambushing the prosecution's case by introducing material which is not subject to cross-examination.

The law relating to the onus of proof seems not to have intruded into the government's deliberations.

In concluding the debate the attorney general became more impassioned, saying that the Legislative Council's:

debate on dock statements raised issues that go to the very heart of the system of justice in New South Wales. This Government has moved to abolish the right of accused criminals to give from the dock unsworn, untested and unaccountable evidence. I thank those members of the Government who rose to speak in the interests of victims of crime in this State.

It is not easy to see what the issue had to do with victims of crime, except politically. Compelling contrary arguments were presented in parliament, such as by the Hon BH Vaughan in the Legislative Council when he said:

Dock statements are just one of the range of protections for what people describe as the less able or the disadvantaged in society. There is considerable anecdotal evidence to suggest that people with less than average education or literacy levels,

that is, people lacking a complete command of the English language or those with mild intellectual disability, completely confused by their surroundings, may feel some pressure to inappropriately agree with skilful prosecutors, thereby incriminating themselves. Therefore, if accused do not give sworn evidence, their sole means of expressing themselves to a jury is lost. As Mr Justice Isaacs explained in *Rex v McMillan*:

The accused may be a nervous or weak type person who may be easily overborne by a strong cross-examiner into saying things which may put an adverse complexion on his evidence.

An innocent person, therefore, may give the impression of lying as a result of nervousness or ignorance. This also applies to Aboriginal Australians.

Of course, the conferral of the right of an accused to give sworn evidence was one of forensic history's great two-edged swords. There was a certain safety in being able to say to a jury, 'if only he were allowed to tell you on oath, you would understand his case', and the unsworn statement carried with it its own dangers. Usually, counsel were not permitted to question the accused in any detail so the statement was the product of a flow of consciousness. Sometimes it flowed into dangerous territory, such as when a man on trial for armed robbery (not for the first time) said that *he would never do anything like that*, thereby inviting rebuttal.

But the unsworn statement was sometimes a necessary way of ensuring fairness, particularly in trials of Aboriginal people, for the reasons advanced by Mr Vaughan. They were abolished as part of a continuing attempt by government to buy votes by being seen to be tough on crime.

### The right of peremptory challenge

In NSW the right has all but gone. Since 1987 the Jury Act has permitted but three challenges per accused, unless by agreement with the Crown. I have never

heard of such agreement being reached. The jurors remain anonymous with no disclosure of either age or vocation. You might challenge a grey haired man wearing an RSL badge because you think he might not like your client. Another barrister might think the same juror might be sympathetic to the accused. I am not a clever enough student of human nature to be able to form an instant view about which three jurors, if any, ought to be challenged. The present process is really a nonsensical ritual, and got that way far quicker than the evolution of the right to challenge a much larger number of jurors.

I think we can set aside challenges for cause or exotica such as challenges to the array, because they are so seldom used. The last challenge to the array I have heard of succeeded before Nader J in Darwin in 1983, when the sheriff had summoned 47 women and 23 men, women apparently being easier to serve with jury summonses (*R v Diack*).

A brief history of peremptory challenges and their significance is this.

In 1895 in his *New Commentaries* Stephen observed that in 'criminal cases, or at least in cases of felony, there is allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all – which is called a *peremptory* challenge, – a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous'. Stephen says there were two reasons for peremptory challenges. Firstly, it was necessary that a prisoner when put to his defence should have a good opinion of his jury, the want of which 'might totally disconcert him' and, secondly, if he failed in a challenge to a juror for cause, the bare questioning of the juror may 'provoke resentment'.

He said the common law settled on 35 challenges in criminal cases because it was fully sufficient to allow the most timorous man to challenge through mere caprice. If there were no limit, an accused person could avoid trial altogether. But in

England, by 5 Geo 4, c.50, (1825) s 29, no person arraigned for murder or felony could be admitted to any peremptory challenge above 20.

Peremptory challenges to military officers as jurors were not permitted. The New South Wales Act of 1823 (s 4) permitted a limited challenge to a military or naval officer 'upon the special ground of a direct interest or affection'. Section 6 enabled a challenge for cause to the magistrate assessors who sat with the chief justice in civil cases. On 25 January 1808 John Macarthur was indicted for sedition. He objected to Judge Advocate Atkins sitting with the military officers. His objection was, in part, that Atkins owed him money. The objection had no legal substance but was sufficiently disruptive of the proceedings to delay the trial, and the rebellion against Governor Bligh was effected on the following day.

The Jury Trials Act of 1833 specifically declared the right of challenge to be the same as in cases in the Courts of Westminster (s 6). That is, it was restricted to cases of felony. By the Jurors and Juries Consolidation Act of 1847 the number of challenges was restricted to 20 (s 24) following the English legislation. The Crown had no right of peremptory challenge, but the Act recognised 'the power of any court to order any juror to stand by until the panel shall be gone through at the prayer of those prosecuting for the Crown as has been heretofore accustomed': (s 24, following the old English practice). According to Archbold, an old practice entitled the Crown to ask that a juror should stand by, that is, to postpone consideration of the cause of challenge until the panel had been gone through and it appeared there would be jurors enough to try the defendant, citing an 1837 case of *R v Parry*.

The Crown's right to have jurors stood aside obtained until it was abolished by s 43(2) of the *Jury Act 1977* (NSW).

In 1901 in NSW the right of peremptory challenge became permitted in cases

of misdemeanour as in felony, but the number of challenges was restricted to eight unless the offence charged was capital, when the right to 20 challenges remained. The Crown was given the same right: s 57, *Jury Act 1901* (NSW). These provisions were re-enacted (as to capital offences) in the consolidated *Jury Act 1912* (NSW) (s 55) and the *Jury Act 1977* (NSW) (s 42).

In 1986 the New South Wales Law Reform Commission by majority recommended that peremptory challenges in all cases be reduced to three. The commission said this would 'allow both parties to take steps to remove bias, without going so far as to enable them to select the jury of their choice'. The commission noted the change in the law relating to murder since 1955 when the death penalty for murder was abolished. Mandatory life sentences were replaced by a discretion to impose a lesser sentence. The commission said this change in the law made it necessary to re-examine the rule relating to peremptory challenges. They did not consider the rules of criminal procedure should differ depending whether the charge was murder or some other serious offence. They were satisfied that the exercise of a large number of peremptory challenges could adversely affect the representative character of the jury.

The recommendation was accepted with some enthusiasm by the government, leading to the *Jury (Amendment) Act 1987* (NSW). The amended s 42 reduced the number of peremptory challenges to three in all criminal proceedings. Attorney General Sheahan felt able to say:

However, when that selection process reaches the court, it may be influenced significantly by the parties through the use of peremptory challenges. At present, in murder trials each party is allowed to challenge twenty jurors without showing cause, and eight jurors in other criminal trials. The origin of this challenge was to enable the accused to remove bias and secure an impartial jury. In fact, the challenge is now put to the opposite use:

jurors are systematically challenged with the intention of introducing bias to achieve the desired verdict. In short, challenges are used in an attempt to skew the representatives of the jury. Thus, by way of example, peremptory challenges have been used by the defence to secure all male juries in rape trials, by the prosecution in a case in Bourke in 1981 to secure an all white jury when the accused was an Aborigine, and an all male jury in the trial of Gloria Hill who was accused of murdering her husband.

I have to say the right of peremptory challenge was criticised well before 1987. In 1864 the *Sydney Morning Herald* disapproved of the acquittal by a jury of the bushranger Frank Gardiner. On 12 July 1864 the editor had much to say of the proceedings, with particular reference to the right to challenge. The editorial included this:

We shall not impute to the persons who were entrusted with the preliminary steps in the prosecution of GARDINER, an intention to screen him from the consequences of his crime, because we do not believe it existed. We cannot, however, but perceive that he has been most fortunate.

We propose to point out in this article how everything has been set in hostile array against public justice - whether in design or through inadvertence - whether by the perversion or the abuse of the law - or by the stumbling-blocks cast in their way in its discharge.

Those friends of order and justice who were in Court saw how the right of challenge could be perverted. If any man appeared looking more respectable than another, or whose character was thought to be too reputable to be trusted, he was immediately challenged. That there was not scope for a jury entirely in harmony with the defence may, we trust, be taken as a sign that society is not wholly gone.

And on 12 August 1864 the *Sydney Morning Herald* printed a long letter from *Civis* which attacked the process, saying



Three victims of the Greenacre gang rape face the media outside the Downing Centre Court in Sydney, August 2002. Photo: Craig Greenhill / Newspix.

it should be limited to six peremptory challenges. The writer directed a broadside at what he (or she) perceived to be abuse of the process, saying, in part:

Practically, it is almost equivalent to allowing him to select the twelve worst jurymen on the list, .... A juror in good broad-cloth and clean linen is 'most intolerable and not to be endured;' a flash-looking *gent*, or one with an air of coarse ruffianism, or (best of all) a fellow with a grog-bepainted nose, is hailed as a god-send.

I have seen jurors with grog-bepainted noses. I have to say the phenomenon does not necessarily bespeak a disposition to acquit.

The reasoning of the Law Reform Commission in 1986 in favour of the reduction to three challenges is really no longer valid, because a person convicted of murder in NSW can now be imprisoned for the term of the prisoner's natural life. However, do not expect any change to the old system.

For a giddy moment I once had the power to make things very difficult for the Supreme Court of the NT in a sittings in Alice Springs. In 1933 the governor-general made an ordinance requiring trial

on indictment for offences against any law of the NT (except those punishable by death) to be by a judge without a jury. Trial by jury in all cases was restored in 1962 when Garfield Barwick procured an amendment of the Commonwealth Northern Territory Supreme Court Act. A judicial visit was arranged and jurors summoned. But true to form the Commonwealth Attorney General's Department had overlooked revising the old jury lists, compiled God knows when, to hear murder cases. So we had about 12 trials (some with more than one accused) and a jury panel of 20. Had I exercised my right of challenge to the full it might have effectively stopped the sittings. But as I knew most of the panel (it was difficult not to know jurors in a town of 3,000 people) and guessed they were none of them disposed to convict, I thought it wise to act with restraint. Which proved right. We had almost the same jury in every trial. I won six straight, after which I should have retired. Then unexpectedly the seventh trial resulted in a conviction. *The Centralian Advocate* then published a front page denunciation of the system, saying, in large print, that being tried by a jury in Alice Springs was like buying a lottery ticket: six times they acquitted and then suddenly convicted! The jurors responded

by informing Justice Bridge they would not sit any more unless the paper's editor apologised. He did. The judge referred the papers to Canberra and recommended the institution of contempt proceedings.

That was in about 1962 or 1963. It seems the Attorney General's Department is still considering the matter.

### New South Wales sexual offences

'Let the jury consider their verdict' the King said, for about the twentieth time that day.

'No, no' said the Queen. 'Sentence first – verdict afterwards.'

Lewis Carroll wrote with some prescience about the trial of the Knave of Hearts, which, while for larceny, looked a bit like a twenty-first century NSW trial for a sexual offence. Trials for sexual offences, particularly rape, have always caused difficulties. Perhaps the most notorious Australian rape trial occurred in Sydney in 1886 when 11 young men were tried for raping a young woman at Moore Park. Contemporary records suggest the trial judge, Windeyer J, was entirely biased against the men, and in a gross display of judicial menace managed to bully the jury into convicting 9 of the 11. In the result 4 were hanged and the rest served 10 years.

The *Truth* on 29 November 1886 reminded readers of the trial judge's 'morose and murderous will'. The editorial went on to say:

The facts of the trial, together with WINDEYER'S conduct in keeping the jury sitting all night, after a protracted trial of four days, and compelling counsel to commence their addresses to the jury after midnight, and to continue them until early 4 o'clock in the morning; his monstrous summing up and almost diabolical determination to prevent as far as possible, the exercise of the Royal prerogative of mercy are too indelibly engraven on the public mind to call for recapitulation. So, too, his brutal sentence of penal servitude and floggings on SWEETMAN, the cabman, who drove the

strumpet to Moore Park, and WINDEYER'S subsequent sudden and judicious 'scoot' on a holiday trip to Europe need no recalling.

Windeyer's summing up is recorded in detail in the *Sydney Morning Herald* of 29 November 1886. It is certainly one sided. He positively slavered when sentencing the youths, saying, in part:

Prisoners, you have been convicted of a most atrocious crime, a crime so horrible that every lover of his country must feel it is a disgrace to our civilisation. I am glad to find that this case has been tried by a jury that has had the intelligence to see through the perjury on perjury that has been committed on your behalf.... It is terrible to think that we should have amongst us in this city a class worse than savages, lower in their instincts than the brutes below us.... I warn you to prepare for death. No hope of mercy can I extend to you. Be sure no weakness of the Executive, no maudlin feeling of pity, will save you from the death you so richly deserve... be sure no pity will be extended to you;... I advise you to prepare to meet your Maker... remember that your time is short. The recommendation to mercy which the jury have made in your favour it will be my duty to convey to the Executive.

The report noted the prisoners appeared unnerved by the sentences.

Generally, judges are not now as bad as Windeyer in 1886, but for some years there has been a trend towards the notion that a woman who accuses a man of a sexual offence will probably be telling the truth. She should therefore be believed and any attack on her credit should be regarded as insulting and offensive. Complainants are now always victims, whether or not they are proved to be so by the conviction of the assailant.

Of course, there will be cases where there will be no doubt that rape was inflicted on a woman, who was obviously therefore a victim. There are cases where the only issue is identity, not the fact of rape. I

accept that the majority of complaints of sexual offences may be true, although there is no way of establishing this as an empirical truth. However, that provides not the slightest justification for eroding an accused person's right to a fair trial. The presumption of innocence is not a quaint anachronism, to be ignored in sexual cases.

But the right has been eroded. In 1981 the Crimes Act s 409B (now re-enacted as Criminal Procedure Act s 293) prohibited evidence of a complainant's sexual reputation or sexual experience or lack of it, with some exceptions, such as sexual experience by the complainant at about the time of the alleged offence, but then only if the probative value of the evidence outweighed any distress, humiliation or embarrassment the complainant might suffer. It is difficult to see how such a balancing act could be possible, but such evidence is scarcely ever allowed. The prohibition has the obvious potential to cause injustice. Without it, a judge having proper control of proceedings could prohibit such cross-examination unless the evidence was relevant to an issue, but judges do not always exercise proper control when it is needed. There is no doubt that cross examination of a woman in a rape trial about other sexual experiences could be humiliating and should be pursued sparingly, but sometimes it is necessary for a just outcome.

Take the case of *Bernthaler* for example, where evidence of a complainant's propensity to make false accusations of a serial nature was held inadmissible. Was that not manifestly unjust to the accused?

The section was the consequence of too many embarrassing but irrelevant questions, and too little judicial intervention. The position could have been cured without the law taking a 180 degree turn.

Another example of the erosion of the rights of an accused person is found in Criminal Procedure Act ss 295-306

which erects a privilege from disclosure of 'protected confidences' which are counselling communications made by alleged victims of sexual assault. A subpoena can be resisted unless the court is satisfied that the contents will have 'substantial' probative value and the public interest in preserving confidentiality is outweighed by the public interest in allowing inspection. Similar provisions apply to the tender of the documents in evidence.

Perhaps on most occasions the counsellor's records will not advance a case one way or another. But sometimes they will. Sometimes they could lead to an acquittal. I have seen it happen, where the story told a counsellor was starkly different from the story told on oath. But what does 'substantial probative value' mean of evidence in a criminal trial? And how is a judge to know, unless he or she knows precisely the defence to be pursued? It is another example of the readiness of government to act inconsistently with the rules of ordinary justice.

An extraordinary example of a direct attack on a person on trial for a sexual offence is Criminal Procedure Act s 294A which effectively excludes the accused from personally defending himself. His only means of cross-examination is by someone appointed by the court to ask only the questions the accused requests be put. It is farcical legislation.

From a lawyer's perspective, the best thing that can be said about this 'reform' is that it should act as a powerful incentive for the accused to obtain legal representation. When enacted it was mistakenly assumed that the court might easily appoint a lawyer to conduct the cross-examination. The Bar Council has, rightly, disapproved of the idea that a barrister can act as a mere mouthpiece asking only those questions the accused wants asked whether they be irrelevant or tantamount to forensic suicide. Where persons other than lawyers relay questions to a complainant, the questioning process is slowed up sufficiently to be ineffective



Premier Nathan Rees at a NSW Police briefing on violence related to outlaw motorcycle gangs, 23 March 2009. Photo: Tracey Nearmy / AAP Image

and it becomes worse if the questioner's proficiency at putting questions is not up to that of the accused.

Why should an accused not be permitted to question his accuser? The answer proffered is that, if he is guilty, it would be painful for the complainant to face questions, probably containing humiliating but untrue suggestions, from the accused. That is not a reason to prevent the accused from asking otherwise admissible questions. Not permitting him to ask questions personally makes it appear as if he is guilty and that his guilt has been prejudged. In any event, the risk that an accused man, capable of running his own defence, might be wrongfully convicted is increased. What happened to the principle that an accused person was entitled to confront his accuser?

There are other examples. For example, a complainant may be screened from the view of the accused and may not even need to attend the trial (except via video link) (s 294B). If a conviction is quashed on appeal, and if there is a second trial, the complainant does not have to give evidence at all. The Crown can simply rely on the transcript of her evidence at the first trial. This provision is grotesque. What if new facts emerge between trials? What

if the conviction was quashed because of the incompetence of defence counsel who failed to adequately cross-examine the complainant?

My worry about all of this is that the continuing influence of pressure groups on government, well meaning or otherwise, may one day lead to a position where guilt is presumed unless an accused person proves otherwise. I think we are paying too high a price in smoothing the path of complainants in sexual cases.

### **Bikies – The Crimes (Criminal Organisations Control) Act 2009**

I sometimes wonder whether the reason why bikies are often unkind to each other, and sometimes less than orderly, is that they feel obliged to live up to the curious names of their various associations. Adult clubs bear the sort of names that the most psychopathic schoolboys usually grow out of by their early teens, but nonetheless names like Hells Angels, Bandidos and Coffin Cheaters suggest a warrior class constantly living on the edge of violence, indeed complete oblivion.

So, instead of denying their right to exist, it might be better if the law simply obliged them to change their club names and so start a trend to a more placid existence.

For example, things might quieten down if the name Hells Angels was abandoned and replaced by The Motor Cycling Academy for The Sons of Gentle Folk or something like that.

I have to concede this is unlikely to happen, so we are confronted with the new tough law and order 'let's go get them' statute called the *Crimes (Criminal Organisations Control) Act 2009* (NSW). The Act is a truly odious exercise of legislative power, worse than the terrorist legislation. For a long time after the constitutional failure of the *Communist Party Dissolution Act 1950*, legislation enabling the executive to proscribe an organisation was unheard of. But it has returned with renewed vigour. In this case, all because one bkie beat another bkie to death at Sydney airport. The airport was not, I understand, under siege.

Like the numerous speeches inflicted upon us in support of terrorism legislation, the second reading speech was quite silent about why the existing criminal law was inadequate to deal with violent crime. It is apparent from the premier's speech that the police were able to make wholesale arrests after the airport incident pursuant to their existing powers, and there is already anti-criminal group legislation in the NSW Crimes Act.

The object of the Act is to make criminal the association of a member with another member of a proscribed organisation. A member includes someone not yet a member. The proscription will be by an *eligible judge*. We are now in the wild terrain of executive intrusion into the judicial function. The police commissioner may apply to an eligible judge for a declaration that an organisation is a declared organisation. On the face of the legislation the eligible judge may be a favourite of the commissioner. He or she will have consented to being the subject of a *declaration by the attorney general* and will be *declared by the attorney general* to be an eligible judge. The attorney general may revoke such declarations. The judge will have surrendered himself or herself

to executive discretion. I understand that a number of judges have in fact been declared eligible judges, accepting the office on the understanding that any judge applying will be appointed, so there will be no selection of particular judges. That may be so, but I question why judges would want to have anything to do with such legislation, in particular by subjecting themselves to a declaration by the attorney general, which carries with it the right of the attorney general to revoke the declaration. Who is in charge here?

The provisions providing for Supreme Court judges to be eligible judges is much the same as that prescribed by the Listening Devices Act in respect of District Court judges and Local Court magistrates. That does not make the law any more acceptable.

The commissioner can apply to an eligible judge for a declaration that an organisation is a declared organisation, a declaration that may have serious consequences for a lot of people. Neither the application nor the grounds said to support it are given to those affected. Service is unnecessary. Publication of the application in the *Government Gazette* and one newspaper is sufficient. Probably, the *Gazette* is not at the forefront of the average biker's reading, so they will have to carefully scan, every day, the four newspapers circulating throughout NSW to determine whether they are under attack.

The judge may have regard to any information 'suggesting' a link, and 'any other matter' the judge considers relevant. Rules of evidence are ignored. The judge is not required to disclose any grounds or reasons for the decision. He or she will be obliged to keep confidential, even from those directly affected, information considered to be 'criminal intelligence'. A member of the target organisation may be present and make submissions (subject to objection by the commissioner). Just how one makes submissions in respect of an application the grounds for which are not disclosed remains unexplained.

There is no appeal. Having found that members of an organisation associate for the purpose of criminal activity, and the organisation is a risk to public safety and order, the judge may direct that an organisation is a declared organisation. The order does not have to be served on anyone affected, just published in the *Government Gazette* and a newspaper. The consequences of a declaration are that the Supreme Court may make control orders against anyone who is a member of a declared organisation. This has the consequence that a controlled member of a declared organisation must not associate with another controlled member, nor recruit someone to be a member, or risk imprisonment for two years and for subsequent offences, five years. It is not necessary on a charge brought against an offending controlled member for the prosecution to prove the association was for any particular purpose or would have led to the commission of any offence.

Another effect of a control order is that the person affected is deprived of the right to earn a living in any number of legitimate ways (for example, carrying on business as a motor vehicle repairer or as a private inquiry agent and *any other activity prescribed by the regulations*). The Act gives a right of appeal against a control order. Otherwise, it does quite the reverse. Nothing can attract the jurisdiction of a court, whether to review a decision made contrary to natural justice or otherwise. No court of law has jurisdiction to consider 'any question involving compliance or non-compliance' with the provisions of the Act or the rules of procedural fairness. What are they frightened of?

The premier of NSW proudly introduced the Bill as providing 'tough new laws'; legislation that 'gets the balance right'. We will put in place, he said 'strong safeguards to ensure that gangs alone are the subject of the bill'. I do not know what they are. He said 'these are tough and well-constructed laws'. I do not know what a well-constructed law is. 'Tough'

and 'getting the balance right' have become a familiar part of the tedious clichés and platitudes of politicians trying to justify the unjustifiable. We saw it time and time again in the passage of terrorist legislation; the words have lost their meaning.

So far as I am aware, no declarations have been made to date, and none need be. The NSW police already have ample powers to deal with violent crime, and conspiracies and solicitings to commit it.<sup>3</sup>

This legislation is a manifestation of the increasing tendency of modern governments to ignore, indeed actively destroy, those rights we once all enjoyed. Mr Cowdery QC, the NSW DPP, in a recent paper highly critical of the Act said:

It matters not that the motives of the urgers or policy makers may be honourable. Justice Brandeis in 1928 warned in *Olmstead v United States* (277 US 438,479):

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent.... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.'

The old days are unattainable. But sometimes politicians might like to reflect upon them. To quote from the Great Gatsby, we beat on, boats against the current. Regrettably we are not borne back ceaselessly into the past, or at all.

My thanks to Steve Robson, Leonie Nagle, Peter Kintominas and Kathy Thom in helping to put this together.

#### Endnotes

1. The law of sedition is presently under review by the Senate.
2. On 19 June 2009 the High Court granted special leave to the DPP to appeal against the decision.
3. See: *Totani v SA* (2009) SASC 301. The South Australian Supreme Court struck down similar legislation as invalid.

## Verbatim

How good are we at predicting a judicial outcome?

See *Agbajec v Agbajev* [2009] 3 WLR 835, a decision of the English Court of Appeal on appeal from the poetically named Coleridge J. After referring to Lord Hoffman's speech in *Piglowska v Piglowski* [1999] 1 WLR 1360 at 1372 where his Lordship said, amongst other things that:

The exigencies of daily courtroom life are such that reasons for judgment will always be capable of having been better expressed.

Ward LJ went on to say:

So I begin with the easy acknowledgement of the high regard in which Coleridge J is universally held and of his vast experience in this field. Paraphrasing Lord Hoffman, one does not have to teach this old and ugly grandmother how to suck eggs. [2009] 3 WLR at 856)

Appeal allowed or dismissed? Score at full time?

'Old and ugly grandmother' 1, Court of Appeal 3.

In what was described by Longmore LJ as '... extremely luxurious litigation ...' the Court of Appeal through Ward LJ feared that 'Homer has nodded' (Homer of course was Coleridge J).

Moral of the story? Old and ugly Greek grandmothers should not nod when sucking eggs.

BW Collins QC

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## Lessons from America: judicial elections and the law of bias

A recent decision of the Supreme Court of the United States, *Caperton v AT Massey Coal Co*, is an important re-statement of the law in that country in relation to the circumstances in which a judge should, or may, recuse him or herself on the ground of bias.

The decision also identifies some of the problems that may arise where, as is the case in many states in America, judges are appointed by way of popular election. Although the facts in the case were unusual, even unique, Justice Kennedy, delivering the opinion of the court, remarked that ‘the facts now before us are extreme by any measure’.

*Caperton* involved a coal producer operating in West Virginia and Eastern Kentucky. In August 2002 a jury in West Virginia found the coal producer guilty of fraudulent misrepresentation, concealment and tortious interference with existing contractual relations. The jury awarded the plaintiff the sum of \$50 million in compensatory and punitive damages.

As noted by the US Supreme Court, the West Virginia state trial court found that the coal producer had:

... intentionally acted in utter disregard of [*Caperton's*] rights and ultimately destroyed [*Caperton's*] businesses because, after conducting cost benefit analyses, [*the coal producer*] concluded it was in its financial interest to do so.

West Virginia is an election state – that is, it appoints its judges through a process of popular election. Elections were due to be held in 2004. A Justice McGraw was then a sitting judge. He stood for re-election. He was opposed by a local attorney, Brent Benjamin.

The chairman, chief executive officer and president of the coal producer, a Mr Don Blankenship, decided to support Brent Benjamin's campaign for election. Justice Kennedy observed as follows (references omitted):

In addition to contributing the \$1,000 statutory maximum to Benjamin's campaign committee, Blankenship donated almost \$2.5 million to “And For The Sake of the Kids,” a political organisation formed under 26 U.S.C. §527. The §527 organization opposed McGraw and supported Benjamin. Blankenship's donations accounted for more than two-thirds of the total funds it raised. This was not all. Blankenship spent, in addition, just over \$500,000 on independent expenditures – for direct mailings and letters soliciting donations as well as television and newspaper advertisements – “to support... Brent Benjamin”.

Justice Kennedy went on (references omitted):

To provide some perspective, Blankenship's \$3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee. *Caperton* contends that Blankenship spent \$1 million more than the total amount spent by the campaign committees of both candidates combined.



The elections were duly held. Brent Benjamin won. He took his place on the West Virginia Court.

In December 2006 the coal producer filed a petition for appeal to challenge the jury verdict.

In November 2007 the West Virginia Supreme Court of Appeals upheld the appeal, 3 to 2. The majority opinion was written by the then chief justice, who was joined by Justice Maynard and the newly elected Justice Benjamin.

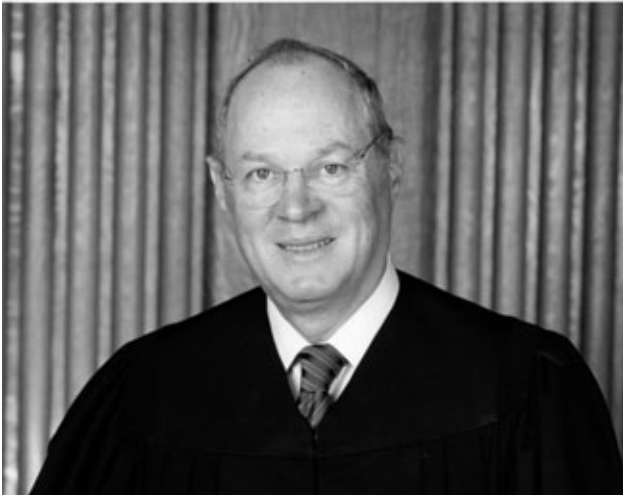
*Justice Kennedy, delivering the opinion of the court, remarked that ‘the facts now before us are extreme by any measure.’*

*Caperton* sought a re-hearing of the appeal. The parties made various applications for disqualification of a number of the judges sitting on the appeal. Among other things, *Caperton* had obtained photographs of Justice Maynard vacationing with Blankenship in the French Riviera while the case was pending. In the light of this evidence Justice Maynard recused himself. Justice Benjamin denied *Caperton's* recusal motion.

At the re-hearing of the appeal Justice Benjamin sat as acting chief justice. *Caperton* made yet another application for Benjamin to disqualify himself; again Justice Benjamin refused to withdraw.

In April 2008 the West Virginia Supreme Court of Appeals, following the re-hearing of the appeal, again reversed the jury verdict. Justices Davis, Benjamin and Fox allowed the appeal; two others justices dissented.

The US Supreme Court decided by a majority of five to four that Justice Benjamin should have recused himself by reason of a probability or risk of actual bias.



Justice Kennedy of the United States Supreme Court.

The opinion of the majority was delivered by Justice Kennedy, who held:

Not every campaign contribution by litigant or attorney creates probability of bias that requires a judge's recusal, but this is an exceptional case.

Justice Kennedy continued:

Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when – without the consent of the other parties – a man chooses the judge in his own cause. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin's recusal.

The opinion of the minority was delivered by Chief Justice Roberts, with whom Justice Scalia, Justice Thomas and Justice Alito joined.

Chief Justice Roberts noted at the outset of his judgment:

Until today, we have recognised exactly two situations in which the Federal Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts.

Vaguer notions of bias or the appearance of bias were never a basis for disqualification, either at common law or under our constitutional precedence.

Roberts CJ was critical of what he apprehended would result from the decision of the majority, namely an uncertain and amorphous test for probability of bias in lieu of the current test. Roberts CJ

identified no less than forty “fundamental questions” which courts will now have to determine – the first three of which questions were as follows:

1. How much money is too much money? What level of contribution or expenditure gives rise to a ‘probability of bias’?
2. How do we determine whether a given expenditure is “disproportionate”? Disproportionate to what?
3. Are independent, non-coordinated expenditures treated the same as direct contributions to a candidate's campaign? What about contributions to independent outside groups supporting a candidate?

After reciting these and a further 37 questions Roberts CJ held:

Today's opinion requires state and federal judges simultaneously to act as political scientists (why did candidate X win the election?), economists (was the financial support disproportionate?), and psychologists (is there likely to be a debt of gratitude?).

Roberts CJ further expressed the view that the court's inability to formulate a ‘judicially discernible and manageable standard’ strongly counselled against the recognition of a novel constitutional right.

Roberts CJ concluded his decision as follows:

It is an old cliché, but sometimes the cure is worse than the disease. I am sure there are cases where a “probability of bias” should lead the prudent judge to step aside, but the judge fails to do so. Maybe this is one of them. But I believe that opening the door to recusal claims under the Due Process Clause, for an amorphous “probability of bias”, will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts. I hope I am wrong.

The facts in *Caperton* reveal the problems that can arise when judges are elected – even if those facts were an extreme case. In a recent speech the Chief Justice of the High Court of Australia, Robert French, discussed *Caperton* in the context of a speech delivered in July this year entitled ‘In Praise of Unelected Judges’, expressing the view that *Caperton* and decisions like it ‘demonstrate powerfully why we should not have elected judges’.

By Jeremy Stoljar SC

## Amendment of pleadings

*AON Risk Services Australia Ltd v Australian National University* (2009) 83 ALJR 951, 258 ALR 14

In *Aon Risk Services Australia Ltd v Australian National University* (2009) 83 ALJR 951; [2009] HCA 27, the High Court considered the factors relevant to a trial judge's discretion to grant leave to file amended pleadings. The High Court unanimously upheld the appeal from the Court of Appeal in the Australian Capital Territory.<sup>1</sup> By majority, the Court of Appeal had dismissed an appeal from the trial judge's decision<sup>2</sup> allowing the Australian National University (ANU) to file amended pleadings following an application made at the commencement of a four week hearing of a commercial dispute.

### Factual background

The facts were set out in the joint judgment (Gummow, Hayne, Crennan, Kiefel and Bell JJ) at [38]-[54] and in the judgment of Heydon J at [136]-[151]. The proceedings were commenced on 10 December 2004 by ANU against three defendants (the insurers), which did not include Aon Risk Services Australia Ltd (Aon). ANU claimed an indemnity for losses it had suffered by reason of extensive fire damage to ANU property in January 2003. After the insurers had filed defences to the original statement of claim, ANU amended its pleadings to join Aon to the proceedings in June 2005. The original claim against Aon, which was ANU's insurance broker, alleged that Aon had failed to arrange the renewal of insurance over some of the property which the insurers claimed was not the subject of insurance. It was expressed to be in the alternative to the claims brought against the insurers. ANU alleged that the balance due to it was in the order of \$75 million.

ANU settled the claim against the insurers during the first two days of the period allocated for the hearing of the matter. The following day, counsel for ANU informed the court that ANU wished to apply for an adjournment in order to seek leave to file a second further amended statement of claim in respect of its claim against Aon, the only remaining defendant. The trial judge granted an adjournment to allow a period of time for the proposed amendment to be drafted and served with evidence in support of the application, and for submissions to be taken on the application. As a consequence the hearing did not proceed in the four weeks that had been allocated.

The proposed amendment sought to expand the claim against Aon substantially. ANU's new allegations included that pursuant to their agreement Aon was to review ANU's policies of insurance, meet with ANU on a regular basis in the process of review, prepare submissions to insurers to ensure all material facts were disclosed and to enable the insurers to determine their criteria for indemnity, and place insurance upon instructions from ANU.

### Decisions at first instance and on appeal

The trial judge determined the application by reference to rules 21 and 501 of the *Civil Procedure Rules 2006* (ACT) (CPR (ACT)).<sup>3</sup> Rule 21 provided for case management principles including the

just resolution of the real issues in the proceedings and the timely disposal of proceedings at a cost affordable to the parties. Rule 501 provided for certain circumstances in which amendments should be made.

The trial judge granted leave to amend the pleadings. The trial judge treated as important the factor that the allegations raised real triable issues between ANU and Aon. This outweighed the fact that the matter had been set down for four weeks and other litigants may be said to have been disadvantaged by the allocated time of the trial: [2007] ACTSC 82 at [43].

In the Court of Appeal, the majority (Higgins CJ and Penfold J) applied *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 and upheld the trial judge's decision on the grounds that the proposed amendment raised a claim which was arguable, there were no case management considerations that would require leave to amend to be refused, and Aon could be compensated for any prejudice by a costs order: [2008] ACTCA 13 at [66]-[67] (Penfold J), see also at [6] (Higgins CJ). Justice Lander delivered a dissenting judgment.

### Reasoning of the High Court

All of the justices of the High Court accepted that the relevant provision under which the amendment application fell to be determined was CPR (ACT) rule 502 rather than rule 501.<sup>4</sup>

The joint judgment noted that the trial judge was in error in failing to recognise the extent of the new claims and the effect that amendment would have on Aon, and by failing to recognise the extent to which the case management principles in rule 21 would not be met if the amendments were allowed (at [105]). The joint judgment referred to the known ill-effects of a delayed determination, and stated that rule 502(1) read with rule 21 did not provide an unfettered discretion to grant leave to amend. The fact that ANU's new claims were arguable was not of itself sufficient to permit amendment and could not prevail over the objectives of rule 21. A 'just' resolution of the proceedings between ANU and Aon required those objectives to be taken into account (at [105]).

It was incumbent upon ANU to tender an explanation as to why the matter had been allowed to proceed to trial in its existing form. The fact that none was given was of some significance (at [106]-[108]). The trial judge incorrectly elevated the fact that the claim was arguable to a level of importance it did not have and failed to recognise the importance of the objective stated in rule 21, being the timely disposal of the proceedings (at [110]). The joint judgment concluded that the trial judge's discretion miscarried.

Chief Justice French delivered a separate judgment which supported the orders proposed in the joint judgment. His Honour considered that the trial judge should have taken into account waste of public resources and undue delay, the associated strain and uncertainty caused to litigants, and the potential for loss of public confidence in the legal system which arises where a court

accedes to applications made without adequate explanation or justification (at [30]). Having regard to all of the relevant factors, the amendment application should have been refused (at [35]).

Justice Heydon also delivered a separate but concurring judgment. The ratio of his Honour's decision was that ANU's amendment application had at all times been put before the trial judge and the Court of Appeal on the basis of rule 501 of the CPR (ACT), and that rule did not provide any foundation for the application to amend (at [120]). As the application was made in reliance on rule 501, the trial judge erred in failing to dismiss the application for leave to amend (at [121]). Justice Heydon went on to consider what the position would be if ANU had filed a notice of contention to rely on the discretion conferred by rule 502, which discretion was informed by the case management principles enunciated in rule 21. It is clear from the firm criticism of the general delay with which the proceedings were prosecuted that Heydon J would not have allowed the application on the basis of the discretion conferred by rule 502 (at [135]-[156]).

### Application as a precedent

This decision is likely to become the leading authority on amendment of pleadings in most Australian jurisdictions, and on the application of case management principles to interlocutory applications more generally, for the foreseeable future. Although the case concerned rules 21 and 502 of the CPR (ACT), the joint judgment noted that the purposes expressed in rule 21 reflect principles of case management by the courts, which management is 'now an accepted aspect of the system of civil justice administered by courts in Australia' (at [92], see also at [36] (French CJ)). The decision has already been cited in the Supreme courts of each state and in the Federal Court.

It is noteworthy that the High Court held that, at least in jurisdictions having rules similar to rules 21 and 502 of the CPR (ACT), *Queensland v JL Holdings Pty Ltd* has ceased to be of authority: at [6], [30] (French CJ), [95]-[97], [111], [116] (joint judgment), [133] (Heydon J). It is now clear, if it was not previously, that an application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation (joint judgment at [111]).

Practitioners and trial judges faced with amendment applications may draw general guidance from paragraphs [97]-[103] of the joint judgment. Relevant factors include:

- The nature and importance of the amendment to the party applying. These factors are to be weighed against the extent of the delay that may be caused and the costs associated with it, as well as the prejudice which might reasonably be assumed to follow (at [102]; see also at [111]-[114]).
- The point the litigation has reached relative to a trial. The court should consider whether a party has had sufficient

opportunity to plead its case, having regard to the other party and other litigants awaiting trial dates (at [102]).

- The explanation for the late application to amend, which will invariably be required where there is delay (at [102]-[103]). The party proffering the explanation will need to show that its application is brought in good faith. That party will also be required to bring the circumstances giving rise to the amendment to the court's attention, so that they may be weighed against the effects of any delay and the objectives expressed in the rules of the court (at [103]).

*Aon Risk Services Australia Ltd v Australian National University* does not require that every application for amendment should be refused because it involves the waste of some costs and some degree of delay (joint judgment at [102]). However, in light of the court's treatment of *Queensland v JL Holdings Pty Ltd* and the significance ascribed to any cost and delay that may be caused by an amendment, the decision will be likely to make it more difficult for parties successfully to amend pleadings.

By Julie Taylor

### Endnotes

1. *Aon Risk Services Australia Ltd v Australian National University* (2008) 227 FLR 388; [2008] ACTCA 13 (Higgins CJ and Penfold J; Lander J dissenting).
2. *Australian National University v Chubb Insurance Co of Australia Ltd* [2007] ACTSC 82 (Gray J).
3. Rule 21 provided: '(1) The purpose of this chapter, and the other provisions of these rules in their application to civil proceedings, is to facilitate the just resolution of the real issues in civil proceedings with minimum delay and expense. (2) Accordingly, these rules are to be applied by the courts in civil proceedings with the objective of achieving – (a) the just resolution of the real issues in the proceedings; and (b) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties. ...'
4. Rule 501 provided: '(1) All necessary amendments of a document must be made for the purpose of – (a) deciding the real issues in the proceeding; or (b) correcting any defect or error in the proceeding; or (c) avoiding multiple proceedings.'
5. Rule 502 provided: 'At any stage of a proceeding, the court may give leave for a party to amend, or direct a party to amend, an originating process, anything written on an originating process, a pleading, an application or any other document filed in the court in a proceeding in the way it considers appropriate.'

## Commonwealth power and the fiscal stimulus

*Pape v Federal Commissioner of Taxation* (2009) 257 ALR 1, 83 ALJR 765

In February of this year, the Australian Government announced that some 8.7 million 'working Australians' would receive a one-off 'tax bonus' of up to \$900 as part of the government's efforts to combat a 'severe global recession'. The government no doubt hoped that each recipient would accept the 'tax bonus' gratefully and head for the closest flat-screen television retailer. Alas, one recipient – Mr Bryan Pape, an academic at the University of New England and part-time barrister – took a different approach. He commenced proceedings in the High Court alleging that the legislation providing for the 'tax bonus' was unconstitutional. While a majority of the High Court rejected his contentions, the four judgments handed down contain important analyses of the so-called appropriations power in s 81 and the executive power in s 61 of the Constitution.

Section 81 of the Constitution permits the appropriation of money from the Consolidated Revenue Fund 'for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.' Section 83 requires any such appropriation to be 'made by law'.

The primary submission made by the Commonwealth in support of the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) ('Bonus Act') was that s 81, when coupled with the incidental power in s 51(xxxix), empowered parliament to authorise the expenditure of money for any purpose and without any relevant limitation. The submission echoed remarks by Sir Robert Garran to the 1929 Royal Commission on the Constitution to the effect that he was unable to divine any 'constitutional or other reason' for limiting the power of the Commonwealth Government to spend money raised by it.

*The government no doubt hoped that each recipient would accept the 'tax bonus' gratefully and head for the closest flat-screen television retailer. ... Mr Bryan Pape ... took a different approach.*

As Heydon J recognised, this was 'a wide submission' that had the potential not only to 'outflank' but 'destroy' the legislative restrictions on the power of the Commonwealth found in ss 51 and 52. The submission was rejected by each member of the court. In the principal majority judgment, Gummow, Crennan and Bell JJ carried out a comprehensive analysis of parliamentary practice with respect to appropriations in the United Kingdom and colonial Australia prior to 1901. According to their Honours, s 81 did not contain a 'power to spend' but simply a 'power to appropriate'. The exercise of the latter power precedes the former and involves the legal segregation of money from the general



mass of the Consolidated Revenue Fund so that it may ultimately be expended by the Executive if otherwise authorised to do so. It followed, according to their Honours, that the expressions 'for the purposes of the Commonwealth' in s 81 and 'by law' in s 83 were not limitations by reference to which any exercise of the power in s 81 was relevantly to be assessed. The power of the Executive to spend money, once appropriated under ss 81 and 83, was to be found elsewhere in the Constitution. To the extent that previous decisions of the court had assumed the contrary, they were in error: see, e.g. *Pharmaceutical Benefits Case* (1945) 71 CLR 237; *AAP Case* (1975) 134 CLR 338.

Having concluded unanimously that neither s 81 nor s 83 of the Constitution supported the Bonus Act, it was necessary to identify another source of power. For French CJ, Gummow, Crennan and Bell JJ, that source was the executive power in s 61, read with s 51(xxxix). According to their Honours, an Act will be valid where it concerns matters incidental to the carrying out by the Executive of 'enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation' (adopting the formulation of Mason J in the *AAP Case* (1975) 134 CLR 338 at 397). Having regard to the material before the court, their Honours held that this test was satisfied. The 'current financial and economic crisis' concerned Australia 'as a nation'. Determining that there was a need for an immediate fiscal stimulus was 'somewhat analogous' to declaring a state of emergency in response to a natural disaster. It was the Commonwealth Executive that was 'capable of and empowered to respond to a crisis be it war, natural disaster or a financial crisis on the scale here' and only the Commonwealth had the resources to meet the present crisis on the scale provided for in the Bonus Act. It was not to the point to 'regret the aggregation of fiscal power in the hands of the Commonwealth over the last century'. French CJ reached a materially identical conclusion but emphasised that '[t]o say that the executive power extends to the short-term fiscal

measures in question in this case does not equate it to a general power to manage the national economy'. In light of the availability of s 61 (read with s 51(xxxix), it was unnecessary for the majority to consider whether the Bonus Act could also be supported by reference to a 'nationhood' power to be implied from s 61 and the Constitution as a whole.

*... the clear divergence in approach between a majority prepared to accept, largely at face value, the submissions of the Commonwealth as to its unique role and financial standing in response to what it considered to be a global economic emergency, and a minority willing to assert the authority of the court and doubt both the accuracy and relevance of the Commonwealth's submissions on a number of levels.*

In two judgments, the remaining three members of the court disagreed with the majority's reasoning on the availability of s 61. According to Hayne and Kiefel JJ, words like 'crisis' and 'emergency' 'do not readily yield criteria of constitutional validity'. The mere fact that only the Commonwealth had the administrative and financial resources to provide a 'tax bonus' in response to such a crisis or emergency did not mean that s 61 applied. Otherwise, 'the extensive litigation about the ambit of the defence power during World War II was beside the point'. At the core of their Honours' reasoning on this question was the distinction between end and means. Even assuming that only the Australian Government could achieve its stated aim of ameliorating the effects of a global financial crisis, the lawfulness of the means chosen by government to achieve that aim was a matter for the court. Their Honours noted that numerous different approaches to the provision of fiscal stimulus were available and that many of those approaches 'would find ready support' in heads of power dealing with taxation (s 51(ii)), social security benefits (s 51(xxiiiA)) and pensions (s 51(xxii)). Section 61 could not be relied upon merely because the provision of a 'tax bonus' was viewed by the Executive as more convenient.

Heydon J similarly noted that 'a speedy stimulus equal in size to the tax bonuses could have been effectuated for the benefit of the nation in some other way'. In order to enliven s 61, it was necessary (but not sufficient) for the Commonwealth relevantly to demonstrate that the application of powers other than s 61 could not have been applied to reach the same outcome. This it did not do. More fundamentally, it would be wrong, in construing the scope of s 61, to ascribe to the Executive all powers which might be thought to be inherent in the idea of 'national government'. To do so would be antithetical to the federal structure adopted in the Constitution. Section 61 was not to be read as conferring upon the Executive any powers not otherwise within the spheres of responsibility for which the Parliament of Australia had legislative competence. Once it was concluded that the creation of a right to receive, and duty to pay, the tax bonuses was a 'matter falling outside the legislative competence or spheres of responsibility of the Commonwealth, it falls outside s 61 also.'

Having determined that the Bonus Act was valid by reference to s 61, it was strictly unnecessary for the majority justices to consider whether the Act also fell within the taxation power in s 51(ii). However, Gummow, Crennan and Bell JJ nevertheless held that the Bonus Act was not a law with respect to taxation. While the 'tax bonuses' provided by the Act were limited to persons who had an adjusted tax liability greater than nil in the 2007–2008 income year, the bonus did not operate as a refund or rebate of tax. So much was demonstrated by the fact that the Bonus Act permitted a person to receive a 'tax bonus' greater than their adjusted tax liability. The present case could therefore be distinguished from *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155. Heydon J reached a similar conclusion. French CJ did not decide the issue. Hayne and Kiefel JJ found that the Bonus Act was valid under s 51(ii) but only to the extent it authorised the payment of a tax bonus equal to the lesser of the recipient's adjusted tax liability and the amount of bonus otherwise fixed in accordance with the Act.

In conclusion, perhaps the most notable aspect of the decision in *Pape* is the clear divergence in approach between a majority (French CJ, Gummow, Crennan and Bell JJ) prepared to accept, largely at face value, the submissions of the Commonwealth as to its unique role and financial standing in response to what it considered to be a global economic emergency and a minority (Hayne, Heydon and Kiefel JJ) willing to assert the authority of the court and doubt both the accuracy and relevance of the Commonwealth's submissions on a number of levels.

**By David Thomas**

## Access to justice: will the costs regime in the Federal Court change?

The *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009* (Cth) (the Bill) is currently before the Senate. It is the subject of a report published by the Senate's Legal and Constitutional Affairs Legislation Committee on 17 September 2009.

The Bill represents changes which are likely to come into effect in the near future. The amendments of most relevance to practitioners relate to case management procedures in the Federal Court, in particular, the insertion of a new Part VB of the *Federal Court of Australia Act 1976* (Cth) (the FCA Act). This includes an 'overarching purpose',<sup>2</sup> which is consistent with the 'overriding purpose' in s 56 of the *Civil Procedure Act 2005* (NSW), obligations on parties and practitioners to act consistently with the 'overarching purpose'<sup>3</sup> and specific powers for the court to give directions about practice and procedure.<sup>4</sup> The Bill also inserts a new sub-section 43(3), setting out some orders that the court may make in regard to costs, although the provision is explicitly stated not to limit the discretion of the court.

The focus for this paper is the implications this legislation may have with respect to the costs regime in the Federal Court, and to the making of costs orders.

There are four provisions of explicit relevance:

- Section 37N(4) – exercise of discretion as to costs *must* take into account 'any failure to comply with' the duty to act consistently with the 'overarching purpose'.
- Section 37N(5) – explicit acknowledgement that a personal costs order may be made against a lawyer pursuant to s 37N(4).
- Section 37P(6)(d) and (e) – costs may be awarded (and may be awarded on an indemnity basis) where a party fails to comply with a direction of the court.
- Section 43(3) – some possible costs orders which may be made by the court.

As can be seen from this brief outline, the effect these provisions are likely to have will depend upon the interpretation of the provisions in Part VB generally.

Arguably, the provisions simply restate the existing discretion as to costs. However, it seems that the Bill represents an expansion of the parliament's expectations with respect to the exercise of the discretion. To what extent will this change the approach to costs orders?

Under the current s 43 of the FCA Act, the Federal Court has a discretion as to costs but that the general rule is that costs should follow the event.<sup>5</sup> This position is consistent with the position in NSW under the *Uniform Civil Procedure Rules 2005* (NSW).<sup>6</sup> The possible costs orders listed in the new s 43(3) of the FCA Act broadly reflect the current discretion with respect to possible costs orders. In light of this, and in light of the explicit codification of the

'overarching purpose' in the proposed s 37M, it may be surprising that there is no statement of the general rule as to costs.

The expression used in the explanatory memorandum is that the new s 43(3) will 'give greater clarity to the types of costs orders the court can make.'<sup>7</sup> However, it is clear from the provisions of Part VB that the intention is to broaden the discretion as to costs. This is supported by the second reading speech for the Bill.<sup>8</sup> The Senate committee's report provided the particular justification that the discretion as to costs required reform where public interest litigants are concerned.<sup>9</sup>

This is of real concern given the history of the costs discretion in the United Kingdom where there is also a broad discretion as to costs.<sup>10</sup> This has resulted in a fact-based approach to costs which has increased uncertainty with respect to awards.<sup>11</sup> Arguably, that uncertainty has increased the incidence of satellite litigation as to costs.<sup>12</sup>

Such uncertainty and associated satellite litigation has real ramifications for clients, especially clients for whom litigation outcomes will significantly influence commercial decisions. While it may be reasonable to review the discretion in cases involving public interest litigants, this is not a sufficient reason to increase uncertainty in cases which do not involve such litigants, especially in purely commercial cases. Further, the 'clarity' referred to by the attorney-general would not be undermined by a legislative statement of the general rule.

Interpretation of s 43(3) is likely to be influenced by current judicial culture. Practitioners in the Federal Court can take comfort from the fact that the courts in the United Kingdom were moving towards the fact-based approach to costs found in the UK CPR before those rules were enacted.<sup>13</sup> Conversely, Australian courts tend to interpret case management legislation in a manner which is strongly influenced by common law principles.<sup>14</sup> Section 43(3) leaves room for a judicial statement that the general rule remains, and it is entirely possible that such a statement will be made.

Nevertheless, the intentional lack of a legislative statement of the general rule potentially increases uncertainty as to costs, and this is of concern.

By Brenda Tronson<sup>1</sup>

### Endnotes

1. LLB (UNSW) BCL MPhil (Oxon). The author contributed to submissions made to the Senate Committee by the NSW Law Society's Young Lawyers Civil Litigation Committee. This paper is partly based on her contribution to those submissions.
2. New s 37M.
3. New s 37N.
4. New s 37P.
5. *Hughes v Western Australian Cricket Association Inc* (1986) ATPR ¶40-748; *DSE (Holdings) Pty Ltd v InterTAN Inc* [2004] FCA 1251; (2004) 51 ACSR 555.
6. See r 42.1.

7. Explanatory memorandum to the Bill, [6]. This sentiment is repeated at [40]–[41].
8. Commonwealth, *Parliamentary Debates*, 22 June 2009, 6732, (Robert McClelland, Attorney-General).
9. Legal and Constitutional Affairs Legislation Committee, Senate, *Access to Justice (Civil Litigation Reforms Amendment Bill 2009) [Provisions]*, at [3.84].
10. *Civil Procedure Rules 1998* (UK), r 44.3.
11. Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (2<sup>nd</sup> ed, 2006) at [26.56].
12. Zuckerman, above, at [26.1].
13. Zuckerman, above, at [26.39].
14. Consider *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146. The question remains open as to whether *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; (209) 258 ALR 14; (2009) 83 ALJR 951 represents a change in judicial culture in this regard.

## Military justice in the dock

*Lane v Morrison* (2009) 258 ALR 404; [2009] HCA 29

*Lane v Morrison* (2009) 258 ALR 404 is a decision the effect of which was to declare the Australian Military Court (AMC) repugnant to the Constitution.

The AMC was established under the *Defence Force Discipline Act 1982* (the Act), pursuant to amendments made by the *Defence Legislation Amendment Act 2006* (Cth), to replace the long established military justice system of courts-martial. Establishment of the AMC followed an inquiry by the Senate Foreign Affairs, Defence and Trade References Committee, which reported in 2005. In two joint judgments, the High Court recounted the history of the military justice system and the recent developments that precipitated the inquiry, such as challenges in the UK and Canada that centred on whether service tribunals were properly independent and impartial. In both the UK (*Findlay v United Kingdom* (1997) 24 EHRR 221) and Canada (*R v Généreux* [1992] 1 SCR 259) the European Court of Human Rights and Canadian Supreme Court concluded that the courts-martial in their respective jurisdictions violated the requirements of the European Convention on Human Rights (ECHR) and the Canadian Charter of Rights and Freedoms (CCRF) respectively, in that they denied the complainants the right to have charges determined by independent and impartial tribunals. French CJ and Gummow J noted (at [16]) that Art 14(1) of the International Covenant on Civil and Political Rights (ICCPR) is cast in similar terms to those parts of the ECHR and CCRF considered in *Findlay* and *Généreux*, and that the Senate inquiry report had emphasised the fact that Australia was a signatory to the ICCPR. The Senate inquiry report recommended the establishment of a permanent military court in accordance with Ch III of the Constitution. The government of the day rejected that recommendation, but agreed instead to establish a non-Ch III court (the AMC).

The facts of this case involved the plaintiff, who at the relevant time was enlisted in the Royal Australian Navy (the RAN), being charged with the offences of ‘an act of indecency without consent’ contrary to s 61(3) of the Act and assaulting a superior officer, contrary to s 25 of the Act. The court declined to set out any details



of the incident (however, newspapers reporting the case were not so reticent). It was intended that the plaintiff would be tried by the AMC. The first defendant was the military judge assigned to hear the case. The plaintiff sought, inter alia, declaratory relief, including a declaration that the legislation creating the AMC was invalid because it provided for the exercise of the judicial power of the Commonwealth by a body not created in accordance with Ch III of the Constitution.

The AMC was created by s 114 of the Act:

(1) A court, to be known as the Australian Military Court, is created by this Act.

Note 1: The Australian Military Court is not a court for the purposes of Chapter III of the Constitution.

Note 2: The Australian Military Court is a service tribunal for the purposes of this Act: see the definition of service tribunal in subsection 3(1).

(1A) The Australian Military Court is a court of record.

(2) The Australian Military Court consists of:

(a) the chief military judge; and



(b) such other military judges as from time to time hold office in accordance with this Act.’

The governor-general appointed military judges for a term of 10 years (which, obviously, is not in accordance with s 72 of the Constitution).

The Commonwealth submitted that the AMC represented merely a ‘modernisation’ of terminology and that it did not depart in substance from the previous court-martial system. The previous system had been held by the court to be a valid exercise of the Commonwealth’s power under s 51(vi) of the Constitution (see, for example, *R v Cox; Ex parte Smith* (1945) 71 CLR 1 and *White v Director of Military Prosecutions* (2007) 231 CLR 570). However, the court emphasised that the previous system’s legitimacy under the Constitution rested on its place within the chain of command such that ‘[w]ithin that command structure, and in contrast to the operation of the civilian justice system, the sentences of courts-martial required confirmation by a superior officer and that confirmation in turn might be quashed upon petition to higher levels of the chain of command’ (per French CJ and Gummow J at [12]); ‘the final decision about guilt or punishment was not made by the court-martial; the final decision about those matters was made within the chain of command of the forces’ (per Hayne, Heydon, Crennan, Kiefel and Bell JJ at [90]). Such a system could not be described as an exercise of the judicial power of the Commonwealth under Ch III of the Constitution, but was instead ‘directed to the maintenance of the defining characteristic of armed forces as disciplined forces organised hierarchically’ and therefore valid under s 51(vi) of the Constitution.

Once again, the court cited the *Boilermakers’ Case* to confirm that the judicial power of the Commonwealth can only be exercised pursuant to Ch III of the Constitution (per French CJ and Gummow J at [28] and Hayne, Heydon, Crennan, Kiefel and Bell JJ at [76]). The Commonwealth contended that parliament could use its powers

outside Ch III to create a body styled as a ‘court’, with some but not all of the features of a Ch III court, so long as such a body did not exercise the judicial power of the Commonwealth. French CJ and Gummow J thought such submissions were dangerously close to a call for ‘legislative courts’ similar to those found in the United States. Relying on the *Boilermakers’ Case*, they swiftly rejected the notion that such courts have any place in Australia: [27]-[30].

The court also spent some time considering whether or not the AMC’s description in s 114 of the Act as ‘a court of record’ had any determination on the question of whether it was a court exercising the judicial power of the Commonwealth. French CJ and Gummow J thought (at [20]) that such a characterisation ‘emphasises, but is not the sole indication of, a legislative intention to create a body with the character of a Ch III court’. Hayne, Heydon, Crennan, Kiefel and Bell JJ held (at [100]) that ‘[d]esignation of a body created by a law of the Parliament as a ‘court of record’ may not, without more, show that it exercises the judicial power of the Commonwealth. It is necessary to have regard to what the body does.”

The court found that the AMC was a purported exercise of the judicial power of the Commonwealth. This was because, in contrast to the previous court-martial system, the AMC was designed to be outside the chain of command and to determine issues finally: ‘the separation of the AMC from command and the conferral on it of authority to decide issues of guilt or innocence finally is of determinative significance in considering whether the AMC exercises the judicial power of the Commonwealth’ (per Hayne, Heydon, Crennan, Kiefel and Bell JJ at [116]). The court dismissed the argument that the AMC was merely an updated court-martial system for the modern age within the ‘historical stream’ of previous systems of military justice, with French CJ and Gummow J concluding (at [62]) that ‘the AMC was designed to make a break with that past and the analysis of the 2006 Act ... shows that the Parliament achieved its objective.’

Having decided that the AMC was purporting to exercise the judicial power of the Commonwealth, it was but a short further step for the court to find that such power was not exercised in accordance with Ch III of the Constitution, since there was no dispute that the AMC was not constituted in accordance with Ch III. The court declared the relevant provisions of the Act invalid and ordered that a writ of prohibition issue directed to the first defendant prohibiting him from proceeding further with the charges against the plaintiff.

By Robin Bhalla

## The National Human Rights Consultation report in outline

### Background

On 10 December 2008, the Australian Government announced the National Human Rights Consultation. A committee, chaired by Father Frank Brennan AO, was established to conduct the consultation and prepare a report.<sup>2</sup> The report was delivered to the government on 30 September 2009, and released to the public on 8 October 2009<sup>3</sup> accompanied by a response from the government.<sup>4</sup>

The terms of reference stated three broad questions for the committee to address in its report:<sup>5</sup>

- Which human rights (including corresponding responsibilities) should be protected and promoted?
- Are these human rights currently sufficiently protected and promoted?
- How could Australia better protect and promote human rights?

Although the terms of reference were reasonably broad, the options available for consideration by the committee were limited:<sup>6</sup>

The options identified should preserve the sovereignty of the Parliament and not include a constitutionally entrenched bill of rights.

Criticisms of this limitation focussed on the second part, that the committee not consider a constitutionally entrenched bill of rights.<sup>7</sup>

The report does justice to the general breadth of the terms of reference. It also does justice to the enormous amount of community participation in the consultation. Over 35 000 written submissions were received by the committee,<sup>8</sup> in addition to public hearings conducted in Canberra and community roundtables conducted around the country. The committee also commissioned social research by way of focus groups and telephone interviews. Phil Lynch has called the consultation an example of 'best practice'.<sup>9</sup>

### The recommendations

The committee has made 31 recommendations in the report.<sup>10</sup> In answer to the most common question about the recommendations, Recommendation 18 states:

The Committee recommends that Australia adopt a federal Human Rights Act.

Recommendations 19-31 provide more detail in relation to matters such as which rights should be included, the nature of the judicial powers which should be contained in any Act and its applicability.

However, the content and structure of the report suggest that the recommendations about the Human Rights Act were not



Commonwealth Attorney-General Robert McClelland with Father Frank Brennan.

necessarily seen by the committee as the most important. For example, Recommendation 1:

The Committee recommends that education be the highest priority for improving and promoting human rights in Australia.

It is accompanied by two recommendations which are more specific regarding a program of education about rights and responsibilities in Australia.

These recommendations require only a limited amount of legal change (although the cultural change may be significant), whereas the recommendations regarding the Human Rights Act require a substantial amount of legal change. It is therefore unsurprising that there is an intermediate set of recommendations relating to human rights in existing policy and legislation (in particular, Recommendation 4 recommends that 'an audit of all federal legislation, policies and practices' be conducted) and in practice (which are essentially a more specific set of recommendations relating to policy and legislation).

There are also two recommendations relating specifically to Indigenous Australians. Recommendation 15 relates to legislation concerning Indigenous Australians, and recommends that the government provide a 'statement of impact on Aboriginal and Torres Strait Islander peoples' to the Parliament of Australia when it introduces legislation specifically relating to Aboriginal and Torres Strait Islander peoples.

Recommendation 16 recommends that the government form a partnership with Indigenous Australians to:

develop and implement a framework for self-determination, outlining consultation protocols, roles and responsibilities (so that the communities have meaningful control over their affairs) and strategies for increasing Indigenous Australians' participation in the institutions of democratic government.

### Themes

The recommendations made by the committee should be understood in the context of the report as a whole. One important part of that context is the set of themes outlined in Part 2.1 of the report (Chapter 2 summarises the community's views<sup>11</sup>). Those themes recur throughout the report.

One powerful theme is the focus of many consultation participants on 'survival' rights, such as rights involving freedom from violence, health, food, clothing and water. It was the fact that there are people who 'fall through the cracks' with respect to these rights which appeared to move many who participated in the consultation.<sup>12</sup>

The strength of this theme is reflected in the parts of the report which back up the recommendations generally,<sup>13</sup> and also specifically in three recommendations: Recommendations 15 and 16, which relate to Indigenous Australians, and Recommendation 22, which recommends specific socio-economic rights be included as non-justiciable rights in any Human Rights Act.

The concern for people who are significantly disadvantaged can be contrasted with the opinion expressed by some that there was no need for further or better protection of human rights in Australia. The committee acknowledged that view, stating:<sup>14</sup>

One can assume that this attitude is a natural consequence of the fact that Australia is a country where most people live with a sense that their freedom, equality and dignity are not threatened. ... The majority of people living here feel the system is not broken, and they do not foresee *their* human rights ever being curtailed.

[emphasis added]

The committee went on to comment:<sup>15</sup>

Throughout the Consultation, however, the Committee heard from thousands of Australians who are troubled by human rights problems—whether affecting themselves or others. There were reports of deprivation of liberty through police and immigration detention and of routine problems such as lack of access to health care, disability support services, housing and education. All such problems, dramatic or otherwise, can have crippling effects on the people who experience them.

The recommendations relating to education state that people should be educated about rights and responsibilities. This could encompass education which is primarily descriptive. However, the substance of the report suggests that such education could also encompass education about the experiences of Australians who do suffer from breaches of their human rights. This is consistent with one rationale for education: that it would create a human rights culture.<sup>16</sup>

The committee described this discrepancy between the opinion of many that their human rights were sufficiently protected and the opinion of many others that the rights of disadvantaged

groups were not sufficiently protected by referring to Australia's protections of human rights as 'a patchwork quilt', commenting in Part 15.2 that:<sup>17</sup>

The patchwork quilt of protections needs some mending.

Another theme was the acknowledgement that there is significant controversy surrounding the implementation of human rights protection in Australia. One area of such controversy relates to 'hot button' topics such as same-sex marriage, euthanasia, abortion;<sup>18</sup> another area of controversy relates to the appropriateness of a Human Rights Act in Australia.

The committee made it clear that specific controversial rights are the province of the legislatures.<sup>19</sup> However, the committee concluded its chapter on themes with the following comment:<sup>20</sup>

A Human Rights Act might help both parliaments and courts in resolving conflicting claims; it might also help communities make decisions on contentious social and moral questions. There is always a risk that groups unhappy with legislative or policy outcomes will claim that a Human Rights Act is applied selectively or ideologically.

Instruments such as a Human Rights Act do not usually provide for rights as specific as those relating to same-sex marriage, euthanasia and abortion. Rather, such issues are covered, if at all, by more generally expressed rights. This is entirely consistent with the committee's comments extracted above.

The attention paid by the committee to the controversy as to the appropriateness of a Human Rights Act in Australia is illustrated by the fact that two chapters are devoted to that topic: Chapter 12<sup>21</sup> outlines the arguments in favour, and Chapter 13<sup>22</sup> outlines the arguments against.

Arguments in favour include '[a] considerable degree of community support',<sup>23</sup> the 'patchwork' nature of current protections, increased protection for marginalised and disadvantaged groups, greater government accountability and service delivery and the contribution of a Human Rights Act to a culture of human rights protection.<sup>24</sup>

However, the committee also noted 'considerable opposition' to the concept of a Human Rights Act in Australia,<sup>25</sup> and arguments against include adequacy of current protections, arguments relating to the role of the judiciary under a Human Rights Act, potentially negative outcomes (for example, where rights conflict), the possibility of an increase in litigation with its associated costs, and other costs associated with a Human Rights Act.<sup>26</sup>

### Final comments

The National Human Rights Consultation report has struck a sensible balance in its recommendations. The most significant controversies and concerns surrounding the protection of human

rights in Australia have been considered, and the primacy given to the recommendations relating to education is a logical and politic way to address those controversies. The practical recommendations and the recommendations relating specifically to Indigenous Australians also seem unlikely to cause much controversy, although it may be possible for the government to cherry-pick at the implementation stage.

However, the recommendations concerning the Human Rights Act constitute a significant portion of the recommendations as a whole and are likely to be controversial for some time to come. In his response, the federal attorney-general remained significantly silent on the topic, making only a non-committal comment that there are 'strong views on the merits of a Human Rights Act' and that 'there are many other ways to protect and promote human rights'.<sup>27</sup>

By Brenda Tronson<sup>1</sup>

## Endnotes

1. LLB (UNSW) BCL MPhil (Oxon).
2. Information about the consultation, including the committee members, terms of reference and the report, can be found at <http://www.humanrightsconsultation.gov.au/>
3. Available at [www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReport-TableofContents](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-TableofContents)
4. The government's response is available at [www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_NationalHumanRightsConsultationReport](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_NationalHumanRightsConsultationReport)
5. National Human Rights Consultation, Terms of Reference, available at [www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/TermsOfReference\\_TermsOfReference](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/TermsOfReference_TermsOfReference)
6. National Human Rights Consultation, Terms of Reference, available at [www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/TermsOfReference\\_TermsOfReference](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/TermsOfReference_TermsOfReference)
7. See, for example, address by Associate Professor A Durbach at the Protecting Human Rights Conference, Sydney 2 October 2009, entitled: Perspectives on the National Human Rights Consultation – an academic perspective. Paper to be published at [www.gtcentre.unsw.edu.au](http://www.gtcentre.unsw.edu.au)
8. There has been criticism in the media regarding the large number of submissions which were sent as part of campaigns, often involving standardised text.
9. Address by Phil Lynch, Director, Human Rights Law Resource Centre, at the Protecting Human Rights Conference, Sydney 2 October 2009, entitled: Perspectives on the National Human Rights Consultation – consulting with the community. Paper to be published at [www.gtcentre.unsw.edu.au](http://www.gtcentre.unsw.edu.au)
10. Available at [www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReport-Recommendations](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Recommendations)
11. Chapter 2 is available at [www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReport-Chapter2](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter2)
12. See Part 2.2, Chapter 2, available at [www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReport-Chapter2](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter2)
13. See also Parts 4.1, 5.3, 5.10.
14. Chapter 2, available at [www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReport-Chapter2](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter2)
15. Chapter 2, available at [www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReport-Chapter2](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter2)
16. See also the committee's findings in Part 6.2, Chapter 6, available at [www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultation-Chapter6](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultation-Chapter6)
17. Chapter 15, available at [www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReport-Chapter15](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter15)
18. Part 2.4, Chapter 2, available at [www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReport-Chapter2](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter2)
19. Part 2.4, Chapter 2, available at [www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReport-Chapter2](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter2) – cf the non-inclusion of relevant rights in Recommendations 22 and 24.
20. Chapter 2, available at [www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReport-Chapter2](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter2)
21. Available at [www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReport-Chapter12](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter12)
22. Available at [www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReport-Chapter13](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter13)
23. Part 12.1, Chapter 12, available at [www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReport-Chapter12](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter12)
24. Part 12.2, Chapter 12, available at [www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReport-Chapter12](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter12)
25. Part 13.1, Chapter 13, available at [www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReport-Chapter13](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter13)
26. Part 13.2, Chapter 13, available at [www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReport-Chapter13](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter13)
27. Available at [www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_NationalHumanRightsConsultationReport](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_NationalHumanRightsConsultationReport) (page 4 in .pdf version)

## Tutors' and Readers' Dinner 2009

The 2009 Tutors and Readers Dinner was held at the Tea Rooms, Queen Victoria Building, on 17 July 2009.



L to R: Paul Coady, Pat Knowles, Geoffrey Evans, Warwick Hunt, Aditi Rao, the Hon Murray Gleeson AC QC



Simon Kerr SC, Scott Robertson and Peter Brereton SC



Warwick Hunt



Aditi Rao



Geoffrey Evans



The Hon Murray Gleeson AC QC



The Hon Murray Gleeson AC QC and Philip Selth OAM

## Junior counsel: brief them early and often

In a usual case of commercial litigation, counsel, at least junior counsel, should be briefed early, according to at least one judge of the New South Wales Supreme Court.

Amidst all the calls for controls on the costs of litigation, White J's recent comments in *April Fine Paper Macao Commercial Offshore Ltd v Moore Business Systems Australia Ltd* [2009] NSWSC 867 provide a timely reminder about how commercial litigation should be conducted.

The matter came before the court on an application for security for costs. There was no dispute that the plaintiff should provide security for the costs. The issue was how much. The defendant sought security in the sum of \$275,265. That was the estimate of the recoverable costs, on an ordinary basis, of an estimated full costs of \$340,000. The plaintiff offered security of \$35,584 up to the completion of discovery with liberty to apply for further security thereafter.

The case involved a claim for \$US477,491.39 for paper sold and delivered to the defendant. The defence raised various issues including non-compliance with a specification and merchantable quality. The case did not appear to his Honour to be a complex case.

The defendant's solicitor estimated the defendant's costs in defending the claim on a solicitor and client basis would be approximately \$384,500. The judge observed that such costs would be out of all proportion to the complexity and importance of the subject matter of the dispute and referred to the provisions of section 60 of the *Civil Procedure Act 2005* (NSW) which provides:

### 60 Proportionality of costs

In any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.

The judge was critical of the defendant's solicitor's 'excessive' estimate of costs for discovery and inspection of documents. He questioned the need for issuing subpoenas as well as the estimated costs of \$10,500 for doing so. Importantly, his Honour observed that both solicitors' affidavits reflected 'a common and misguided approach to preparing commercial litigation', namely leaving obtaining relevant documents until discovery and not taking statements of evidence until preparation of the case for hearing. His Honour observed:

Such an approach too often involves duplication of work, delays the identification of the real issues in the proceedings and results in late applications for amendments to pleadings. Such an approach can sometimes prove fatal to the client's case, through no fault of the client. The assembly of relevant documents and the taking of statements of evidence should be done at the earliest possible stage so that pleadings are prepared with the benefit of proofs of evidence and the client's documents. Thus in preparing their case, although the solicitor has had conferences with four witnesses, it seems they will have to be interviewed again in order to prepare witness statements as well as there being conferences again with counsel

before the hearing. Without witness statements and all the relevant documents of the client, the solicitor or barrister will often be uncertain as to what documents might be required from the opposing party, or from third parties, with the result that wide-ranging demands for documents are made. In other words, and speaking generally, a case will not assume its proper focus until those essential preparatory steps of obtaining and organising documents and taking proofs of evidence are taken.

No doubt that throws a heavier burden of costs to the earlier stage of preparation of proceedings but the approach saves costs in the long run. In particular, it minimises the risk of the real issues not emerging until late in the process.'

In relation to the briefing of counsel, his Honour said:

In a usual case of commercial litigation, counsel, at least junior counsel, should be briefed early. Where there is work that can be done either by the solicitor or by junior counsel, and, as often happens, junior counsel is more experienced than the solicitor and charges at a significantly lower rate, then the solicitor's duty to his or her client is to ensure that the work is done at the lower cost. That general statement is, of course, subject to the ability of the individual legal practitioners involved. But very often one sees work done by a solicitor in a firm which could be done equally well or better at a fraction of the cost by junior counsel with considerably more experience as a litigation solicitor and with more expertise.

To illustrate his point, White J referred to the defendant's solicitor's hourly rate of \$440 for a legal practitioner admitted in July 2004 with limited litigation experience. By comparison, junior counsel who was admitted as a legal practitioner in 2002 and after almost six years of practice was admitted to the bar in June 2008, charged only \$250 per hour.

The judge repeated his observations in *Motor Trade Finances Prestige Leasing Pty Ltd v Elderslie Finance Corporation Ltd & Ors* [2005] NSWSC 921 at [28] and [29] that a costs assessor should consider whether it is just and reasonable for a losing party to pay more towards a successful party's costs than would have been incurred if the successful party made efficient use of the resources of the junior bar.

The judge required security of \$130,000 in stages - \$85,000 for work to be done up to four weeks before the hearing and \$45,000 thereafter.

By Phil Greenwood SC

## Australian Lawyers Surfing Association

Peter Strain reports on the ALSA 2009 conference held in Lombok.



When we learned that our accommodation in Canberra had fallen through, we attempted to find suitable, alternative digs for our annual legal conference. Eventually we settled on the next best thing to our nation's capital – Kuta Beach, Lombok, next to the Island of Bali.

Approximately twenty five intrepid lawyers from around Australia attended the conference, some with wives in tow and even a couple of brave attendees with children. The conference intended to cover all the regular important legal topics such as: 'Native Vegetation Removal and Net Gain' by Chris Wren SC; 'The Good Faith Wraith' by Tony Bannon SC; and, importantly, 'Litigation and Arbitration in the United Arab Emirates' by Ray Younan, our international delegate. We were also, from time to time, entertained by a variety of other disciplines, including lectures by a psychologist, a banker and a financial planner, whose job it was to make sure we were all financially able to return to the conference next year.

As luck would have it, the ocean also played its part by generously providing good swell for the week. Despite the obvious disabilities caused by their great age, Bannon SC and Martin SC proved that youth was not necessarily a prerequisite for charging in the water. (This was something learned on previous

conferences when Leggat SC was present). This time both silks adopted different styles in combating the large waves; Martin brought his lovely wife Rosy for moral support and encouragement and Bannon brought his old crash helmet (the one he used to wear before Young J) as a safety precaution. Needless to say the local masseurs did a roaring trade with 'Happy Hands' (a favourite amongst the lads) boldly announcing that on the strength of the conference visits the global financial crisis was officially over. For other conference members who were lucky enough to remember to bring their surfboards, the beaches and point breaks of Lombok provided a suitable distraction to the intellectual rigour of the conference table. Next year's conference is at Nihawatu, Sumba. Check the web site ([www.alsaonline.com.au](http://www.alsaonline.com.au)) for details.

### East Bali Poverty Project (EBPP)

For the past three or four years ALSA has been funding a poverty project in East Bali as part of our charter to leave a positive footprint in the wake of our conferences ([www.eastbalipovertyproject.org](http://www.eastbalipovertyproject.org)). In the past some of us have made the trek to the East Bali Poverty Project itself which is situated in the mountains in the North East of the island. The project was started in 1998 by David Booth, an eccentric English engineer. At the time



there were thousands of people living in 19 hamlets in abject poverty without water, sanitation, adequate nutrition and totally devoid of health and education facilities. The sustainable transformation has been unbelievable. Every child is now educated, crops flourish and full medical facilities are available to all.

This year in view of the fact that the conference was not in Bali we decided to bring David Booth to Lombok for a few days to report on the development of the project. Over the past few years ALSA has raised nearly \$30,000 in support of a sustainable bamboo reforestation building including two workshops and an associated café and toilet block. Our support for the villages continues.

ALSA is always looking for new members and given that membership is now free there would appear to be little or no reasonable impediment for any self-respecting surfer not to join. We are a sensitive new age, politically correct organisation and to that extent we also welcome long boarders, boogie boarders and judges. Body surfers and people who just like the beach are also welcome.

## Bench and Bar lunches

By Phil Greenwood SC



'What was it like in the old days when barristers and judges used to meet and have lunch in the Dining Room?'

This question was asked during a New Barristers' Committee meeting several years ago. It brought back mixed feelings.

In 1984, Jan was the cook in the kitchen and Dorothy ('Dot') was the waitress. Breakfast and lunch was served. Jan was friendly and would take special orders. Dot was a Scot – diminutive and brusque – and did not muck around. The food was basic, but adequate – most of the time. Finding a band-aid in a salad one day was a low point.

Breakfast was a quiet affair. There was a handful of regulars who tended to sit in the same spot each morning.

Lunch was quite different. At 1.00pm the procession of judges and barristers from court would commence. Wigs and gowns would be left in the cloak room. Tables would be filled in turn. It was not done to start a new table whilst a seat was empty at an existing table. Most people knew each other. If not, introductions were curt. Orders were placed immediately. There was not a lot of choice. Meals were served with alacrity (mostly). Conversations ranged widely from current news events to speculation about appointments. It was friendly chatter (mostly). Lunch was consumed efficiently. No-one left the table until the senior person rose.

Tea or coffee would often be taken in the Common Room when the conversation

would tend to move to reminiscences and, depending on the company, be more opinionated.

Murray Gleeson QC, then president of the Bar Association, referred to these occasions as a medium for scandalous information; an occasion of privilege for defamation; and a forum for ideas about the bar.

It was certainly an extraordinary opportunity and privilege to meet and mix with judges and barristers of all seniorities, be treated as an equal (mostly) and hear their opinions and insights on almost any topic.

During the 1990s, the Dining Room went through a number of changes. The caterer changed and despite a number of attempts to re-invigorate the place, slowly but surely patronage declined. Various reasons for this were suggested, including the increased cost of the food, a preference to be above-ground and a desire for variety in both food and company. Eventually the decision was made to close the Dining Room.

In an attempt to revive the positive aspects of the dining room, some members of the bar have been organising occasional 'cheap and quick' lunches for barristers and judges for the last couple of years.

The intent is to provide a regular and casual opportunity for judges and barristers to interact and communicate informally.

The lunches seemed to have been well-received. Judges from the High Court, Federal Court, Supreme Court, Land and Environment Court and District Court have been regular supporters. They have commented on the benefits of being able to meet new barristers and catch up with old friends from the bar. Counsel of all seniority have remarked on the positive spirit of camaraderie and community. Each occasion has attracted about 80–90 barristers and judges.

Most lunches have been held at the Hyde Park Barracks Cafe in Macquarie Street. One lunch was held in the Hellenic Club in Elizabeth Street to be closer to the southern legal precinct. A choice of three dishes is offered, including a vegetarian dish, for \$25. People are encouraged to join the next available table, order immediately and eat when served.

But there is the ongoing problem of individual barristers taking financial responsibility for booking a restaurant and then hoping that people attend. A solution remains elusive. All suggestions, on this or any other aspect, are welcomed.

In 2010, five lunches are planned. Each is on a Tuesday in an 'odd' month. They will be on:

16 March;  
4 May;  
20 July;  
14 September;  
and  
16 November.

All current and retired members of the bench and bar are welcome and encouraged to attend. That includes the newest reader. Everyone has something valuable to contribute.

If you wish to book now, find out more or contribute a suggestion, please e-mail: Phil Greenwood SC at [pgreenwood@wentworthchambers.com.au](mailto:pgreenwood@wentworthchambers.com.au), Jeremy Gormly SC at [gormly@denmanchambers.com.au](mailto:gormly@denmanchambers.com.au), Joshua Knackstredt at [knackstredt@12thfloor.com.au](mailto:knackstredt@12thfloor.com.au) or David Mackay at [dmackay@sixthfloor.com.au](mailto:dmackay@sixthfloor.com.au)

## Sherlock Holmes in Australian judgments

By the Hon Leslie Katz SC

One of the characteristic functions of Australian judges and tribunal members is the drawing of conclusions of fact from evidence that's before them. Sherlock Holmes is one of the best-known fictional characters whose function it was also to do that very thing and is one who, what's more, frequently philosophised about the process of doing it. In those circumstances, it's not surprising that we find Australian judges and tribunal members referring in their reasons for judgment or decision both to examples of Holmes's engaging in that process and to examples of his philosophising about it.

A famous example of his engaging in that process, referred to a number of times in Australian reasons for judgment or decision, occurred in the story 'Silver Blaze'.<sup>1</sup> There, we find Holmes drawing a conclusion of fact, not from the presence of a particular act, matter or thing, but from its absence.

I'll discuss only one of the sets of reasons in which that famous example has been referred to, the reasons for judgment of Ipp J, then of the Western Australian Supreme Court, in *Entwells P/L v National and General Insurance Co Ltd*.<sup>2</sup>

I have two reasons for limiting myself for present purposes, only to what Ipp J had to say in that case.

*In 'Silver Blaze', a person had been able to enter the stables in which the famous racehorse was being housed at night and to do so without the watchdog's barking; therefore, that person must've been known to the watchdog.*

The first reason is simply that Ipp J is the only judge or tribunal member I've found who, in his or her reasons, actually quoted the famous passage from the story, which passage consists of an exchange between, on the one hand, Inspector Gregory, described by Dr Watson as 'a man who was rapidly making his name in the English

detective service', and, on the other, Holmes. According to Ipp J:<sup>3</sup>

The situation brings to mind the following exchange:

'Is there any other point to which you would wish to draw my attention?'

'To the curious incident of the dog in the night time.'

'The dog did nothing in the night time.'

'That was the curious incident,' remarked Sherlock Holmes.

The second reason why I mention only what Ipp J had to say is that, unlike that in any other case that I've found, '[t]he situation' to which his Honour was referring at the beginning of the passage that I've just quoted was a factual situation remarkably similar to that which had been imagined by Holmes's creator.

In 'Silver Blaze', a person had been able to enter the stables in which the famous racehorse was being housed at night and to do so without the watchdog's barking; therefore, that person must've been known to the watchdog. In the case before Ipp J, a person had been able to enter a shop at night and to do so without its burglar alarm's going off; therefore, the person must've been 'known to' the burglar alarm (in other words, the person must've known

the secret code that one had to enter in order to prevent the burglar alarm's going off).

What, I wonder, would Holmes have made of such a coincidence? Probably nothing, since, as he told Watson in the story, 'A Case Of Identity',<sup>4</sup> 'life is infinitely stranger than anything which the mind of man



could invent.'

As to Holmes's philosophising about the process of fact-finding, one can find a reference to a famous example of such philosophising in the reasons for judgment of Muirhead J of the Federal Court of Australia in *Nominal Defendant v Owens*.<sup>5</sup> That was an appeal from a judgment that had depended on the finding of fact that, of the two occupants of a car at the time that it had crashed, the plaintiff in the case had not been the driver. In the course of rejecting that finding of fact by the trial judge, Muirhead J said,<sup>6</sup> 'In the words of Sir Arthur Conan Doyle: "It is a capital mistake to theorize before one has data" (*The Memoirs of Sherlock Holmes*).'

Conan Doyle had obviously been very enamoured of the sentiment implicit in the statement on which Muirhead J relied, because he (Conan Doyle) had put it into Holmes's mouth many more times than just the once referred to by Muirhead J. In the novel, *A Study In Scarlet*,<sup>7</sup> Holmes had said, 'It is a capital mistake to theorize before you have all the evidence'. In the story, 'The Adventure of the Second Stain',<sup>8</sup> Holmes had said, 'It is a capital mistake to theorize in advance of the facts'. In the story, 'The Adventure of the Speckled Band',<sup>9</sup> Holmes had said, '[H]ow dangerous it always is to reason from insufficient data.' In the story, 'The Adventure of Wisteria Lodge',<sup>10</sup> Holmes had said, '[I]t is an error to argue in front of your data.' In the novel, *The Valley Of*



*Fear*,<sup>11</sup> Holmes had even gone so far as to say to Inspector MacDonald of Scotland Yard, 'The temptation to form premature theories upon insufficient data is the bane of our profession.'

Unfortunately, in making his statement, Muirhead J appears to have made the capital mistake of theorising before he had data or, in other words, of giving an attribution for the quotation without actually looking it up. It had not appeared in *The Memoirs of Sherlock Holmes*<sup>12</sup> (any more than had any of its variants that I've found). In fact, Holmes had made the particular statement quoted by Muirhead J in the story, 'A Scandal In Bohemia', which story appeared in *The Adventures of Sherlock Holmes*.<sup>13</sup>

Still, as Holmes himself acknowledged in the story, 'The Adventure of the Sussex Vampire',<sup>14</sup> 'One forms provisional theories and waits for ... fuller knowledge to explode them. A bad habit...; but human nature is weak.'

Because Holmes is so familiar to us, equally familiar are some of the physical tools of trade that he used in his detecting, for instance, his magnifying glass. However, I've only been able to find one reference to any such tool of trade of his in Australian reasons. That reference occurred in the reasons for decision of the Administrative Appeals Tribunal in *Re National Trust (NSW) and Minister of Industry and Commerce*.<sup>15</sup>

The question in that proceeding was whether the National Trust was entitled to a book bounty in respect of certain of its publications. Paragraph 3A(1)(c) of the *Bounty (Books) Act 1969* (Cth) provided

that a bounty was not payable in respect of any book that was 'a directory, guide or timetable or similar publication relating, in whole or in substantial part, to Australia or place or places in Australia'. In construing the reference in the provision to 'a directory, guide or timetable', the tribunal decided that the words had been used according to their ordinary understanding and gave, as a typical example of a 'timetable' within the meaning of the provision, "Bradshaw" (beloved of Sherlock Holmes)'.<sup>16</sup>

Despite that comment by the tribunal, when one examines the Sherlock Holmes canon<sup>16</sup> for 'Bradshaw'<sup>17</sup> references, one finds surprisingly few of them. In fact, I've been able to find only two. Notice that it's only in the first of the two that a Bradshaw is actually used and used for its intended purpose and that, on that occasion, it's identified as belonging to Watson.<sup>18</sup>

First, in the story, 'The Adventure of the Copper Beeches',<sup>19</sup> Holmes receives an urgent summons to the city of Winchester. According to Watson:

The telegram which we eventually received came late one night, just as I was thinking of turning in, and Holmes was settling down to one of those all-night researches which he frequently indulged in, when I would leave him stooping over a retort and a test-tube at night, and find him in the same position when I came down to breakfast in the morning. He opened the yellow envelope, and then, glancing at the message, threw it across to me.

'Just look up the trains in Bradshaw,' said he, and turned back to his chemical studies.

The summons was a brief and urgent one. Please be at the Black Swan Hotel at Winchester at midday tomorrow (it said). Do come! I am at my wits' end. - HUNTER.

'Will you come with me?' asked Holmes, glancing up.

'I should wish to.'

'Just look it up, then.'

'There is a train at half-past nine,' said I, glancing over my Bradshaw. 'It is due at Winchester at 11.30.'

'That will do very nicely.'

Secondly, in the novel, *The Valley Of Fear*,<sup>20</sup> Holmes is trying to decipher a coded message that he's received. He's satisfied that deciphering the code requires knowledge of the contents of a book, but which one? He's convinced that it must be large, printed in double columns, in common use and printed in one edition only. He discusses the matter with Dr Watson as follows:

This is clearly a book which is standardized. He [that is, the author of the message to be deciphered] knows for certain that his page 534 will exactly agree with my page 534.

But very few books would correspond with that.

'Exactly. Therein lies our salvation. Our search is narrowed down to standardized books which any one may be supposed to possess.'

'Bradshaw!'

'There are difficulties, Watson. The vocabulary of Bradshaw is nervous and terse, but limited. The selection of words would hardly lend itself to the sending of general messages. We will eliminate Bradshaw.'<sup>21</sup>

In light of the two extracts that I've just set out, the only ones in the entire Sherlock Holmes canon in which, so far as I can tell, Bradshaw is even mentioned, a serious question must arise about the intensity of the amatory relationship that had been perceived by the tribunal to exist between Holmes and Bradshaw.<sup>22</sup>

Finally for present purposes, I'll mention three sets of reasons in which Holmes's remarkable detective skills have been referred to as a standard which it would be either unreasonable or unnecessary to require others to reach.

First, in *Stateliner v Legal & General*,<sup>23</sup> White J, of the South Australian Supreme Court, was considering the standard of

defect-checking of its vehicles that an insurer was entitled to expect from an insured bus company. According to White J,<sup>24</sup> 'An objective and balanced standard of detective care is called for, not the standards of a Sherlock Holmes....'

Secondly, in another case, the driver of a car had been very seriously injured when, at night, he ran into the back of an insufficiently-lit truck. The truck had been parked at the side of a highway, though it protruded onto the highway to some extent. At the time the driver had happened upon the truck, another car was coming from the opposite direction, so that if the driver had swerved to miss the truck, he would have collided with the oncoming car. An appeal to the High Court of Australia by the trucking company and its driver against a judgment for damages in favour of the very seriously injured driver was dismissed, Mr Ligertwood having appeared on the appeal for the trucking company and its driver.

In his reasons for judgment, Rich J said:

The respondent met in an unexpected place a large stationary vehicle not properly lighted. At the same time he had to pass an oncoming car. If he had swerved, he would have crashed into that car. It was a case of Scylla and Charybdis. Mr. Ligertwood's argument appeared to suggest that in these unexpected and difficult circumstances Dr. Watson should have possessed and exercised the prescience of Sherlock Holmes.

Yes, it's true; the very seriously injured driver's name was Watson and he was a doctor!

Nonetheless though Rich J was in favour of dismissing the appeal against the judgment in Dr Watson's favour, I can't help but regard his introduction of the name of Sherlock Holmes into his reasons for judgment as a joke in very poor taste.<sup>25</sup>

Finally, in his reasons for decision in *Gaculais and Minister for Immigration and Multicultural Affairs*,<sup>26</sup> Chappell DP said:<sup>27</sup>

It does not require the skills of a Sherlock

Holmes or Dr Watson to discern the nature of the systematic pattern of immigration fraud and abuse emerging from these cases. It is very disturbing, however, to realise that it is a pattern which appears to have been allowed to continue over a substantial period of time without effective actions being taken to investigate and prosecute those responsible. It would appear that rather than Holmes and Watson at the investigative helm, Inspector Clousseau [written thus] is the person who has been in charge of any activities which may have been conducted to detect and deter what appears to be gross misconduct on the part of certain persons who have been allowed to practise their professions as migration agents.

As to the passage just quoted, one may respond that it doesn't require the skills of a Sherlock Holmes to discern that Chappell DP wasn't much of a Sherlock Holmes aficionado. He made that perfectly plain in what he said by equating the detective skills of Dr Watson with those of Mr Sherlock Holmes!

#### Endnotes

1. From *The Memoirs of Sherlock Holmes* <<http://www.gutenberg.org/etext/834>>.
2. Unreported as to the part of the reasons relevant for present purposes; 19 July 1991.
3. At pages 12-13.
4. From *The Adventures of Sherlock Holmes* <<http://www.gutenberg.org/etext/1661>>.
5. (1978) 45 FLR 430.
6. At page 447.
7. <<http://www.gutenberg.org/etext/244>>.
8. From *The Return of Sherlock Holmes* <<http://www.gutenberg.org/etext/108>>.
9. From *The Adventures of Sherlock Holmes* <<http://www.gutenberg.org/etext/1661>>.
10. From *His Last Bow* <<http://www.gutenberg.org/etext/2350>>.
11. <<http://www.gutenberg.org/etext/3289>>.
12. <<http://www.gutenberg.org/etext/834>>.
13. <<http://www.gutenberg.org/etext/1661>>.
14. From *The Case-Book of Sherlock Holmes*, of which I haven't been able to find an electronic copy.
15. <<http://www.austlii.edu.au/au/cases/cth/AATA/1984/146.html>>.
16. <[http://en.wikipedia.org/wiki/Canon\\_of\\_Sherlock\\_Holmes](http://en.wikipedia.org/wiki/Canon_of_Sherlock_Holmes)>.

17. <[http://en.wikipedia.org/wiki/George\\_Bradshaw#Bradshaw.27s\\_railway\\_timetables](http://en.wikipedia.org/wiki/George_Bradshaw#Bradshaw.27s_railway_timetables)>.
18. It's plain, incidentally, that each of the two references is to the version of Bradshaw that was devoted to the trains of the United Kingdom. There was also a version of Bradshaw devoted to the trains of the Continent. There were even guides carrying the Bradshaw name that were devoted to the trains of parts of Australia.

Although one finds no reference in the canon to any Continental or Australian version of Bradshaw, in the story, 'The Boscombe Valley Mystery', from *The Adventures of Sherlock Holmes* <<http://www.gutenberg.org/etext/1661>>, set in the late 1880s, one does find Holmes using 'a map of the Colony of Victoria'. Could that map have been abstracted from *Bradshaw's Guide to Victoria*? That that monthly publication contained such a map and had done so since at least the 1870s is confirmed by, among other things, uncontroversial evidence given in litigation involving the publication: see *In re Bradshaw's Guide, Ex parte Stillwell* (1903) 29 VLR 415, at pages 415-16.

19. From *The Adventures of Sherlock Holmes* <<http://www.gutenberg.org/etext/1661>>.
20. <<http://www.gutenberg.org/etext/3289>>.
21. Obviously, Holmes was not very impressed with the vocabulary of the then-current issue of Bradshaw. That issue was from the end of the 80s, according to Watson's dating of his conversation with Holmes, which dating occurred elsewhere in the novel's opening chapter.

Holmes's attitude to Bradshaw is reminiscent of that of Charles Dickens: 'No book, no newspaper! I left the Arabian Nights in the railway carriage, and have nothing to read but Bradshaw, and 'that way madness lies''. (A Plated Article, *Household Words* <<http://www.archive.org/stream/householdwords05dicklond#page/118/mode/2up>>, APR 24 1852).

PG Wodehouse made Lancelot Mulliner, a character in his story, *Came The Dawn*, from *Meet Mr Mulliner* <<http://www.archive.org/stream/meetmrmulliner00wodeuoft#page/162/mode/2up>>, express a different view of Bradshaw. Lancelot, who seems to have been speaking in 1927, described Bradshaw as being 'more eloquent than Shakespeare, the book of books, the crown of all literature'.

## Law Council awards President's Medal to Bret Walker SC



In September 2009, Bret Walker SC was awarded the Law Council's highest honour, the President's Medal. He was nominated for this award by the New South Wales Bar Association for his outstanding contribution to the legal profession and the wider community in his various capacities as a community lawyer, barrister, senior counsel and philanthropist.

Speaking at the presentation ceremony, during the Australian Legal Convention,

in Perth, the president of the Law Council, John Corcoran said: 'Mr Walker is held in high regard for his sharp legal mind and his advocacy skills, as well as his strength of character and integrity. His contribution to social justice and the rule of law in this country has been extraordinary. He is often involved in matters in which the more disadvantaged in our community come face-to-face with the law. Both his practice at the bar and his time spent giving pro bono assistance to a wide range of causes reflect both his incredible legal skill and deep understanding of people from all walks of life. His commitment to social justice and his ability to interpret and apply the law at the highest level make him an invaluable member of the profession, as well as of the wider community. On behalf of the Law Council and the wider profession, I congratulate Mr Walker on this award. It is formal recognition of his substantial contribution to the law and the community.'

Bret Walker SC has been a practising

barrister for nearly 30 years, and was appointed senior counsel in December 1993. He regularly advises the Australian Government on a wide variety of constitutional issues. He has also been appointed by the NSW Government to conduct inquiries into Campbelltown and Camden hospitals, the management of Kosciusko National Park in the wake of the Thredbo landslide, and the Sydney Ferry Service. He was president of the Law Council of Australia from 1997-98, and president of the NSW Bar Association from November 2001 to November 2003. He is the primary author of the New South Wales Barristers rules, the Australian Bar Association's Model Conduct Rules and the Law Council of Australia's current Model Conduct Rules.

In December 2003 he was made a life member of the New South Wales Bar Association, in recognition of his exceptional service over many years to the Bar Association and the profession.

### Sherlock Holmes in Australian judgments (continued)

In an attempt to test Holmes's theory about the limited nature of Bradshaw's vocabulary, I searched the *OED* (2d) electronically for words or phrases whose meaning was illustrated by quotations taken from pre-1890s Bradshaws. I found only six such words or phrases: express (as in 'express train'); mixed (as in 'mixed train'); parliamentary (as in 'parliamentary train'); second-class (as in 'second-class railway ticket or compartment'); slip (as in 'to slip a railway carriage'); and third-class (as in 'third-class railway ticket or compartment'). Not much Shakespearean-style eloquence in that lot!

Incidentally, the book that Holmes correctly concluded had been used to create the coded message was *Whitaker's Almanack* <[http://en.wikipedia.org/wiki/Whitaker's\\_Almanac](http://en.wikipedia.org/wiki/Whitaker's_Almanac)>.

22. Completeness dictates that I mention here two references that I've found in the Sherlock Holmes canon to a railway timetable, with no mention of whether or not that timetable was one that had been produced by Bradshaw. In the story, 'The Adventure of the Bruce-Partington Plans', from *His Last Bow* <<http://www.gutenberg.org/etext/2350>>, a question arose as to the first train that someone could've taken from Woolwich to London Bridge after a certain time. According to Watson, 'A reference to the timetable showed that the 8.15 was the first... In the story, 'The Adventure of the Dancing Men', from *The Return of Sherlock Holmes* <<http://www.gutenberg.org/etext/108>>, Holmes asks Watson whether there is a train to North Walsham that night. According to Watson, 'I turned up the timetable. The last had just gone.'

23. (1981) 29 SASR 16.

24. At page 33.

25. The case was *Lee Transport Co Ltd v Watson* (1940) 64 CLR 1 and the quotation from the reasons for judgment of Rich J is at page 5. At pages 5-6 in my paper, *Homer in Australian reasons for Judgment or Decision* <<http://papers.ssrn.com/abstract=1322208>>, I mentioned, without providing examples, that one could find in such reasons reference to someone's being between Scylla and Charybdis. The passage from Rich J's reasons for judgment that I've quoted in the text provides an example of such a reference.

26. <<http://www.austlii.edu.au/au/cases/cth/AATA/2000/959.html>>.

27. At paragraph [64].

## Bar Practice Course 01/09



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## Bar Practice Course 02/09



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# Albert Bathurst Piddington

By David Ash

## Cyclone

*a. gen. A name introduced in 1848 by H. Piddington, as a general term for all storms or atmospheric disturbances in which the wind has a circular or whirling course.*<sup>1</sup>

Albert Bathurst Piddington was to write fondly of H 'Storms' Piddington, his father's uncle. As well he might, for his own life was a cyclone of fine proportion. A client would write in his own memoirs:<sup>2</sup>

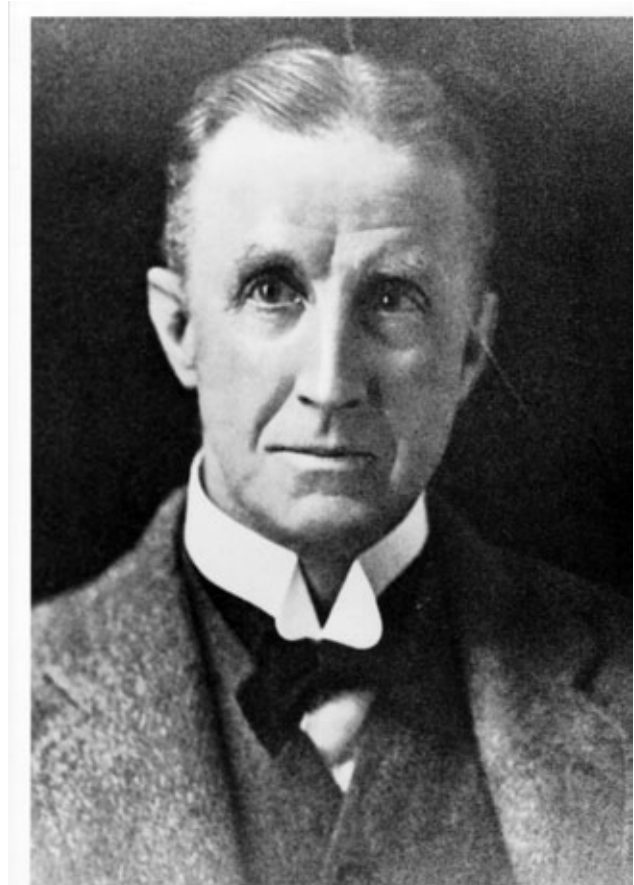
Mr. A. B. Piddington KC could be a sketch by Dickens, a grey-haired old gentleman, thin as a rake, but inside him there burns a volcano, which will soon erupt and spit fire for four months. He will cause the Judges a lot of trouble, although he was one himself not long ago. He resigned his position on the bench of the High Court, and also his position of Arbitration Court Judge, with their high salaries and high honours, the first because of a personal view regarding a point of duty, the second as a protest against an anti-democratic measure of the Governor. He is respected for his fidelity to his convictions, as an art historian, as a Shakespearean scholar, and as a linguist. In the course of the trial he will learn yet another new language, or rather, a very old one, in spite of his seventy-three years.

## The young Piddington

'There may be an age of innocence. I never found it.'<sup>3</sup> So Piddington opens the chapter of his published reflections touching on his childhood.<sup>4</sup> His father was English-born, a Wesleyan who became an Anglican, ending his career as an archdeacon in Tamworth. Religion in Piddington's early life was practised with a pungent dose of Victorian chastisement. 'My father was passionately fond of us all, but if it was the Lord's will that he should be chastened by having an imp of a son, it was also the Lord's command that he should correct him. At school the cane, at home the horsewhip, was the curriculum.'<sup>5</sup>

Piddington was born on 9 September 1862,<sup>6</sup> at the place which gave him his second name. This was thirteen and eleven years after the two Sydney members of the first court – Barton and O'Connor – and a year before Piddington's replacement Rich, who would sit until 1950. His education was that of a nomad; his first school was Cleveland Street Infants, in Sydney, then Newcastle Public School, and then Goulburn Public, which he left without knowing his declensions, something he justified by the fact that Latin was only taught once a week and on the same day as the cattle sales.<sup>7</sup>

There was a scholarship to Newington, then the former home of the Blaxland family on the banks of the Parramatta River. Piddington found himself in a Latin class with much older students, men, in fact, who were themselves teaching before they could afford to study for the ministry. Having started so late, they made mistakes; the headmaster being unable to cane twenty-one or twenty-two year olds, caned Piddington in their stead.<sup>8</sup> Piddington later ran



away but was recovered after his father telegraphed 'Inform the police, search the river; if absconded, punish severely', which in later years came back to Piddington as 'If alive, flog; if dead, bury!'<sup>9</sup>

The child and the school abided each other for a term. Providence intervened in the form of J F Castle, who had run Calder House, a proprietary school in Redfern which included among its alumni the Sly brothers, Jack Want, Sir William Cullen and Sir Kelso King. Castle had lately purchased Cavan, a property some 15 miles out of Yass, where he continued classes. Piddington's truancies at the cattleyards proved not in vain. He responded vigorously, and went on to success first at Albert Bythesea Weigall's Sydney Grammar and then at Sydney University. He graduated in 1883 aged 21 with first class honours and the university medal in classics.

Piddington later recalled that his first public dinner was a banquet given to Charles Badham on his seventieth birthday in the vestibule of the Town Hall.<sup>10</sup> The toast being given by W B Dalley – Australia's first Privy Councillor and thrice-refuser of the chief justiceship – 'the wines came on in orthodox order and profusion'.<sup>11</sup> Only four saw the end, among them Piddington and Edmund Barton. Barton was elected to the chair and they toasted all officials of the university

to the yeoman. Somehow Piddington was able to walk home to St Paul's College, where he had been student and was to become vice warden. He was also a member of the first staff of Sydney High, established in Castlereagh Street:<sup>12</sup>

The building chosen as the site of the new schools was a two-storeyed building on land now occupied by David Jones, surrounded by a high wall. It had been commissioned in 1820 by Governor Macquarie and designed by Francis Greenway and in the meantime it had been St James Church of England Primary School. The boys entered from Castlereagh Street and occupied the ground floor, the girls entered from Elizabeth Street and occupied the first floor.

In 1929 and to mark the opening of the new school building a year earlier, Mr AM Eedy, the school's first pupil, donated MLC shares to provide annual prizes for English and the 100 yards championship. The former was named for Piddington as an expression of the affectionate regard in which he was held by Eedy. The AB Piddington Prize for English (advanced) is still given out to a year 12 student.<sup>13</sup>

In 1887, Piddington took a year's leave of absence in Europe, visiting Badham's old college and Cobet of Leyden. He would write that 'In the pure serene of Greek scholarship [Badham] and Cobet of Leyden shone as the great Twin Brethren, the Castor and Pollux of their section of the sky'.<sup>14</sup> Piddington's biographer adds that he found time to get to Bonn 'where instead of seeking to make an impression as an academic he enthusiastically joined university students in noisy revelry'.<sup>15</sup>

### Piddington at the bar

Back in Sydney, Piddington kept up his teaching; he lectured evening students from 1889 to 1894 and was an examiner in the Junior Public Examination. Meanwhile, in 1889, he served as associate to Sir William Windeyer. An associateship with a highly regarded judge must have been quite a prize for anyone considering a barrister's life. However, it seems to have jarred with this highly strung young man. In Piddington's 1929 reminiscences, neither of his two references to Windeyer is warm:<sup>16</sup>

[In the first of two chapters on Badham] Dalley's pursuit of pleasure was angrily spoken of by the late Judge Windeyer, but fits of religious contrition alternated to keep his nature from any lasting contamination of the soul...

[In his chapter on Sir Samuel Griffith] Sir Frederick Darley was no longer at his best, though he gave of his best. A sound common lawyer, he was never a jurist, and his judgments, careful and conscientious, evince no width of intellect. Windeyer was gone, before whom every man felt he had to do his best to make headway in the judge's esteem, and Sir Frederick at times showed signs of fatigue.

Darley himself was more sympathetic to Windeyer, saying that

he was 'singularly able, conscientious, zealous and hardworking ... in some respects he was much misunderstood, for those who knew him best know what a tender heart he had and what a depth of sympathy he possessed for all those in distress and misery'.<sup>17</sup> Sir Henry Parkes, not known for being a killjoy unless there was a vote in it, might equally have been writing of Windeyer's grandson when he observed 'My friend Windeyer was a young man of high spirit, bold and decisive in the common incidents of life, with a strong capacity for public affairs. He would have made as good a soldier as he has made a sound Judge'.<sup>18</sup> I have not found how the associateship came about, although Piddington the scholar would have been familiar with Windeyer the educationalist; at the time, the latter was between his vice-chancellorship and chancellorship of the university. Whatever, the relationship appears to have got no further than oil and water.

To Piddington's rooms. Denman Chambers, like Wentworth Court, was constructed on land owned by the businessman and District Court judge Joshua Frey Josephson. His father reached the colony in 1818, having been sentenced to fourteen years for having forged £1 notes in his possession. Josephson himself was a music teacher, a Sydney mayor, a solicitor, a member of the founding committee of St Paul's College, and a founder of a number of businesses, before being called to the bar in 1859.<sup>19</sup>

It was at Denman Chambers – or 182 Phillip Street – that Piddington had his rooms. He later wrote that it was 'a hive of industry, but also a club of friends', with reflections along the following vein:<sup>20</sup>

Among Walter [Edmunds]'s visitors was a well-known remittance man, an English barrister, Cornewall Lewis. He was the son of that Chancellor of the Exchequer who was noted for his epigrams – among them the famous 'Life would be tolerable but for its pleasures.' His son imitated the gift, and worked his good things off when he was seeking accommodation in chambers. Thus when Mr Blank, a member of Parliament at the time, at last drew the line and would not be bled any more, Cornewall Lewis waited at the street door and said: 'Poor Blank! not quite a lawyer, not quite a statesman, not quite a gentleman' – an epigram he shouted out about an eminent judge when he took his seat for the first time on the High Court Bench in Sydney.

The difficulty with Piddington's account is that, as I understand, the Chancellor of the Exchequer of that name had no children of his marriage, and his three stepchildren seemed to have been eminently respectable. Which makes me wonder about the last part.

### Piddington the politician

Piddington made two attempts in 12 months to enter the Legislative Council. In 1894, he stood against Premier Sir George Dibbs in Tamworth, representing free trade liberals. He chose also to identify with the labour movement, although he firmly rejected the disruption caused by strikes and the violence employed by

trade unionists; in his own words, 'He had chosen to consecrate himself to a great cause... that cause which took its shape in the labor [sic] movement of the present century... a cause for which a man might willingly lay down anything and not stop short of life'.<sup>21</sup> (Even if we allow for 'an age of perorations', Christopher Brennan was on the money when he referred to his friend as 'the singer of hyperbole'.<sup>22</sup>)

Dibbs would lose the premiership to George Reid, but took Tamworth with 612 votes. Piddington polled 492 and another labour leaning candidate 277, leading the Tamworth Observer to remark that 'the workers have themselves to blame for permitting their ranks to be so broken up as to allow the Fat Man's representative to sail in'.<sup>23</sup>

It was not, however, all tears in the Piddington family. His brother William Henry Burgess Piddington was elected as the member for Uralla-Walcha. WHB would hold the seat until his death at the age of 44, in 1900. Like Dibbs and no few others, he changed allegiances, moving from Independent Free Trade to Free Trade to Protectionist in his six years.<sup>24</sup>

A year later, Reid went to the people, and the situation had changed. Piddington took 621 votes, and Dibbs, the only other candidate, 559. Piddington was now member for Tamworth. However, it was not free trade but federation which was the issue on which Piddington would leave his mark. (His brother supported and Piddington opposed the 1898 Constitution Bill, WHB being 'will have bill' and AB being 'anti-bill'.<sup>25</sup>) Piddington's major opposition to federation was the role to be given to the Senate. He distrusted the power to be afforded it, and distrusted its power base in the states as undemocratic.<sup>26</sup>

A paper on 'Federation and Responsible Government', read before the Australasian Association for the Advancement of Science on 11 January 1898, was published under the title *Popular Government and Federation*, together with an article on 'The Senate and the Civil War in America'... [Piddington] wrote of two chambers 'each commissioned to voice the assent of a different master'. The Senate would certainly use the powers it was granted unless the Commonwealth Act operated 'as a repeal of human nature'. That for Piddington no bicameral system of representative government was logical, only a referendum of the people, not the proposed 'dual referendum' of States and people, would prevent executive government from becoming 'a prize to be wrestled for between the bodies of equal statutory powers'.

Piddington contributed his bit to the colony getting less than the required 80,000 yes votes, with Tamworth's voters coming out firmly against the Bill. His heightened profile led to an invitation from – and an enduring association with – H B Higgins, a prominent anti-Biller.<sup>27</sup> However, this did not help him in the following election. He was deeply disappointed, but his biographer suggests, 'It was not a matter of Piddington's losing touch with his constituency. He had never listened to their concerns. He had wanted them to listen to

him... a comment applied to Cobden and Bright applied equally to him: 'To their very great ability can be added their inexperience in politics, the fact that they were unpractised in compromise'.<sup>28</sup>

### Industrial arbitration

With the eclipse of Piddington's political career and the carriage of federation came a set of briefs in a new area of law which was ultimately to form the frame of Piddington's professional and philosophical outlook for the rest of his life, the world of compulsory industrial arbitration.

This was a furious area of debate in the 1890s. Reid's attempt to introduce a bill in 1895 failed to get a second reading in the upper chamber, with RE O'Connor 'reflecting the almost unanimous view that going a step beyond the voluntary principle was 'to walk over the edge of the precipice'. He genuinely feared that the intrusion of state power into the personal relationship between masters and men would rapidly destroy the basis of free society as liberals saw it.<sup>29</sup> (Just as Piddington would leave behind an older view of liberalism, so too O'Connor; it was he and not Higgins who, less than a decade later, would sit as the first president of the Commonwealth Court of Conciliation and Arbitration.)

An Industrial Arbitration Act made it onto the books in 1901 (temporarily, as provision was made for it to expire in 1908) and Supreme Court judge HE Cohen was its first president. The early years were fertile ones for lawyers, not only because of the subject matter but because of its newness; just as jurisdictional battles kept industrial law on the battlegrounds at the beginning of the 21<sup>st</sup> century, so too the 20<sup>th</sup>. One example is *Clancy v Butchers' Shop Employees Union & ors*, a matter which made its way to the High Court.<sup>30</sup> There had been a dispute between the butchers and their employees which had resulted in an award under the Act. Clause 4 provided that shops were to close at 5.00pm on Mondays, Tuesdays, Thursdays and Fridays, 1.00pm on Wednesdays, and 9.00pm on Saturdays. Mr Clancy was alleged to have kept his shop open to 9.30pm one Saturday, and found himself the subject of a summons taken out by the union and others, for Mr Clancy to show cause before the Arbitration Court as to why he should not pay a penalty of £5 for his breach of the award.

Mr Clancy's brief came up with the argument that the matter with which clause 4 purported to deal – closing times – was not an industrial matter within section 2 of the Act, with the result that the Court of Arbitration – whose jurisdiction was so limited – had no power. A full court of the Supreme Court disagreed, by majority, but the High Court did not. Sir Samuel Griffith found that there was nothing in the legislation 'to interfere with the employer during his own spare time; but after the relationship of employer and employee [spelled in the reports employé] has ended the employer is free to do as he pleases.' The chief justice continued that the employer 'retains his common law right to dispose of his own time as he thinks fit without reference to anyone else, and the

Arbitration Court has no power under the Act to interfere with the exercise of this right.<sup>31</sup> Barton and O'Connor JJ agreed. In the case, Piddington and WA Holman appeared for – and both addressed – the union and its secretary.

After the Act died its timetabled death, and the court with it, a new bill – the Industrial Disputes Bill – made its way through both houses. This made provision for wages boards, chaired by judges or other persons ‘of good standing and fair mind’. There were not enough judges, and the upshot for current purposes was that Piddington was appointed to chair ten boards from 1909 to 1911.<sup>32</sup> Piddington got invaluable experience, and grew in favour with both Labour and Capital. Or more accurately, he became a person acceptable to both.

### A royal commissioner

So it was that Piddington was on call when the first NSW Labor government was elected in 1910 with W A Holman as attorney general. And called on he soon was, no less than as a royal commissioner. In 1911, he was appointed to inquire into and report on three matters, an alleged shortage of labour; the effects of the hours and conditions of employment of women and juveniles in factories and shops; and the cause of the decline in apprenticeship and the practicality of using technical college and trade classes as substitutes.<sup>33</sup>

Piddington’s work revealed a concern – shared by many of the time – that a reduced birthrate and the health dangers for factory girls would produce ‘race suicide’ at a time when our neighbours’ populations were increasing rapidly.<sup>34</sup> He also had a moral objection to women in factories:<sup>35</sup>

He was shocked at the ‘open and unconcealed employment of young unmarried girls in and about the preparation of preventives of conception’ and how they ‘applied joking names’ to them. He regarded this as ‘a disregard for decency’ apart from his objections in the national interest to ‘the apparently wholesale dissemination of the means of race suicide’. He endorsed the urgent recommendations of doctors to separate the workplaces of males and females. In his view, if boys and girls should be separated at school it was ‘simply to court disaster’ to let them work together. He went as far as recommending that female employees should enter and leave the premises at least a quarter of an hour before males.

Whatever Piddington’s naivety, he still had his rhetoric. When he sought more skilled labour, he was able to answer union fears thus:<sup>36</sup>

... the flow of human energy and skill poured into the veins of the body industrial will not only vitalise it highly for its present duties, but create in all its parts so strong a pulse and so sound a growth that before long a new necessity will arise for a fresh infusion of skilled as well as other immigrants.

### Spanish sketches

In 1912, Piddington attended a Congress of the Universities of the Empire in London. (He had been elected unopposed to the University of Sydney Senate in 1910.) He and his wife also attended in London an International Eugenics Congress. He found time to visit Spain, and his observations are recalled in *Spanish Sketches*. The sketches first appeared in the *Sydney Morning Herald* in 1913, and then in book form in 1916.<sup>37</sup> It is an elegant little travelogue, covering places and painters in descriptive but not – for Piddington, at least – too imposing a style.

In Spain, Piddington met with Prime Minister Jose Canalejas, who was interested in Piddington’s views on and experiences with compulsory arbitration:

He does not, however, propose compulsory arbitration (which he had a day or two before denounced in the Cortes as ‘hateful to liberty and to Liberals’ abomination de la liber tad y del Liberalismo) but a voluntary tribunal, with representatives for each side, and a representative of the State, as being a third but neutral party. This last ingredient, logical as it is, the Socialists oppose out of utter, and, I am convinced, sincere, distrust of the neutrality of the Government. And on the main question, the taking away of the right to strike el derecho de huelga the Conservatives, led by Maura, are at one with the Socialists. There are evidently, then, troublous days ahead for Canalejas; but he is a brave, resourceful, and alert man.

The last sentence is poignant: the interview took place in Madrid on 25 October 1912; it was written up by Piddington in London on 10 November; Canalejas was assassinated while walking in the Puerta del Sol a couple of days later.

There is a visit to Seville, in particular to the Biblioteca Columbina, where ‘the layman finds his greatest interest centered in the narrow compass of books on which Columbus pored long and pondered deeply, and which are annotated in his own hand’.<sup>38</sup> We have seen that Piddington – like many of his class – had something of a naivety about poverty. But – and this comes through time and time again in his writing – he would be the last to hold that a merely bookish approach was ever warranted. If Piddington wanted for experience himself, he was someone who recognised its value as a teacher. His defence of Columbus is a good example:<sup>39</sup>

Amidst much detraction which in the last half-century has succeeded to the lay canonization of Columbus in earlier days, nothing has been more futile and misplaced than the relish with which some writers have proved that Columbus was not, as used to be said, a learned or a scientific man, and did not make his discovery as the result of a sound theory, nor even seek to find India, as he afterwards said he had meant to do and had done. These books of Columbus, of which I speak, would prove all these things except perhaps the last, and yet are they worth proving? It is one of the snares of learning that it often feeds the nerve of that vanity in men which thrills at contact with the faults of others, and that it sometimes produces (to quote a notable phrase of Badham’s) ‘the flatus of self-

sufficiency rather than the afflatus of inspiration'. Columbus made geography if he did not know geography, and though he was not an inventive theorist, he was an inventor, and therefore, by the unappealable judgement of history, he rightly enjoys the exclusive and perpetual patent of his discovery. Others had pondered but not sailed; others still had sailed but not pondered. Columbus both pondered and sailed, and seems to have been the only man of his time who at once absorbed (and this at times with a felicitous credulity) the opinions of all who had speculated or even dreamt about the New World, and at the same time absorbed them always and only as the nutriment of a fixed practical resolve.

### The High Court

On the way home from Europe, Piddington received an offer from Billy Hughes to sit on the High Court. The court's own site provides the framework of the appointment:<sup>40</sup>

In November 1912 Justice O'Connor died in office. At the same time, the workload of the High Court had grown to the extent that it was stretching the capacity of five Justices, so Parliament agreed to again increase the Bench by two. In February 1913 Frank Gavan Duffy was appointed to replace Justice O'Connor, and the following month Charles Powers and Albert Bathurst Piddington were appointed to increase the High Court Bench to seven Justices.

Gavan Duffy's appointment was warmly welcomed by the legal profession but there was considerable disquiet about the appointment of Justices Powers and Piddington. Criticism centred around their abilities as lawyers: the bars of New South Wales and Victoria even went so far as to withhold the customary congratulations on their appointment.

Piddington's biographer permits himself more latitude:<sup>41</sup>

Piddington was not appointed because he was the best judicial material available in the Commonwealth. This was the first opportunity that a Labor government had to appoint a High Court judge likely to be more sympathetic to Labor viewpoints. Piddington was not a member of the Labor party and was not even a King's Counsel, but he was the most appropriate pro-Labor barrister known to Hughes.

I am not sure what is meant by 'the first opportunity'. In fact, Labor's first opportunity for an appointment had already been exercised, Hughes appointing Frank Gavan Duffy in place of Richard O'Connor. Perhaps, as one of Henry Bourne Higgins's biographers suggests, 'there was a slight sense of the court's token Catholic being replaced by another'.<sup>42</sup>

Piddington's appointment is said to have come from an exchange of cables between Hughes and Piddington, with Dowell O'Reilly the intermediary. Graham Fricke summarises it thus:<sup>43</sup>

In 1913 radical senior lawyers were rather thin on the ground. Hughes was attracted to the notion of appointing Piddington, who

during the federal convention debates had shown the same individualism as Higgins, and who was by no means a run-of-the-mill ambitious conservative barrister.

But before offering the appointment to Piddington, Hughes wanted to ascertain his views on constitutional issues. Unfortunately, Piddington's absence overseas made it difficult to make discreet inquiries, so Hughes took the unorthodox step of writing to Piddington's brother-in-law, Dowell O'Reilly [Marion's brother] (the poet, Labor parliamentarian and son of Canon O'Reilly). Hughes pointed out that before appointing Piddington he wanted to be satisfied that the proposed appointee was not a rabid States'-right champion. An assurance that Piddington 'looks favourably upon the national side of things' would be 'quite sufficient'. He suggested that if O'Reilly did not know Piddington's views, he should cable Piddington and ask him what they were. O'Reilly duly cabled Piddington:

Confidential. Most important know your views Commonwealth versus State Rights. Very urgent.

The cable was sent to intercept Piddington, who had left England by ship, at Port Said. On 2 February 1913, Piddington cabled O'Reilly:

In sympathy with supremacy of Commonwealth powers.

O'Reilly transmitted the reply to Hughes, who went ahead with the proposal. His offer reached Piddington at Colombo in mid-February. According to a newspaper account given by Piddington almost ten years later, he had in the meantime become uneasy about the propriety of having expressed his political views in response to O'Reilly's cable. He claimed – in the 1922 newspaper report – to have replied to Hughes's offer:

Unofficial. If with complete independence validity questions shall accept. Do not hesitate to withdraw offer if you wish, wire again Frederick der Grosse and I will reply officially, grateful anyhow.

Hughes announced the appointment.

More on the 1922 situation later. Meanwhile, the *Bulletin* was scathing:<sup>44</sup>

Piddington was, till W.M. Hughes discovered him last week, a more or less obscure junior, with a modest, in fact, insignificant practice... [The] men who were fitted for this big job stand out like beacons. The names which occur most readily are Patrick McMahon Glynn, B.R. Wise, Josiah Symon and Irvine the Iceberg.

For the magazine, 'he is one of the last whom a colleague would select as the possessor of a judicial mind. He possesses no sense of legal proportion. His intellect is, forensically speaking, of the perverse and pedantic order. He was a 'coach' for years, and the mark of the schoolmaster is still on him in plain figures. His experience of public affairs... has been meagre, to put it mildly.'<sup>45</sup>

The *Bulletin's* remarks were published on 20 February 1913. On 10 March, the New South Wales Bar met – in a ‘large and representative’ mood – and resolved:<sup>46</sup>

- (1) That in order to maintain the prestige of the High Court, as the principal Appellate Court of the Commonwealth, and to secure public confidence in its decisions it is essential that positions on that bench should be offered only to men pre-eminent in the profession.
- (2) That this Meeting of the Bar of New South Wales regrets that this course was not adopted with respect to the two most recent appointments to the Bench of the High Court.
- (3) That a copy of these resolutions be forwarded to the Prime Minister of the Commonwealth.
- (4) That a copy of the first two resolutions be forwarded to the Attorney-General and the Solicitor-General of this State, with the request that congratulations should not be offered to either of the justices in question on behalf of the Bar of this State.

Despite consultations with Sir William Cullen, chief justice of New South Wales, and Sir Edmund Barton (whom he had as a friend), Piddington chose to resign and did so on 24 March. Arguably, this was ‘a hurried escape [from the wrath of the legal profession] rather than being a matter of conscience’,<sup>47</sup> although Fricke points out that Piddington was already suffering grief at the news of a half-brother’s death.<sup>48</sup> Barton later wrote to Marion Piddington, regretting a resignation which some might describe as quixotic, but which he saw as ‘conduct worthy of a high mind’.<sup>49</sup>

Can we glean some insight into Piddington’s frame of mind and to his subsequent attitude to the court, from his inclusion of Sir Julian Salomons as a chapter in his 1929 memoirs? Salomons had been appointed as chief justice in 1886, but:<sup>50</sup>

... a meeting of the Bar convened in the Attorney-General’s chambers on 19<sup>th</sup> November 1886. The Attorney-General because of political interests could not be present and M. H. Stephen, Q.C., as senior member of the Bar took the Chair. It was unanimously resolved that a letter be written to Salomons asking him to withdraw his resignation and the letter was sent over the signatures of sixty barristers. At a separate meeting Sydney’s solicitors came to a similar decision. Salomons, however, could not be induced to change his mind. [He later did.]

In fact, Piddington, in a laudatory sketch, makes no mention of that trying experience. However, in the context of one well-put criticism of Salomons as a constitutional advocate, he gives a summary of the bench which suggests no lingering rancour. He is writing in 1929:<sup>51</sup>

When he [Salomons] came out of his retirement to argue the question of interference of State laws with Commonwealth instrumentalities, he protested to the High Court that ‘no lawyer

would ever support’ the proposition he was opposing. Griffith said somewhat sternly: ‘You are forgetting that the Judges of this Court have already so held.’ Salomons replied, ‘I did not say no *Judge* would say so, I said no *lawyer* would say so.’ That Bench could afford to ignore the affront, for every member of it possessed in a high degree the special sense for constitutional questions – a sense not to be won by technical studies alone, but compounded of an historical knowledge of man as a political animal, of expedients to adjust claims at war with one another, and of that feeling for the principles of human government which make it a requirement of the constitutional lawyer that he should be a servant of freedom slowly broadening down from precedent to precedent.

This was the one aptitude that was missing when Salomons, who was prone to surround a constitutional right with the same atmosphere as a commercial contract, was arguing a point of constitutional law.

### Back on track

Piddington’s collapse was soon trounced by confidence. Premier Holman immediately appointed Piddington silk, ‘a kind of consolation prize’,<sup>52</sup> and followed it up a few days later, in April, with a second royal commission, a process which sealed for him a lifelong commitment to a system of industrial peace governed by judicial arbitration, a commitment which would not always sit easily with another lifelong commitment, to the liberty of the individual.

Piddington’s report came down in the same year, 1913, and he presumably expected to become a judge of the reformed Arbitration Court whose creation he had urged. However and extraordinarily, he was to be offered a fresh opportunity to sit on another of the nation’s highest bodies, the Inter-State Commission. In 1913, everyone – well, almost everyone except some High Court judges – thought that this was a position of great potential and that it was time for the potential to be realised. Labor had been ousted and Joseph Cook’s Liberal Party was in power, and Cook appointed Piddington as its chief commissioner. Just as Piddington had been acceptable to Labor and Hughes, so he was acceptable to the Liberal Party and to Cook, who had known Piddington when they were both MLAs.

This body, its august place in the constitutional firmament, and its ultimate and permanent eclipse, is the subject of another article in this issue of *Bar News*. Piddington excludes any discussion of the commission in his memoirs, but records a trip with Sir Nicholas Lockyer, one of his two co-commissioners, with typically fervent irrelevance:<sup>53</sup>

... I was travelling to Melbourne by the *Marmora* and was introduced to the captain by his namesake and relation, Sir Nicholas Lockyer.

Captain Lockyer at once said ‘Are you a relative of ‘Storms’ Piddington?’ and when I said ‘Yes,’ he went on, ‘Well, there’s a

coincidence! The other day I was talking to Hunt the Commonwealth meteorologist and asked him 'Why don't you people give us something useful? Nowadays, when a sailor man strikes trouble, he's only got two things to help him – his own bally sense and Piddington's *Law of the Storms*.'

### Another royal commission

By the end of 1919, the war to end all wars had ended and the workers were battling out the peace on the streets of Europe's cities, and Australian men – working men as well as the tragically incapacitated – were returning home. A price Billy Hughes had paid in that year's federal election was the promise of another royal commission to inquire into the cost of living and to devise a mechanism to adjust automatically the basic wage. (A post-conscription Hughes, it will be recalled, yet with Capital's suspicion that he remained Labour's man.) And who should emerge as the unanimous choice by the commission's capital and labour representatives for chair, but the subject of this essay?

Travelling alongside and sometimes indistinguishable from the development of arbitration in the industrial fabric of Australian life has been the *Harvester* judgment, a decision in which Henry Higgins – wearing his cap of president of the Commonwealth Industrial Court – attempted to lay down a basic wage, which had to be enough to support the wage earner 'in reasonable and frugal comfort', an expression which had appeared in Cardinal Manning's translation of Pope Leo XIII's encyclical *Rerum Novarum*.<sup>54</sup> The decision had been made in 1907, a time of twelve years but what must have seemed a distance of twelve light years. The new royal commission was born 'in the context of aggressive trade union dissatisfaction with wage levels, recognition by industrial tribunals of the need to overhaul the Harvester wage base, and fears of the spread of Bolshevik revolution to Australia.'<sup>55</sup>

Attempts had been made to get the information via statistical analysis, by Higgins himself and by, for example, the distinguished NSW arbitration judge, CG Heydon. There was also George Handley Knibbs – later Sir George – who had been appointed as first Commonwealth statistician in 1906. In 1910–1911 he undertook an inquiry into the cost of living. But after distributing 1500 booklets for housewives to keep records of a year's budgeting, he got back only 212 usable returns. A second effort in November 1913 saw 392 returned from 7,000 distributed.<sup>56</sup> (Knibbs, like Marion Piddington, was absorbed by eugenics, involved internationally and later embracing what he called the 'new Malthusianism'. At a personal level, his biographer records that he talked quickly and quietly in a high-pitched voice about his extraordinarily wide interests; one interviewer observed that 'an hour's conversation with him is a paralysing revelation'.<sup>57</sup>)

Piddington was even less successful than Knibbs, getting 400 budgets returned from 9,000 requests, for a four-week survey.<sup>58</sup> However, he and his commissioners reached out to the community

in no uncertain terms. There were 115 public sittings in all capital cities and Newcastle, with 796 witnesses and 580 exhibits.<sup>59</sup> (One of the owners and managers of CSR, Edward William Knox, desired 'a uniform absence of [government] interference in industrial matters' and refused in 1920 to give information to the commission;<sup>60</sup> in 1919, his younger brother Adrian had been sworn in as Sir Samuel Griffith's successor.)

To be accurate, it was not a basic wage but the different exercise of determining the cost of living which the commission focussed on. It was, Piddington would argue, then the task of government to make the political decisions and the task of the Commonwealth Arbitration Court to implement them.<sup>61</sup> Nevertheless, when the employers' representatives realised that the effect of acting upon the findings would raise a basic wage level from around £4 to £5 16s that they submitted a minority report.<sup>62</sup> Nor were the unionists happy; according to them, Piddington had failed to take account of old age and invalid pensioner dependants and of over-14s earning less than the living wage or still at school, and moreover he had allegedly understated the total value of production by over one hundred million pounds.<sup>63</sup>

### An independently Labor man

The royal commission had three particular effects on Piddington's career.

First, the affirmation of his belief in and fervour for child endowment as an essential tool of social justice. In 1921, Piddington published a tract called *The Next Step: A Family Basic Income*.<sup>64</sup> On the first page, he says:

It is the purpose of these pages to show that this minimal duty is not and cannot be adequately enforced under the existing Australian system which applies the sanctions of law only to a prescribed wage (the 'living wage' or 'basic wage') that is uniform for all employees. To ensure the adequate observance of that duty two things are necessary:

1. the continuance of the existing system with a different domestic unit for the living wage;
2. a law for the endowment of children out of a tax upon employers according to the number of their employees, such endowment to be paid to mothers.

Later in the text, under the subheading 'Position of Mothers and Children', we find Piddington in typical form:

A work with a striking title was published in America a few years ago by the famous Judge Lindsay, 'Horses' Position of Rights for Women.' Its theme was the Mothers and right of women to 'the normal needs of a human being living in a civilised community,' just as a horse has rights of 'fair and reasonable treatment' in Mr. Justice Higgins' words already quoted. I allude to it now only to submit, by analogy, that in this question of a living wage the children also of the workers

have rights as individual citizens, not as mere inclusive appendages in a compromise. From the moment of their birth they have a right to expect that the nation will so order its economic structure that they can live. 'All men are created equally entitled to life,' says the Declaration of Independence. It is a fond fashion of Homer to describe the family as 'wordless children,' which reminds us that their claim to life at the hands of the community cannot be voiced by themselves. Yet that wordless claim is as convincing as was the clutch of the foundling infant's hand on Squire Western's finger in Fielding's *Tom Jones*. What is wanted in Australia is not rhetoric bedecked with baby-ribbon upon 'The Day of the Child,' nor benevolent asylums, nor the kindly provision of creches or baby clinics, or children's playgrounds, or occasional treats – admirable as such charities are – but a strict and evenhanded canon of plain justice which will recognise that the children of those engaged in industry have a right to maintenance from industry, and that the mother who rears children for the future of industry and of the State has a right to receive the only wage she ever asks enough to enable her as society's trustee for nurture and education to discharge the duties of her trust.

Upon what principle of social justice, to say nothing of social wisdom, are we to perpetuate a system like the present which, in the name of family support, penalises parenthood while simultaneously offering money-prizes to the childless?

As part of this nation's economic history, the royal commission and its results can be found elsewhere. In particular, feminist analyses of the 'living wage' developments and its biases and flaws have been made in more recent times.<sup>65</sup> For Piddington's part, there is no doubt that he held views that would be regarded as paternalistic, not only in relation to gender but to class. That said, he had supported Kate Dwyer's attempts to improve the educational opportunities of women, when they were both members of the University of Sydney Senate.<sup>66</sup> (There, Dwyer had campaigned for a chair of domestic science. She had earlier assisted Piddington, in his 1911 royal commission.<sup>67</sup>)

The idea – or perhaps ideal – of 'woman' is an important part of Piddington's brand of liberalism, something both deeply influenced by and at times inexplicably paternalistic in the light of, his marriage to Marion. It will be recalled that they had both attended the International Eugenics Conference in London, where, his biographer records, 'he met, and was impressed by, the Russian anarchist Prince Pyotr Kropotkin, who stressed the improvement of a national stock through the removal of social defects rather than through sterilisation of the unfit.'<sup>68</sup> In this context, one observes that the opening paragraph of his 1921 tract reads 'This pamphlet is published in the belief that both employers and employed in Australia, whatever their pre-conceived opinions, are willing to examine fairly any proposal which is put forward in the spirit of that mutual aid which Kropotkin has shown is the paramount biological law of nature and of society.'

The second effect of the commission was the entrenchment among

Capital of the view that Piddington was now irretrievably Labour. He did not help his case by suggesting in that same preface that his hope for a family basic income was confirmed by the NSW State Conference of the ALP putting a motion with respect to it on its agenda. Piddington's tragedy was that he was irretrievably independent, something which made him impervious to the realities of politics.

Which helps us understand a little more the flavour of the third effect of the commission on him, a marked decline in his relationship with Hughes. Hughes would never be trusted by Capital – rightly so, supporters of Bruce would argue – but would never be forgiven by Labour. In 1920, Piddington had given Hughes something he might have wanted but couldn't afford, and Hughes's solution was not uncharacteristic:<sup>69</sup>

Hughes extricated himself from his promise to implement the Commission's findings by claiming that it had depended on the Commonwealth's being granted extended powers on industrial matters in the referendum held with the elections. He said that with the defeat of the referendum he was restricted to legislating for Commonwealth public servants, and he did introduce a system of child endowment to public servants, although only 5s. a week, not Piddington's recommended 12s. Piddington later rejected Hughes' claim that government action depended on a successful referendum. He insisted that he had at first declined to accept the Royal Commission because the inquiry might prove futile if the Constitutional amendment was rejected. He had informed Hughes during the campaign, after accepting the chairmanship, that he would not continue in the position if the promise were conditional but was given the assurance by Hughes that it was not. Piddington's opinion of the integrity of Hughes continued to worsen in 1920.

### **Hughes, the High Court and hindsight**

These three things – Piddington's unwavering adoption of child endowment, his move – or perceived move – away from Capital, and his attitude to Hughes, coalesced in a decision to go to the federal legislature. In his first attempt – a by-election in the seat of Parramatta caused by Joseph Cook's appointment as high commissioner to London – he attracted less than 20 per cent of the vote and lost his deposit.<sup>70</sup> The second – at the general election of 1922 – was pure Piddington. Hughes's seat of Bendigo was threatened, so the Nationalists parachuted him in to North Sydney. Where better for Piddington to continue his campaign for child endowment? The ALP helpfully came to the party, withdrawing its candidate.

The campaign was hard-fought, and has the peculiar interest for us, because the High Court debacle of a decade before formed a colourful part. Piddington's biographer again:<sup>71</sup>

In the last days of the campaign R. A. Parkhill, Nationalist campaign director and organiser of the gift of £25,000 to Hughes as thanks for wartime leadership, with a reputation for a style of campaigning

that was 'robust to the brink of unscrupulousness', circulated a pamphlet accusing Piddington of having resigned from the High Court because he could not face the hostility and criticism of the Bars of the eastern States. This not only ensured that the issue of child endowment would not make a last-minute emergence but also further poisoned relations between Hughes and Piddington. With amazing naivety after all that had been said, Piddington telegraphed Hughes complaining of Parkhill's slanderous attack and requesting him to acknowledge publicly that the cause of his resignation was Piddington's belief that he had compromised himself by indicating to Hughes a preference for the 'supremacy of Commonwealth powers'. Naturally Hughes refused this act of political charity. After Piddington released the 1913 interchange of cables between him and Dowell O'Reilly, who had acted as intermediary in the High Court offer, Hughes bitterly attacked Piddington. He accused him of having 'resigned from his great office like a panic-stricken office-boy', of having asked 'on very many occasions... to appoint him as a justice of the High Court' and of being the most eager man 'for office and its emoluments' that he ever knew.

Though Piddington, supported by extensive documentation, came out of the exchange better than Hughes, who produced none of the letters and documents he claimed to have, Piddington's reputation was damaged by it. A letter from O'Reilly to the *Sydney Morning Herald* rejecting Piddington's reason for resigning from the High Court as a gross twisting and misstatement of the facts and a 'thoroughly Piddingtonian' invention, hurt, especially in view of his brother-in-law's support for him in 1913 as one '(who has never pulled a gossamer, much less a string – nor had one pulled for him)... [compared with] all those lesser men, many of whom have doubtless been hauling on a hundred cables'. O'Reilly's bitterness towards Piddington continued a serious family estrangement begun in 1917. He had been a womaniser before the death of his wife, Eleanor, in 1914. When he persuaded his English cousin, Marie, to come to Australia in 1917 and marry him, Marion attempted to warn Marie of the risks of such a marriage and was met with a predictably dismissive response from the couple. But Marion must have had a eugenic concern as well: such consanguinity was unacceptable. Months before the 1922 election O'Reilly displayed his continuing contempt, especially for his brother-in-law. Prompted by Piddington's resignation as president of the University Public Questions Society in protest against its allowing theosophist Annie Besant to lecture, O'Reilly exhorted a correspondent to 'Be good – eschew Leadbeater's pernicious doctrines and never masturbate except when Piddington invites you to fill his syringe in the great cause of Via Nuova!'

The disturbed relationship between O'Reilly and the Piddingtons has received a fresh focus by the publication this year of a thesis by Helen O'Reilly. The thesis draws on their correspondence to suggest that the novelist Eleanor Dark – O'Reilly's daughter by his first marriage – based her early fiction on (unresolved) accusations that her father had sexually abused his first wife, who had died in Callan Park Hospital. I have not read the thesis, although it was

discussed by Susan Wyndham in an article in the *Herald* earlier this year.<sup>72</sup> The article records that O'Reilly threatened to expose Marion's 1917 complaints to the federal government. Presumably to embarrass Piddington. And O'Reilly had counteraccusations of Piddington's peccadilloes as well. In any event, O'Reilly would die in 1923 and Marie – although a staunch supporter of his memory – would herself die at the Gap some years later.

As to North Sydney, Hughes won 16,475 votes to Piddington's 11,812. But both ultimately lost from the election. Stanley Melbourne Bruce took over from Hughes soon after, and with the Nationalists in power in the Commonwealth and in New South Wales, Piddington's chance for office was non-existent.

### The Lang years

Although Piddington continued as a barrister – appearing a number of times in the High Court<sup>73</sup> – his main profile until 1925 was as a correspondent with *Smith's Weekly*. In that year, J T Lang was elected premier. Eighty years on, the name will mean little to many, although some will have an idea that he was involved with the cutting of the ribbon when the Sydney Harbour Bridge was opened. It is difficult for us to recall the increasing division in society, the fissures that the Great War had opened and time had not healed.

As in all industrial(ising) countries, Australia's industrial relations was both a cause and a symptom of these tensions. There were particular features, too, the constitutional difficulty – and Nationalist indifference – of federal industrial hegemony, and the short but complex history of industrial arbitration. By 1925, unions had come around to opposing judicial arbitration and to supporting a return to the old wage boards. For them, the delays in litigation and the bias of the judges themselves was too much. And it was with this as part of his platform that Lang took office with a narrow majority.

The legislation passed and there it was, the office of the first industrial commissioner. And while Lang did not know Piddington – they did not meet until December 1926 – the unions were only for Piddington. There was also 'lively but lightweight' support from a young Clive Evatt, editor of the Sydney University magazine *Hermes* and called to the bar in 1926; for him, Piddington was a spokesman for a younger generation because of his role in the University Senate 'in an uphill fight against reaction and purblind conservatism'.<sup>74</sup>

The Nationalists and the employers were aghast. And it was not as though two years on *Smith's Weekly* had kept Piddington out of their thoughts. The current leader of the opposition, Thomas Bavin, had regularly suffered under his pen. When Bavin as attorney had ordered a police raid of the Seamen's Union, his language was condemned by Piddington as a 'neurotic brainstorm, generated by the crowning disaster to a hectic and inglorious career as chief

law adviser to the Crown’ and the government effort generally as ‘a protracted crucifixion of British liberty’.<sup>75</sup>

Again, this essay is not the forum to discuss the wider history. It will surprise no reader to learn that by 1927 employers through the *Sydney Morning Herald* were accusing the commission of being ‘a creature of a stop-gap Ministry which [was] bound over hand and foot to the Reds of the Trades Hall’; that Piddington wanted a royal commission into the accusations because a libel action would have meant months of delay; that Lang warned him against exposing himself to cross-examination; and that eventually Lang reluctantly agreed.<sup>76</sup> Ruthless in his examination of Piddington was S E Lamb KC for the *Herald*, who would later represent de Groot.

In terms of his honesty and ability, Piddington was exonerated by the commission, although a majority criticised his interpretation and application of the relevant legislation. It did not much matter, as the Nationalists came to power in NSW the same year, with Bavin as premier. ‘With low commodity prices and increasing difficulty in financing the debt from overseas borrowing, New South Wales was the first to feel the pinch of a declining national economy. Bavin’s remedy was to reduce wages and the standard of living. But first he had to reduce Piddington.’<sup>77</sup>

Bavin achieved this by nominally increasing Piddington’s status, to that of president of a judicial bench, but by making him one of three members of the new commission, with KW Street KC and ME Cantor KC alongside him. The legislation giving rise to the scheme of a full bench was referred to privately in the Commonwealth Arbitration Court as ‘the Piddington Suppression Act’.<sup>78</sup> The turbulence in the commission over the following years was part of the wider political and social scene. There was Bavin’s replacement by Lang in October 1930. There was Lang’s suspension of interest payments to overseas bondholders and the formation of the New Guard in February 1931. In September 1931, Street was elevated to the Supreme Court, an elevation which, in the absence of an immediate replacement, effected an hiatus in the constitutionality of the commission. The headnote to a report of an application by Goldsborough Mort to the full Supreme Court – in which Lamb KC appeared for the employer – tells the story:<sup>79</sup>

On 29<sup>th</sup> September, 1931, the Industrial Commission, which was at that date fully constituted, referred to the Deputy Commissioner, E. C. Magrath, Esq., the matter of an application for the variation of an award. On 30<sup>th</sup> September, 1931, one of the members of the Industrial Commission resigned and no further appointment was made to fill the vacancy thereby occasioned. The Deputy Commissioner nevertheless proceeded to hear the matter.

What would have been a minor bureaucratic oversight appears to have effected the commission’s end.<sup>80</sup> In any event, on 13 May 1932, NSW Governor Sir Philip Game dismissed Lang, and this prompted Piddington’s resignation six days later and a few weeks short of a judicial pension.<sup>81</sup> Piddington produced a pamphlet, a yellowed copy of which is before me, headed ‘The King and the



Mahatma Gandhi next to his spinning wheel. Photo: Margaret Bourke-White / Time Life Pictures / Getty Images

People and The Severing of Their Unity’. How far the electors in the ensuing ‘Pseudo-Election’, as Piddington termed it, took his comments on board is not known. The quote from Milton on the inside of the front cover opens ‘Thus much I should perhaps have said, though I was sure I should have spoken only to trees and stones...’<sup>82</sup>

### Piddington and Gandhi

In the midst of his own professional turmoil, Piddington found time to experience the serenity of a visit to Gandhi in his ashram in January 1929, an event covered as a chapter in his 1929 memoirs and published separately in 1930, *Bapu Gandhi*.<sup>83</sup> (Bapu is a Hindi word for father.) He records the reverent attitude to the cow, observing that they strolled about the streets with more than the assurance of the dairy cows in Blackheath in earlier days. The basis for this observation is revealed in an anecdote about the late A H Simpson CJ in Eq. He was in his gardening clothes and asking the local sergeant why he hadn’t impounded some straying cattle which had damaged his flowers. The sergeant took pity on the untidy and unkempt person before him, laying a hand on his shoulder and explaining gently ‘My good man! If you knew as much about the law as I do, you’d know that we can’t impound in Blackheath, because it isn’t a municipality.’<sup>84</sup>

The visit itself highlights Piddington’s worldliness – one can hardly see many of his class acknowledging, still less visiting one of the exploders of the colonial world – alongside his naïve singlemindedness. Gandhi himself appears to have appreciated the nicety of being called upon as the leader of hundreds of millions for whom the rule of law was a chimera, to listen to a doubtless dense description of the jurisprudence surrounding the supplementation in New South Wales of a living wage with child endowment. As Piddington himself records, Gandhi politely listened, then asked

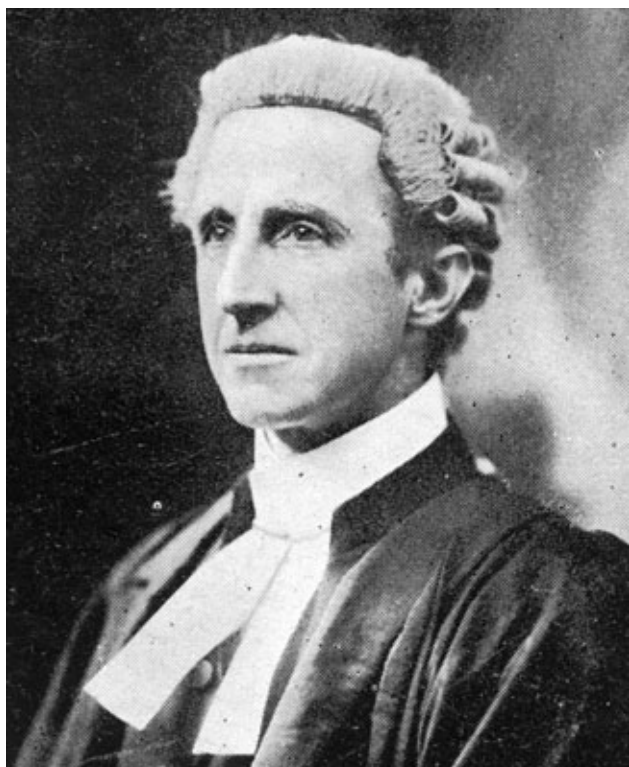


Photo: State Library of New South Wales

'And you have come all the way from Calcutta to tell me all this interesting news about the methods of your country?'<sup>85</sup>

In fairness to Gandhi's courtesy and to Piddington's persistence, by the end of their second meeting, Gandhi was able to say 'I am greatly struck by the way the wage question is dealt with in Australia, and especially with that separate provision for children of which you spoke. I approve of it thoroughly, and we must see what we can do, bearing in mind the figures you have given me about the local requirements in money.'<sup>86</sup>

### The Privy Council

Piddington's resignation upon Lang's sacking stalled Piddington's career of public service but did not end what he understood to be his duty of serving the public. In *Piddington v The Attorney-General*<sup>87</sup> he sought an interim injunction to restrain the government from giving effect to its Legislative Council reforms. He was unsuccessful. It seems that he removed himself as a plaintiff in order to press the substantive claim as counsel, but this did not stop the defendants succeeding on a demurrer.<sup>88</sup>

Piddington's team pressed an appeal to the Privy Council. The report is cold enough, but the exchanges – reported in the *Herald*<sup>89</sup> – were at freezing point. Lord Russell of Killowen said 'I have listened to you for five minutes and I have not followed anything that you

have said'. The senior law lord, Lord Tomlin, said 'As interesting as these considerations are, they do not concern our minds in the slightest. We are concerned with the meaning of an Act.' (Given that Edmund Barton was a twice unsuccessful litigant in the Privy Council, it is a curious footnote that the Australian component of the government team – the English leader being Greene KC – comprised Maughan KC and Wilfred Barton, respectively Barton's son-in-law and son.)

Heard about the same time was *Abigail v Lapin*.<sup>90</sup> In this, Maughan KC and Barton appeared for the appellant and Piddington KC for the respondents. Lord Wright's opinion is interesting for its tenor. The High Court had split 3-2; Lord Wright said that it was 'difficult fairly to summarize these carefully reasoned judgments...'; he refers to the conclusion of 'the late learned Chief Justice, Sir Adrian Knox, long a distinguished member of the Judicial Committee'; and he sees a 'conflict of eminent judicial opinion', before bringing the Committee down on the side of the dissenters Gavan Duffy and Starke JJ.

### An advocate in the High Court

Over the summer of 1934 and 1935, Piddington had the opportunity to act against the dark forces in a far different cause. The Kisch affair has been recorded by Kisch himself and, among others, by author and judge Nicholas Hasluck. Egon Kisch's own assessment of Piddington opens this article. It is sufficient for current purposes to summarise the three ventures to the High Court, all reported in volume 52 of the *Commonwealth Law Reports* and in each of which Piddington appeared for Kisch.<sup>91</sup>

In *The King v Carter; ex parte Kisch*<sup>92</sup>, Captain Carter as captain of the SS *Strathaird* prevented his passenger from landing at any port of the Commonwealth, as he believed Kisch to be a prohibited immigrant within the meaning of the Immigration Act. Among the issues was whether there was a sufficient basis for the requisite ministerial declaration by which Kisch would have acquired that status, and Evatt J pressed the Commonwealth into bringing in an affidavit from the relevant minister. Piddington pounced, seeking leave to cross-examine. The judge, doubtless with a mild glint, records:<sup>93</sup>

I was loath to inconvenience the Minister, but he is not entitled to any immunity from bona fide cross-examination. I therefore indicated that I could not resist the application to cross-examine, although I made it quite clear that I reserved my opinion as to whether any question asked would be admissible or allowed. Counsel for the Commonwealth then asked leave to withdraw the affidavit, and, the two parties agreeing, I allowed such withdrawal.

Hasluck records:<sup>94</sup>

I digress briefly to say that the elderly Piddington did not necessarily impress all of those associated with the case. In Peter Crockett's biography of Justice Evatt the author draws on various sources in

support of a contention that Evatt was concerned about the way in which the case was being argued on behalf of Kisch. Neglecting his judicial obligation of impartiality, Evatt called Piddington's junior counsel to his chambers to explain that a different line of argument would be more persuasive. [The junior was Parsonage, not G L Farrer, who appears to have been his regular and who had gone with him to the Privy Council.]

Having failed to get to 'prohibited immigrant' by means of a ministerial declaration, the government tried a different route, the dictation test. Section 3(a) of the Act prohibited as an immigrant any person who failed to write out as dictated a passage of 50 words 'in an European language'. Kisch, a Czechoslovak, failed a test in Scottish Gaelic and was convicted of the appropriate offence. This time, in the form of *The King v Wilson & anor; ex parte Kisch*,<sup>95</sup> the matter came on before five judges. Rich, Dixon, Evatt and McTiernan JJ found that Scottish Gaelic was not a language, it not being a standard form of speech. Starke J offered a typically spirited dissent.

Over the next couple of months, the *Herald* published some staunch criticism in its letters pages. The Chancellor of the University of Sydney Sir Mungo MacCallum weighed in under the name Columbinus, asking 'Is it possible that their Honours have adopted the old Highland tradition that it was the language of paradise, the vanished sanctum that, according to Dante, has been transferred to the southern hemisphere'.<sup>96</sup> Before anyone knew what was happening, Piddington's client was pressing an application that the *Herald* be punished for contempt, in that various articles and letters either were calculated to derail Mr Kisch's next visit to the Court of Petty Sessions or were themselves so serious attack on the High Court that the paper and its editor should be punished. This case – *The King v Fletcher & anor; ex parte Kisch*<sup>97</sup> – also came on before Evatt J. Evatt described his old lecturer as follows:<sup>98</sup>

The next matter to which reference is required is an article published under the pen name of 'Columbinus' on December 27th. The writer strained to affect a scholar's detachment from all the merely legal questions involved in the case, but it seems not improbable that an element of malice lurks behind the facade of heavy sarcasm and hackneyed story. But the Court is constrained to give the respondents the benefit of every reasonable doubt upon all questions of fact which are involved, and it is unable to infer with sufficient certainty that a more damaging imputation upon the Judges than ignorance of the facts as to Scottish Gaelic was attributed to this article by the newspaper readers. This contributor also accepted payment for his article. Although his identity was disclosed to the Court, the parties agreed that it was unnecessary that it should be revealed in proceedings to which he is not a party.

An apology was read out prior to judgment and Evatt J did find that the paper and three contributors went beyond the limits of fair criticism and although no punishment was meted out, the respondents were deprived of their costs. While I confess I read

that portion of the judgment set out immediately above as a malice directed to MacCallum, Dixon J was in no such mind:<sup>99</sup>

My dear Evatt,

.... It appears to me that the course you took is calculated to enhance the Court's reputation in a substantial degree. The exposure of the editor's methods, the contrition expressed through Curtis which is the peccavi of the sinner as much as the recantation of the craven, the consideration shown to Mungo MacCallum in withholding the name of Columbinus, the obvious justice of the observations on that scribe's contribution, the tone of detachment which the judgment has and the entire absence of any spirit of retaliation, all this does more to strengthen the authority of the Court as an instrument of justice than the imposition of any deterrent punishment, which might perhaps operate to suppress the publication of criticism in the future but would promote a real hostility to the Court....

It is easy to have some suspicion of Piddington's role in Kisch's application, as the *Herald* and he had a rancorous history. No-one seemed too concerned at the irony of Mr Kisch alleging contempt in an effort to prosecute his own right to free movement and speech.

Piddington's practice was a lively one. At times, it was not so much a case of leaving any stone unturned, but of overturning stones which were best left to lie. In 1937, he appeared for the plaintiff; Evatt J opened his judgment 'The plaintiff's claim is a curious one.'<sup>100</sup> Later in the same year, Rich J observed of Piddington's client that 'In this case the appellant brings a suit of a very unusual kind.'<sup>101</sup> Piddington had no hesitation in asserting constitutional invalidities,<sup>102</sup> in one case succeeding with Dixon J but not his Honour's brethren.<sup>103</sup>

### A personal injury matter

In the autumn of 1938, a quarter of a century after Albert Bathurst Piddington had resigned from the High Court of Australia, he was knocked down by a motorcycle at the intersection of Martin Place and Phillip Street. In the ensuing trial, his witness said in cross-examination that he had seen the accident while taking a message for a Major Jarvie to a bank. The bank manager was called by the defendant, and said that there had not been any operation on Major Jarvie's account for that day. The jury returned a verdict for the defendant. The full court of the Supreme Court dismissed an appeal (with, it must be noted, a dissent from by-now Mr Justice Bavin), and Piddington pressed on to the High Court. For him were Windeyer KC and McKillop, with them Evatt KC. Dovey KC and WB Simpson were for the respondent.

A majority – Dixon, Evatt and McTiernan JJ – found that the evidence of the bank manager was inadmissible and ordered a new trial. Latham CJ and Starke J disagreed, Starke J adding that 'Friendship and sympathy for an old and distinguished member of the legal

profession should not sway the judgment of the court'.<sup>104</sup> In fairness to the majority, the closeness of the vote reflects the difficulty of the point, the grey world where credit and relevance mingle and collide. The last word is with the legislature, in the current section 106(2)(d) of the Commonwealth and state Evidence Acts. That provides that the credibility rule does not to apply to evidence that tends to prove that a witness is or was unable to be aware of matters to which his or her evidence relates. 'Section 106(d) has significance, because it represents an attempt, probably successful, to reverse such decisions as *Piddington v Bennett & Wood Pty Ltd* (1940) 63 CLR 533 to the effect that evidence rebutting a denial of absence by a witness is inadmissible.'<sup>105</sup>

### The end

Piddington died in Sydney on 5 June 1945 and Marion five years later. Professor Geoffrey Sawer has said that Piddington was 'an able and civilized man who would have made a much better judge than Gavan Duffy'.<sup>106</sup> However, one is left to wonder at Piddington's brittleness. His difficulty was not a want of integrity but an inability to wield it as a sword as well as a shield. Too often he took the robust and often unfounded criticism which is part and parcel of public life as a personal attack. Too often he failed to appreciate that what he perceived as an expression of independence was seen by friend and foe alike as the exercise of an erratic mind. It is hardly surprising that he has been described as quixotic, and whatever his shortfalls there is a vividness in the image of him furiously tilting at windmills, an imperfect advocate for an ideal. Claude McKay, owner with Joynton Smith and RC Packer of *Smith's Weekly*<sup>107</sup> and friend of Evatt, once wrote:<sup>108</sup>

I saw a lot of Bert when he decided to stand for the State Parliament as a Labor candidate, a brand of politics the big interests detested and were quick to make known to his disadvantage professionally. Briefs which came readily to the young barrister on account of his brilliance ceased abruptly and Bert was cut to the quick. He couldn't understand the vengeful attitude of the money-bags. But there it was. A. B. Piddington, I remember, told me of a somewhat similar instance, that of a remarkably able young lawyer who rose like a rocket at the Bar. One night in the Union Club he let himself go on the wrongs of the workers and, quoting Rousseau, saw them 'gnawing at the bloody skull of capitalism'. In capital's citadel that marked him as dangerous and sealed his professional ruin.

In the humanities there was an affinity between Bert and Piddington. They both had a wide streak of altruism in a world where the one-eyed man is king. Anyway with both of them it proved a handicap to personal advancement.

Piddington's biographer leaves the last word to his son Ralph, a social anthropologist who fought his own battle with the

establishment. In 1950, Ralph dedicated the first volume of *An Introduction to Social Anthropology* to the memory of his father, 'in a translation of a Pacific island dirge to a 'maru', a public official':<sup>109</sup>

Broken is the shelter  
Of my father  
Lost to sight  
You were the true maru, generous to the common folk.

### Endnotes

1. The OED says in full '1848 H. PIDDINGTON *Sailor's Horn-bk.* 8 *Winds*. Class II. (Hurricane Storms..Whirlwinds..African Tornado..Water Spouts..Samiel, Simoom), I suggest..that we might, for all this last class of circular or highly curved winds, adopt the term 'Cyclone' from the Greek κυκλωζ (which signifies amongst other things the coil of a snake) as..expressing sufficiently the tendency to circular motion in these meteors.'
2. Egon Kisch, Australian Landfall, passage quoted in Nicholas Hasluck, *The Legal Labyrinth – The Kisch Case and Other Reflections on Law and Literature*, 2003, Freshwater Bay Press, p.25.
3. AB Piddington, *Worshipful Masters*, 1929, Angus & Robertson, p.142.
4. *Ibid.*
5. *Ibid.*, pp.143 to 144.
6. However, the Parliament of New South Wales site gives New Year's Day 1862 as the date: <http://www.parliament.nsw.gov.au/prod/parliament/members.nsf/1fb6ebcd995667c2ca256ea100825164/9c74b65d0ffd781bca256e4e001d3e051?OpenDocument>, accessed 11/09/09.
7. AB Piddington, *Worshipful Masters*, p.146.
8. *Ibid.*, p.147.
9. *Ibid.*
10. *Ibid.*, p.1.
11. *Ibid.*, p.6.
12. *The History of Sydney Girls High School* ([www.sghs.nsw.edu.au/History/index.html](http://www.sghs.nsw.edu.au/History/index.html), accessed 8/09/09).
13. I am grateful for the assistance of Ms Louise Graul, SBHS Archives.
14. AB Piddington, *Worshipful Masters*, p.119.
15. Morris Graham, *AB Piddington: The Last Radical Liberal*, 1995, UNSW Press, p.4.
16. AB Piddington, *Worshipful Masters*, p.229.
17. Sir Frederick Darley, quoted in Windeyer, Sir William Charles (1834 – 1897), *Australian Dictionary of Biography – Online edition* ([www.adb.online.anu.edu.au/biogs/A060452b.htm](http://www.adb.online.anu.edu.au/biogs/A060452b.htm), accessed 8/09/09).
18. Sir Henry Parkes, *Fifty Years in the Making of Australian History*, quoted in Windeyer, Sir William Charles (1834–1897), *Australian Dictionary of Biography – Online edition* ([www.adb.online.anu.edu.au/biogs/A060452b.htm](http://www.adb.online.anu.edu.au/biogs/A060452b.htm), accessed 8/09/09).
19. Josephson, Joshua Frey (1815–1892), *Australian Dictionary of Biography – Online edition* (<http://www.adb.online.anu.edu.au/biogs/A040558b.htm>, accessed 8/09/09).
20. AB Piddington, *Worshipful Masters*, pp.40 to 41.
21. Morris Graham, *AB Piddington: The Last Radical Liberal*, p.8.
22. *Ibid.*, p.8 and p.11.
23. *Ibid.*, p.12.
24. [en.wikipedia.org/wiki/Electoral\\_district\\_of\\_Uralla-Walcha](http://en.wikipedia.org/wiki/Electoral_district_of_Uralla-Walcha), accessed 11/09/09.
25. Morris Graham, *AB Piddington: The Last Radical Liberal*, p.19.
26. *Ibid.*, p.21.
27. Graham, pp.21 to 22; Nettie Palmer, *Henry Bourne Higgins – A*

- Memoir*, 1931, Harrap, p.181; John Rickard, *H. B. Higgins – The Rebel as Judge*, 1984, Allen & Unwin, p.102.
28. Morris Graham, *AB Piddington: The Last Radical Liberal*, pp.24 to 25.
  29. *Ibid.*, p.32.
  30. 1 CLR 181.
  31. 1 CLR 181 at 203.
  32. Morris Graham, *AB Piddington: The Last Radical Liberal*, p.39.
  33. *Ibid.*, p.43.
  34. *Ibid.*, p.44.
  35. *Ibid.*, p.47.
  36. *Ibid.*, p.45.
  37. AB Piddington KC, *Spanish Sketches*, 1916, Oxford University Press.
  38. *Spanish Sketches*, p.110.
  39. *Ibid.*, pp.110 to 111.
  40. [www.hcourt.gov.au/about\\_02.html](http://www.hcourt.gov.au/about_02.html) (accessed 19/09/2009).
  41. Graham, p.52.
  42. John Rickard, *H. B. Higgins – The Rebel as a Judge*, 1987, George Allen & Unwin, p.273.
  43. Graham Fricke, *Judges of the High Court*, 1986, Hutchinson, p.80.
  44. Quoted by Fricke, p.81.
  45. Quoted by Graham, p.52.
  46. HAR Snelling in Bennett (ed), p.150 to 151.
  47. Graham, p.53.
  48. Fricke, p.81.
  49. Graham, p.53.
  50. J M Bennett, in Bennett (ed), p.99.
  51. *Worshipful Masters*, p.203. See also p.233 to 234.
  52. Graham, p.53.
  53. *Worshipful Masters*, p.67 to 68.
  54. Rickard, p.173.
  55. Graham, p.82.
  56. Graham, p.80 to 81.
  57. Knibbs, Sir George Handley (1858 – 1929), [www.adb.online.anu.edu.au/biogs/A090623b.htm](http://www.adb.online.anu.edu.au/biogs/A090623b.htm) (accessed 21/09/09).
  58. Graham, p.82 to 83.
  59. Graham, p.83.
  60. Knox, Edward William (1847 – 1933), [www.adb.online.anu.edu.au/biogs/A090629b.htm](http://www.adb.online.anu.edu.au/biogs/A090629b.htm) (accessed 16/09/09).
  61. Graham, p.86.
  62. *Ibid.*, p.85.
  63. *Ibid.*, p.89.
  64. A B Piddington KC, *The Next Step: A Family Basic Income*, 1921, Macmillan & Co; online edition @ [www.archive.org/details/nextstepfamilyba00piddrich](http://www.archive.org/details/nextstepfamilyba00piddrich).
  65. Graham, p.81 to 82.
  66. *Ibid.*, p.82.
  67. Dwyer, Catherine Winifred (Kate) (1861 – 1949), [www.adb.online.anu.edu.au/biogs/A080412b.htm](http://www.adb.online.anu.edu.au/biogs/A080412b.htm) (accessed 22/09/2009).
  68. Graham, p.51.
  69. *Ibid.*, p.88.
  70. *Ibid.*, p.94 to 95.
  71. *Ibid.*, p.97 to 98.
  72. Susan Wyndham, 'Abuse as a muse', *Sydney Morning Herald*, 6-7 June 2009.
  73. See *Spain v Union Steamship Company of New Zealand Ltd* (1923) 33 CLR 555; *Pickard v John Heine & Son Ltd* (1924) 35 CLR 1; *Hillman v Commonwealth* (1924) 35 CLR 260; *Burwood Cinema Ltd v Australian Theatrical & Amusement Employees' Association* (1925) 35 CLR 528; *New South Wales v Cth* (1926) 38 CLR 74.
  74. Graham, p.126.
  75. *Ibid.*, p.115.
  76. *Ibid.*, p.144 to 145.
  77. *Ibid.*, p.150.
  78. *Ibid.*, p.154.
  79. *Ex parte Goldsborough Mort & Co Ltd; re Magrath & ors* (1931) 32 SR(NSW) 338.
  80. Graham, p.172.
  81. Fricke, p.83.
  82. Although there is no reference to the source, it is an apt one, Milton's short work, *A Ready and Easy Way to establish a Free Commonwealth*.
  83. A B Piddington, *Bapu Gandhi*, 1930, Williams & Norgate.
  84. *Bapu Gandhi*, p.14.
  85. *Ibid.*, p.47.
  86. *Ibid.*, p.48 to 49.
  87. *Piddington v The Attorney-General* (1933) 33 SR(NSW) 317.
  88. *Doyle v The Attorney-General* (1933) 33 SR(NSW) 484.
  89. Graham, p.186.
  90. [1934] AC 491.
  91. There is also *R v Dunbabin* (1935) 53 CLR 434, Piddington's successful prosecution of *The Sun* newspaper for contemptuous commentary on two pieces of High Court litigation, one being Kisch's.
  92. 52 CLR 221.
  93. 52 CLR 228.
  94. Hasluck, p.29 to 30.
  95. 52 CLR 234.
  96. Hasluck, p.37.
  97. 52 CLR 248; see also *R v Dunbabin* (1935) 53 CLR 434.
  98. 52 CLR, 255.
  99. Kylie Tennant, *Evatt: Politics & Justice*, 1981, Angus & Robertson, p.91.
  100. *McDonald v Victoria* (1937) 58 CLR 146.
  101. *Brunker v Perpetual Trustee Co Ltd* (1937) 59 CLR 140.
  102. See eg *Werrin v Commonwealth* (1938) 59 CLR 150.
  103. *R v Brislan; ex parte Williams* (1935) 54 CLR 262.
  104. 52 CLR, 550.
  105. J D Heydon, *A Guide to the Evidence Acts 1995* (NSW) and (Cth), 2<sup>nd</sup> ed, 1997, Butterworths, [3.450].
  106. G Sawyer, *Australian Federalism in the Courts*, 1967, MUP, page 65, quoted in Fricke, p.82.
  107. McKay, Claude Eric Fergusson (1878 – 1972), [www.adb.online.anu.edu.au/biogs/A150273b.htm](http://www.adb.online.anu.edu.au/biogs/A150273b.htm) (accessed 19/10/2009).
  108. Claude McKay, a letter to Tennant, quoted in Tennant, p.43.
  109. Graham, p.194.

# The missing constitutional cog: the omission of the Inter-State Commission

By Andrew Bell SC

## Introduction

Section 101 of the Constitution provides that:

There shall be an Inter-State Commission with such powers of adjudication and administration as the Parliament deems necessary for the execution of maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and all laws made there under.

Contrary to this constitutional injunction, there is not an Inter-State Commission and, for most of this country's federal constitutional history, there has not been such a body. One does not need to pause too long to conclude that this really is a somewhat remarkable fact, given not only the mandatory language of s 101 but also the plethora of s 92 cases that dominated the (unsatisfactory) constitutional jurisprudence in the High Court until *Cole v Whitfield* (1988) 165 CLR 360 as well as the frequently tense relations between the states in relation to the economic pie and sharing of resources (the current clash over access to the water of the great rivers for agricultural and environmental purposes to the cost of downstream states being a case in point). The origins of, and the reasons why, what was intended to be a critical piece of this country's constitutional and economic machinery does not exist present an intriguing historical tale. This is the story of the missing constitutional cog.

## Constitutional origins

The constitutional origins of the Inter-State Commission, as revealed in the Federal Convention Debates of the 1890s, are cognate with those of s 92 of the Constitution, designed to prohibit the making of laws and regulations derogating from absolute freedom of trade between the states. The principle of freedom of inter-state trade was at the heart of the movement towards federation – indeed a clause strikingly similar to the ultimate s 92 was the first of Parkes's Draft Resolutions for the 1891 Sydney Assembly, over which he presided.<sup>1</sup> Six years later, in Adelaide, this central principle was reiterated in a slightly modified form by Edmund Barton, appearing as the fifth of his Draft Resolutions.<sup>2</sup> As a statement, it effectively summarised the near universal aversion to protectionist border-tariffs – physically manifested by the Customs Houses which 'even protectionists loathed the sight of'.<sup>3</sup>

Customs-Houses were, however, only one exemplum of the commercial 'evil' which federation sought to overcome. The other and more insidious problem lay thinly concealed in the complex system of 'differential' and 'preferential' railway rates which were especially prevalent in New South Wales and Victoria. Examples (and criticism) of these, especially in regard to the Riverina district, were legion throughout the Convention Debates.<sup>4</sup> One delegate to the 1891 Sydney Convention bluntly acknowledged that 'Nothing has caused more friction than the practice of imposing differential railway rates and so filching trade from a neighbouring colony ... in fact I know of no other cause of strong feeling between the



The bridge over the Murray River at Echuca, as etched in the *Illustrated Sydney News* of 12 January 1876. This, together with the other illustrations in this article, is taken from Michael Coper's *Encounters with the Australian Constitution*, and is reproduced with his kind permission.

people of these different communities than that which has arisen from commerce.<sup>5</sup>

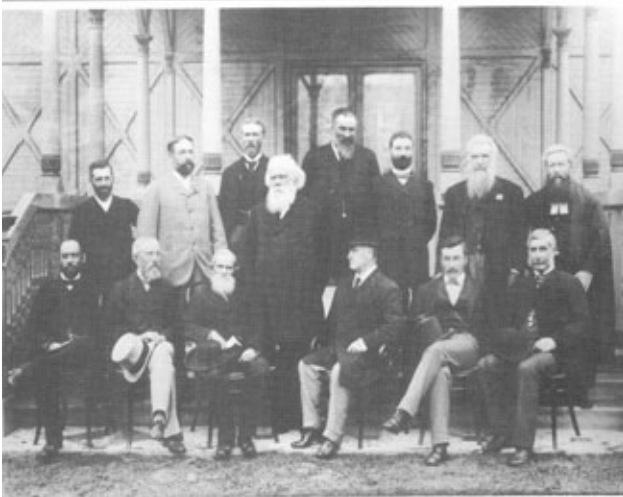
The resolution of this tension would not come easily, however, for it was underscored by provincial concerns and the powerful vested interests of those 'two mighty corporations – NSW and Victoria',<sup>6</sup> both of which had invested large sums in the development of their distinctive railway systems in the latter half of the nineteenth century.<sup>7</sup>

At the 1897 Convention, the familiar debate regarding inter-state railway rivalry again flared but was given a new dimension by Sir John Gordon of South Australia who posed the relevant question:

What of our river trade which has been cut off by this cut-throat system? It is a question not only between railway and railway, but between railway and river.<sup>8</sup>

The issue of the fair operation of inter-state free-trade under a federal system now clearly concerned three states and at least two modes of transport. Involving as it did issues of 'fairness' and what was 'just and reasonable', it would not prove easy to settle. Recognising the heat and great moment of this issue, O'Connor surely confirmed the uneasiness of many delegates by declaring that the central and crucial principle of inter-state free trade could not stand alone as a constitutional prohibition, but rather would need to be institutionally guaranteed:

It must be evident to members that the practical working of this principle of freedom of trade throughout the Commonwealth will be a very difficult thing indeed, unless it is in the hands of some skilled body of persons.<sup>9</sup>



The Melbourne Conference of 1890 was the real beginning of the federal movement. Professor La Nauze observed that Parkes was 'the central figure of any conference at which he was present'.

Similarly, South Australian delegate Gordon expressed the concern of his state by arguing that 'For Federation to be of any service to South Australia, we must be absolutely secure in connection with the commercial part of the bargain.'<sup>10</sup>

If s 92, especially as it affected state railways and the complex system of freight rates, was to be policed, however, the question of the appropriate tribunal or body to do so remained open. For such a politically charged issue was it that it was deemed an inappropriate task for the High Court<sup>11</sup> and touching as it did on such a parochial and provincialised question, it was felt undesirable that the federal parliament should settle it, especially considering the Senate's role as a states' house. Something in the nature of a compromise was needed.<sup>12</sup> Victorian premier, Sir George Turner, took the opportunity to suggest the following provision:

Parliament may make laws to create an Inter-State Commission to execute and maintain the provisions of this Constitution relating to trade and commerce upon railways within the Commonwealth and upon rivers flowing through, in or between two or more States.<sup>13</sup>

For Turner this compromise would serve (i) to dissolve the tension between the two largest states and (ii) more importantly, to defer the whole issue to a future federal parliament's discretion. For other delegates the suggestion of this body was welcomed, and if a compromise, then a valuable and useful one. Not surprisingly, South Australia's Gordon advocated that 'we must give it very wide powers and it should be viewed from a commercial standpoint.'<sup>14</sup> Another delegate Grant, interestingly also from a smaller state (Tasmania) hailed it, claiming that 'its decision will be based on what is just and fair rather than on abstruse legal opinions.'<sup>15</sup> Significantly, he located a useful role for a future Inter-State

Commission as an alternative to the High Court and, in his view, a more appropriate body to determine the type of issues raised by s 92.

From Adelaide the Convention moved to Melbourne where the dispute concerning differential and preferential railway rates once again flared, developing, in La Nauze's judgment, into 'the most tedious and tangled debate of the Convention,'<sup>16</sup> lasting some four days.<sup>17</sup> What was clear to most delegates from this continued tension was that the terms providing for the establishment of an Inter-State Commission at parliament's discretion would need to be strengthened. Accordingly the weak and discretionary 'Parliament may make laws ...' was altered to the seemingly mandatory 'There shall be an Inter-State Commission ...'<sup>18</sup>

While provision for this body was criticised by some,<sup>19</sup> support for it was strong – so strong indeed that the Convention voted to extend its jurisdiction from control over railways and rivers to trade and commerce generally.<sup>20</sup> The Inter-State Commission was now a 'necessary adjunct to the Constitution'<sup>21</sup> and would be a vital cog in the institutional machinery of the emergent Commonwealth. Indeed its inclusion in the Constitution was a *sine qua non* for some states' decision to enter the federal compact. As the South Australia, Sir John Gordon recalled, 'Had it not been for the provision in the Constitution, I make bold to say that South Australia, at least, would not have entered the Union.'<sup>22</sup>

The Inter-State Commission was designed<sup>23</sup> to complement the High Court which, it was thought, would defer to the commission's independence and expertise<sup>23</sup> in areas of trade and commerce and not interfere with the policy issues with which it would inevitably be concerned.<sup>24</sup> The dual functions of adjudication and administration, ultimately ascribed to the commission in s 101 of the Constitution, reflect a combination of the respective roles of the English Railway and Canal Commission and the United States Inter-State Commerce Commission,<sup>25</sup> but unlike its two models, the scope of the Australian body's power extended beyond transport matters (and railways specifically) to the whole of Commonwealth's trade and commerce power, enumerated in s 51(i) and qualified by s 92 of the Commonwealth Constitution. This wide and general jurisdiction was largely the result of the foresight of Sir George Reid who perceived that 'if the railways are taken over (by the Commonwealth) the rivers are left, and questions may arise of public roads, trade and commerce generally, so that under any set of conceivable circumstances, the Inter-State Commission is a body that will be useful'.<sup>26</sup>

Quick and Garran noted that 'while in Australia the competing railway interests will be fewer and less complex [i.e. not private businesses as in the United States], nevertheless they will be correspondingly greater and will perhaps be involved with large political issues.'<sup>27</sup> The Inter-State Commission would have to arbitrate, therefore, not between private business companies but vast public institutions concerned not only with profit making but

also involved with major policy issues pertaining to the development of the States.<sup>28</sup> In short, the Inter-State Commission's envisaged role was the balancing of diverse interests in the public interest. It was to be 'free from all political prejudices and unnecessary control.'<sup>29</sup> Provision was made in s 103 of the Constitution for the appointment of commissioners for seven year terms; in other respects, s 103 mirrored s 72 of the Constitution in relation to the appointment of federal judges, indicative of the status that the Inter-State Commission was intended to have: in short, it was to be the fourth arm of government and, as Sir John Donaldson put it, was to 'have a function similar to the High Court but in regard to other matters.'<sup>30</sup>

### The early parliaments

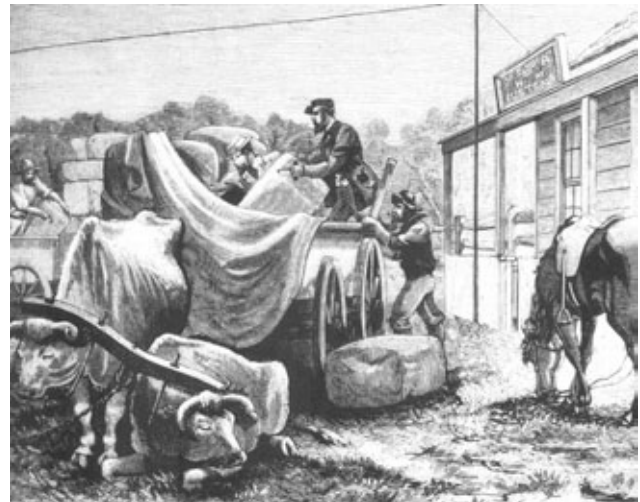
The actual birth of the Commonwealth of Australia and the accompanying sense of federal elation has been well documented.<sup>31</sup> Edmund Barton, who had distinguished himself as leader of the final conventions<sup>32</sup> was appointed acting prime minister on the

### *The creation of the High Court, through the Judiciary Act 1903, would itself be strongly opposed as an unnecessary luxury*

first of January, 1901 by Governor-General Hopetoun and three months later the first federal elections were held.<sup>33</sup>

In his policy speech, delivered in Maitland, NSW on January 17, 1901, Prime Minister Designate Barton referred to the fact that a Bill to constitute an Inter-State Commission was already being drafted by Sir William Lyne (acting minister for trade and customs) and that two of the new body's envisaged functions would be to (i) 'abolish unfair and preferential rates on the railways and in other areas' and (ii) 'to prepare the way for considering the subject of taking over the railways, but only with the States' consent.'<sup>34</sup> As a body 'next in importance to the High Court', Barton assured his constituency and the new Commonwealth, via the press, that together these 'two tribunals will give confidence everywhere to the people of the Commonwealth that justice will be done for them.'<sup>35</sup> In other words, the Inter-State Commission, as a complement to the High Court, would secure the commercial aspect of the federation bargain.

Upon formal election and confirmation in office of the acting ministers, the business of the first parliament commenced, primarily being concerned with the creation of the machinery necessary for federal government. Accordingly, in introducing the Inter-State Commission Bill on 17 July 1901, Sir William Lyne referred to the opportunity to institute a body, the necessity for which had long



This sketch - 'Passing the Customs Officer at Wodonga' - appeared in the *Australian Sketcher* of 20 August 1881.

existed.<sup>36</sup> The prevalence of discriminatory costs and charges was cited,<sup>37</sup> as it had been throughout the debates of the 1890s, and, in short, the immediate rationale for the Inter-State Commission was the 'existence of the difficulties which the Constitution foresaw.'<sup>38</sup>

In addition to the existence of these foreseen problems, new guises of illicit state protectionism had appeared which also compelled the urgent creation of the Inter-State Commission. This body would be able to police, for example, such provisions as the Sydney Harbour Trust Regulations, cited by Sir John Quick as 'undoubtedly repugnant to the principle of inter-state free trade.'<sup>39</sup> Notwithstanding federation and the constitutional direction of s 92, the continuing reality which made the Inter-State Commission necessary was that 'we are all commercial rivals and anxious to get as much as we can from the trade of our neighbours.'<sup>40</sup>

The continued and indeed growing presence of such discriminatory preferential rates and charges seemed to recommend the smooth passage of Lyne's Bill. Despite assurances otherwise,<sup>41</sup> however, this Bill was abandoned and not taken up again during the life of the first parliament. The reasons for this are, in part, a result of the historical timing of the Bill and, in part, due to the existence of the same problems which thwarted the Inter-State Commission's subsequent history. Sawyer<sup>42</sup> attributed the lapsing of the Bill to opposition chiefly on economic grounds. Certainly during the first decade of the Commonwealth, finances were tight due to the operation of the Braddon Clause,<sup>43</sup> the absence of revenue additional to duties of customs and excise (as a result of not levying a Commonwealth income tax) and the tight fiscal rule of the treasurer, Sir George Turner.<sup>44</sup> Accordingly, all outlays for Commonwealth bodies needed to be very well justified. The creation of the High Court, through the *Judiciary Act 1903*, would itself be strongly opposed as an unnecessary luxury<sup>45</sup> and it was not

surprising, therefore, that the estimated annual operating cost of the Inter-State Commission (£8000) was thought unwarranted by some,<sup>46</sup> especially given a belief that there would not be sufficient business to keep it occupied from day to day, let alone for seven years (the constitutional tenure of commissioners).<sup>47</sup> Suggestions<sup>48</sup> were made that the courts and state railway commissioners could deal with the problems with which the Inter-State Commission would be expected to deal – however the inappropriate nature of either of these two institutions had been the very reason for the inclusion of provision for an independent Inter-State Commission in the Constitution in the first place.

Stronger forces were at work in opposing the Bill than mere questions of economy and timing, however. These were represented by the Federal Steamship Owners of Australasia and the Australian Shipping Federation – whose marshalling of opposition to the Bill provides a neat and compelling case study of the influence and operation of a well-organised economic pressure group resisting the legislative initiatives of the nascent Commonwealth Government. Indeed the campaign of opposition orchestrated by the above two organisations predated equally concerted campaigns by various chambers of manufacturers and employers' federations against the Conciliation and Arbitration Act (no. 13 of 1904) and the union label clauses in the Trade Marks Act (1905). As such, Matthews's conclusion that the latter two bodies 'devoted their time almost entirely to resisting Commonwealth legislative measures regarded as 'socialistic' and inimical to the interests of private enterprise,<sup>49</sup> could be retrospectively applied to the opposition of the ship owners some years earlier.

The ship owners' protest<sup>50</sup> represented a combination of fear and self-interest and stemmed directly from the inclusion and definition of the term 'common carrier' in the Bill to include privately owned ocean-going vessels, trading between two states. The government, drawing on s 101's wide terms, had sought to override preferences in all forms of inter-state traffic, including ocean navigation. Thus an Inter-State Commission would not be restricted, as perhaps historically envisaged, to overseeing only state-owned railways and other forms of internal carriage. This was resented by ship owners who claimed that had they known that an Inter-State Commission could control their activities, then they would have opposed its inclusion in the Constitution during the 1890s.<sup>51</sup> However, the government's rationale for this wider reach was consistent, as Sir William Lyne explained: 'provisions relating to the inclusion of ocean-going steamships as common-carriers had to be made in the Bill to allow an Inter-State Commission to be of any use at all, for underlying the whole Bill was the prevention of trade being drawn unduly or unjustly from one state to another. All carriers must therefore be brought under the Bill.'<sup>52</sup>

The Steamship Owners, however, saw this form of supervisory control of all carriers as most unnecessary and highly undesirable. Anderson of the Orient Shipping Company complained that 'the measure contemplates a gross interference with private enterprise'<sup>53</sup>

while Captain Webb of Huddart, Parker and Co. (and chairman of AUSNC) claimed, to the same effect, that 'nothing would do more to strangle Australian seaborne commerce more determinedly as the Inter-State Commission Bill would do if passed in its present form.'<sup>54</sup> Support in opposing the Bill was enlisted from broader commercial circles such as the Melbourne Chamber of Commerce which favoured a motion 'to combine with shipowners to prevent excessive legislative interference.'<sup>55</sup> As far as the chamber was concerned, the ship owners' experience made it follow, 'as a matter of course, that the government would have to assume management of private businesses in many other directions.'<sup>56</sup>

Vested commercial interests also lobbied state politicians and in this way the familiar and confusing issue of states' rights was introduced to blur the dispute. New South Wales MLA John Norton feared that 'the members of it (the Inter-State Commission) might make a decision affecting the industries of NSW, driving away the shipping from our port and thus affecting not only rich merchants but thousands of working men.'<sup>57</sup> New South Wales Premier John See argued both in NSW and Victoria that state rights ought to be safeguarded in the face of the proposed Inter-State Commission.<sup>58</sup>

In the light of Sir William Lyne's conviction that for an Inter-State Commission to be of any use at all, all modes of inter-state transport (including oceangoing ships) should come under the aegis of that body, the government's concession to the powerful and vested interests of the mercantile marine meant that the appeal and therefore urgency for Inter-State Commission waned. Towards the end of the Second Reading Debate, Knox summed up the mood of many in the parliament when he reflected – 'I have somewhat the feeling that we are dealing with an exhumed body after it had a decent sort of burial.'<sup>59</sup> It was not surprising, therefore, that despite his previous insistence on the importance of the measure,<sup>60</sup> Barton announced<sup>61</sup> that his ministry would not be proceeding with the Inter-State Commission Bill.<sup>62</sup>

The problems which would have justified the passage of the Inter-State Commission Bill did not disappear with its lapsing, however. The continuing nature of these problems and the whole issue of inter-state rivalry through protective measures was highlighted in two questions by Frank Tudor to the minister for trade and customs, Sir William Lyne, early in the second session of the first parliament (4 September, 1902):

Whether, in view of growing dissatisfaction existing regarding the continuance of preferential railway rates and the fact that these rates tend to defeat interstate free trade, he means to reintroduce the Inter-State Commission Bill as early as possible next session?

Whether he is aware that not only in the Eastern States but also in Western Australia, local products are carried at a much lower rate than imported products, and that strong public protests are now being made in those States against such rates?<sup>63</sup>

To these questions, Lyne answered – 'the great necessity for an

Inter-State Commission is being demonstrated in these and other ways, and the question of the re-introduction of an Inter-State Commission Bill will receive the early attention of the Government.' The government's 'early attention' did not materialise in this session which was plagued by the 'discursive loquacity of Members and the want of a strong guiding hand to keep them to their work.'<sup>64</sup>

The Third Parliament (December 1906 – February 1910) was dominated by Alfred Deakin whose 'Fusion' Ministry came to power on the basis of their appealing policy of 'New Protection.' Sawyer has neatly described this policy as one 'by which tariff encouragement to Australian industry was linked with measures to prevent the growth of injurious monopolies and ensure fair prices for consumers and fair wages for workers.'<sup>65</sup> It was in connection with the latter aspect of the 'New Protection' that the minister for trade and customs, Senator Sir Robert Best, introduced a Bill for an Act relating to the Inter-State Commission on 1 October 1909.<sup>66</sup> This Bill, in essence, sought to deal with three issues.

First, in line with the Inter-State Commission's historical origins, it sought to create the machinery to make sections 102 and 104 of the Constitution operable. As such, it contained nothing 'either very novel or perhaps very debatable.'<sup>67</sup> It sought to 'maintain a real as opposed to paper freedom of trade between the States' and to deal with 'the highly anti-federal preferential rates which have ever been a source of friction.'<sup>68</sup> As already noted, however, this issue no longer aroused the intensity of feeling it once had due to the more accommodating attitudes of the state railway commissioners. Secondly, the Bill contemplated large investigatory duties for the Inter-State Commission, 'analogous in some respects to those possessed by the British Board of Trade.'<sup>69</sup> This would involve inquiry into diverse economic issues such as the question of the tariff, unemployment and immigration, although one caustic senator dismissed this aspect of the Bill as 'so much padding, so much flapdoodle.'<sup>70</sup> But thirdly, and the real 'agenda' behind Sir Robert Best's Inter-State Commission Bill of 1909 was Part V, pertaining to the industrial question bound up with the policy of the 'New Protection'. The Inter-State Commission was to be established as a federal industrial tribunal to 'decide whether variations between awards of state industrial tribunals, and the absence of awards in the case of some industries, constituted unfair business competition between the states.'<sup>71</sup> The contemporaneous *Boot Operatives Case*<sup>72</sup> before Judge Heydon, president of the NSW Industrial Court, provides an example of the difficulty the Inter-State Commission legislation was designed to overcome. Judge Heydon was reported as wishing to fix the labourers' wage at nine shillings per day, but was compelled to fix it at eight shillings because this was the Victorian rate. For if the NSW rate was higher, then NSW manufacturers would be at a distinct disadvantage. The state premiers acknowledged this equalisation problem at the 1909 Inter-State Conference where they resolved that the states should 'vest in the Commonwealth certain powers in respect of industrial matters.'<sup>73</sup> This was the *raison d'être* of Sir Robert Best's

#### 1909 Inter-State Commission Bill.

While the Bill hardly aroused the intensity of opposition that had plagued its 1901 counterpart, nevertheless the *Sydney Morning Herald* reported the adverse reaction of the Sydney Chamber of Commerce, which resolved:

This Council is of the opinion that up to the present no necessity has arisen to warrant the introduction of legislation to create an Inter-State Commission; and also that if further industrial legislation is deemed necessary, the powers of the existing Federal Industrial Tribunal should be sufficiently enlarged to obviate the necessity of creating another, and at the same time, very costly Federal department.<sup>74</sup>

The *Herald* also reported the views of a 'representative shipowner' who described the Bill as 'paternal, mischievous and objectionable legislation' and called for greater specificity both in relation to certain terms of the Bill and the proposed functions of the Inter-State Commission.

The greatest measure of opposition came from within the parliament, however. Since the success of the industrial portion of the Bill hinged on reference being made to the Commonwealth by the states, the government found itself in an embarrassing position for at the time Sir Robert Best introduced the Inter-State Commission Bill (10 October 1909), several months had elapsed since the Inter-State Conference and only one state (NSW) had introduced a model referral Bill into its own legislature. *The Age* pointed out<sup>75</sup> that the premiers had failed to reckon with their notoriously conservative legislative councils, rendering any reference of industrial power problematical while Senator Pearce taunted that 'these State Premiers are ephemeral and their promises go with them.'<sup>76</sup> In the course of a ninety minute speech,<sup>77</sup> he made the telling point that the value of the Inter-State Commission, namely its ability to ensure the equalisation of awards, would be compromised if not all states subscribed to the federal tribunal.<sup>78</sup> *The Age* could editorialise that 'in a session which is supposed to be a busy one it is a somewhat clumsy thing to pass a law 'in anticipation' of something which may never eventuate' and concluded critically that 'it is a somewhat feeble and uncertain mode of accomplishing the New Protection.'<sup>79</sup> This verdict was reinforced in the parliament where the innovative Bill was allowed to lapse without trace amid familiar cries that it was both 'costly and unnecessary.'<sup>80</sup>

Thus the first decade of federation passed and the fourth arm of government, 'the necessary adjunct to the Constitution'<sup>81</sup> remained only a paper provision in that document. It was the victim of political whim in this period which had been characterised by the absence of any real party political dominance – the legacy, to quote Deakin's famous phrase, of having 'three elevens in the field' – and federal fiscal stringency. As the various federal governments strove to establish a national identity by equipping themselves with the paraphernalia of office, both the states and private business

alignments jealously guarded their own interests, strongly and, in the case of the Inter-State Commission, successfully resisting any concession to Commonwealth control.

### Establishment

By 1912, much of the governmental machinery for the young nation of Australia had been set up. The Commonwealth Bank, together with a national system of currency and postal rates, had been established as had the High Court and a Commonwealth Arbitration system. Overseas, Australia was represented by its first High Commissioner in London (Sir George Reid) and its shores were protected by an incipient national navy. The economic policy of Tariff Protection and the racial policy of a 'White Australia' had been agreed upon.<sup>82</sup> Most symbolically perhaps (and after considerable deliberation) the site of Yass-Canberra had been chosen for the nation's capital. Yet for all this 'national' achievement, Australia remained something of a political paradox at the end of its first decade. Parochialism was evidenced by 'too much talk about state advancement, and far too much disparagement of one state by another.'<sup>83</sup>

Certainly the states each guarded their position jealously and the assertion of state rights *vis-a-vis* those of the Commonwealth<sup>84</sup> (even to the degree of overriding party unity)<sup>85</sup> naturally sustained strong notions of independent identity. Legally this was evidenced by the dual doctrines of 'implied prohibition' and 'immunity of state instrumentalities',<sup>86</sup> ('a mixture of judicial discretion and gruff paternalism only thinly disguised')<sup>87</sup> and the fact that the states sought to look to the Privy Council and not the High Court for the settlement of constitutional inter-se questions.<sup>88</sup> Inevitably, the maintenance of distinct state identities dictated continued inter-state rivalry and discrimination, in various guises. A concrete example of this arose in *Fox v Robbins*<sup>89</sup> where the High Court unanimously invalidated a West Australian Act imposing a licence fee twenty-five times higher for publicans selling non-West-Australian liquor.<sup>90</sup>

The political frictions outlined above made the need for the Inter-State Commission perfectly plain. Indeed it was 'the precise psychological moment ... there being no doubt in any man's mind that the Inter-State Commission is needed.'<sup>91</sup> In 1912, Deakin lamented that 'its absence has already been seriously felt in this country.'<sup>92</sup> Accordingly, the Fisher government successfully rushed a Bill to establish the Inter-State Commission through the last session of the Fourth Parliament.<sup>93</sup> The Inter-State Commission was to be a body 'of high character, which could be trusted to act as the eyes and ears of the people as a whole.'<sup>94</sup>

The timing of the Bill was also bound up with a sense of political frustration on the part of the Fisher Labor government which was 'the first Government with an absolute majority in either House, let alone both.'<sup>95</sup> This frustration had its origins in the 'Fusion' government (1906–1909) in which, under Deakin and in alliance



Between 1911 and 1926 there were 12 failed proposals to amend the Australian Constitution, all seeking greater economic powers for the Commonwealth. This Norman Lindsay cartoon appeared in *The Bulletin* of 20 April 1911. The establishment of the Inter-State Commission in 1913 was in part a response to, and function of, Commonwealth Government frustration.

with his 'Liberal' party, the federal Labor Party pursued the policy of the 'New Protection.' One manifestation of this policy was the Excise Tariff Act (1906) exempting manufacturers from payment of excise duties on specified goods if, and only if, workers were provided with fair and reasonable conditions of remuneration. A majority of the High Court, however, 'heavily sedated by the State reserved powers doctrine',<sup>96</sup> declared this central Act invalid.<sup>97</sup> This decision was followed a year later by *Huddart, Parker and Co. v. Moorehead*<sup>98</sup> in which the Commonwealth's corporation power (by which the federal government sought to regulate trusts and monopolies and outlaw restrictive trade practices) was narrowly construed.<sup>99</sup> The High Court's stance in these two cases dictated that the 'New Protection' lapsed for want of constitutional power.<sup>100</sup> If anything, this judicial conservatism strengthened in the period during which Fisher's Labor Party held historic majorities. The powers given to a royal commission to enquire into the activities of CSR were curtailed.<sup>101</sup> An attempt to smash the Coal Vend – an alliance of coal producers and inter-state shipping companies – was similarly thwarted by a majority High Court decision.<sup>102</sup>

In the face of these decisions providing an interpretation of the Constitution completely adverse to Labor's policies,<sup>103</sup> the case – and need for – constitutional reform, originally discussed at the

Labor Party's Conference in Brisbane (1908)<sup>104</sup> was confirmed. Accordingly, on 16 April 1911 Attorney-General WM Hughes put two questions first to the parliament and then to the people via the referendum mechanism. The first question was a sweeping request that the Commonwealth be given power over trade and commerce (generally and not restricted to inter-state or overseas trade, as in s 51(i) of the Constitution); industry; wages and conditions of employment; the right to arbitrate on all industrial disputes; and the power to control all business combinations and monopolies (undoubtedly a response to the *CSR* and *Coal Vend* decisions of the High Court). The second question asked specifically that the Commonwealth be given power to nationalise monopolies.

Both proposed amendments failed, receiving majority support only in Western Australia.<sup>105</sup> This failure can be attributed not only to conservative fear and some justifiable scepticism at the 'woolliness and vagueness'<sup>106</sup> of the arguments presented in favour of the amendments, but also to federal-state antagonisms within the Labor party. Joyner<sup>107</sup> has closely documented the 'hot and heavy' dispute which Hughes and NSW Labor leader Holman had become embroiled in over the question of the amendments, and highlights in particular the shrewd tactics of Holman which worked to undermine Hughes's proposals even amongst Labor supporters.

Thus, despite its decisive mandate, the Fisher government was frustrated by the joint activities of the High Court, the people at referendum and even some within their own party. While the hope of constitutional amendment still remained, yet the uncertainty of this initiative and the prospect of continued judicial obstruction dictated legislative boldness which resulted in the Inter-State Commission Act of 1912. That this measure was politically motivated and a response to the government's frustration is further supported by two factors – first, the personnel mooted for the Inter-State Commission; secondly, the extremely wide powers granted to that body under the Act.

It was widely rumoured before, during and after the passage of the Act that Attorney-General Hughes would become the first president of the Inter-State Commission.<sup>108</sup> Indeed, so certain did the appointment seem that candidates for his federal seat had already presented themselves.<sup>109</sup> During the passage of the Inter-State Commission Bill, the *Sydney Morning Herald* had expressed some concern over the prospect of Hughes's appointment to this supposedly neutral and independent body:

It is very questionable whether the very wide powers granted by the Bill should be administered by a politician, however able, who has been so prominently associated with certain controversies, as the present Attorney-General.<sup>110</sup>

One of the controversies alluded to was Hughes's insistence that Commonwealth powers should be expanded to facilitate the development of a national, central economy.<sup>111</sup>

That Hughes and the Fisher Labor government saw the Inter-State

Commission as a potential vehicle by which it could implement 'national' economic policies and circumvent the sources of frustration it had encountered during its period of office is confirmed by a recollection of Mr Matthews (member for Melbourne Ports) in 1920:

I remember well what happened in the 1913 election when we asked the people for increased powers. I know what we intended to do with those powers if we got them. It was understood at the time that the present Prime Minister (Hughes) was to be the President of the Inter-State Commission which was to have vast powers...The Inter-State Commission is a ridiculous body, because it never received the powers which it was thought would be conferred on it through this Parliament obtaining further legislative powers itself.<sup>112</sup>

From this, it is clear that the government intended that its increased powers (as a result of referendum submissions identical to those of 1911 – though now presented as six separate questions) could be well utilised by the Inter-State Commission with the forceful and, at the time, still ideologically sound Hughes at the helm.<sup>113</sup> It may also explain why the Fisher government made no appointments to the Inter-State Commission prior to the May 1913 election and simultaneous referendum (despite making two appointments to the High Court in the same period)<sup>114</sup> for the perceived usefulness of the Inter-State Commission was contingent upon a further extension of its potential jurisdiction which would have been possible had the referenda proposals been successful.<sup>115</sup> In many respects then, Labor's narrow loss in both the political and referenda campaigns of 1913 was a pre-natal blow for the Inter-State Commission.

Irrespective of political motivation, the Bill, which had been assured of bi-partisan support when Deakin ventured that the commission 'will become a great institution and a body of high character'<sup>116</sup> was easily passed in December 1912. In speaking to the Bill, Hughes in a fulsome and perhaps expectant manner, described the Inter-State Commission's powers as 'judicial as well as administrative and investigatory... In short, the functions of an Inter-State Commission under this Bill are to be a Standing Commission of Inquiry (with Royal Commission powers)<sup>117</sup>; a Board of Trade – to act as an independent critic; a Board of Advice;<sup>118</sup> an active guardian of the Constitution;<sup>119</sup> and a Commerce Court (with the powers of a Court of Record).<sup>120</sup> The breadth of the commission's scope, as envisaged in the Bill, is best evinced by clause 16 which is provided:

The Commission shall be charged with the duty of investigating, from time to time, all matters which, in the opinion of the Commission, ought in the public interest to be investigated affecting:

- (a) the production of and trade in commodities;
- (b) the encouragement, improvement and extension of Australian industries and manufactures;

- (c) markets outside Australia, and the opening up of external trade generally;
- (d) the effect and operation of any Tariff Act or other legislation of the Commonwealth in regard to revenue. Australian manufactures. and industry and trade generally;
- (e) prices of commodities;
- (f) profits of trade and manufacture;
- (g) wages and social and industrial conditions;
- (h) labour, employment and unemployment;
- (i) bounties paid by foreign countries to encourage shipping or export trade;
- (j) population;
- (k) immigration; and
- (l) other matters referred to the Commission by either House of the Parliament, by resolution for investigation.

In response to this extraordinary economic litany, one parliamentary wit quipped that 'if you added astronomy, they (the Commissioners) might be able to fill their time.'<sup>121</sup>

Part V of the Bill purported to invest the Inter-State Commission with judicial power. It was to be a court of record in relation to commercial causes. Attorney-General Hughes drew attention to the fact that 'commerce courts now settle commercial disputes with dispatch. They are presided over by men who understand such causes, and the procedure is free from those forms and ceremonies, long and wearily drawn out, which sometimes hamper inquiries in Courts of Law'.<sup>122</sup> Hughes went on to predict that 'if it (the Inter-State Commission) commands the respect of commercial men by its despatch of business and impartiality, its powers will be availed of to a very large extent'.<sup>123</sup>

Despite the obvious great expectations for the Inter-State Commission, together with the easy and relatively uncontroversial passage through the parliament, the Bill was not without some detractors. In the light of the Inter-State Commission's subsequent demise (within one constitutional term of seven years) it is pertinent to note the several criticisms levelled against the Inter-State Commission Bill in 1912. Livingstone (member for Barker) defensively intoned that 'if this sort of thing goes on, there will not be very much left for the Parliament to do',<sup>124</sup> while Matthews (member for Melbourne Ports) was trenchant in his criticism that the Inter-State Commission represented 'a wasteful duplication of machinery to discharge functions which might be sufficiently carried out by our well-equipped Departments'.<sup>125</sup> This theme of redundancy and duplication was continued by Senator Vardon (South Australia) to the effect that 'if a good many of these matters are not covered by our Arbitration Court, I do not know what is'.<sup>126</sup> Perhaps the most apposite criticism of all was the terse remark from Greene (member for Richmond) that 'its proposed scope is too wide'.<sup>127</sup> This accorded with the *Herald's* judgment that the three men to be appointed commissioners would need to be 'supermen

who probably did not exist'.<sup>128</sup>

In the event, the task of appointing commissioners fell to the Cook-Forrest Liberal government which had narrowly defeated Fisher's Labor Party at the May, 1913 elections.<sup>129</sup> Cook, who had opposed the creation of the Inter-State Commission in 1901,<sup>130</sup> made the bold appointment of A B Piddington<sup>131</sup> as chairman, with George Swinburne<sup>132</sup> and Sir Nicholas Lockyer<sup>133</sup> as fellow commissioners. The enthusiasm of the commissioners for their new position and the expectation they held were well distilled by Swinburne who wrote that 'the honour that has been conferred on me is very great and the work that the Commission can do for the economical development of Australia is very far-reaching and can be of greater use than any Parliament or public body'.<sup>134</sup>

### Achievement

On 8 September 1913, the minister for trade and customs, Littleton Groom, directed the newly created Inter-State Commission to investigate and report on:

Any industries now in urgent need of tariff assistance

Anomalies in the existing Tariff Acts...

The lessening where consistent with the general policy of the Tariff Acts, of the costs of the ordinary necessities of life, without injury to the workers engaged in any useful industry.<sup>135</sup>

The Tariff Inquiry was striking for the 'scientificity' of its approach, designed to circumvent the problems parliament had previously encountered when dealing with tariff matters of 'voting in the dark'.<sup>136</sup> The elevation of the tariff from the parliamentary forum to a quasi-scientific level was seen as necessary because 'what confronts us (the Parliament) in Tariff discussions is the interdependence of industries. It is this which makes the Protectionist voter of one moment the Free Trade voter of the next...and so a scientific instrument becomes mutilated'.<sup>137</sup> The *Age* reported Sir Joseph Cook as thinking that 'the marvel is that the tariff has been made a football for politicians for so long when the business-like method such as now adopted (by the Inter-State Commission) was possible all the while'.<sup>138</sup>

The Inter-State Commission undertook a massive survey of industry, and embarked on an investigation which led to six hundred and sixty-six applications being received and one thousand two hundred and thirty-seven witnesses<sup>1</sup> being examined, Piddington concluding that 'this body of evidence is, we believe, such as has not previously been obtainable for the purposes of tariff revision'.<sup>139</sup> The massive response of industry indicated an eagerness to co-operate with the Inter-State Commission and seemed a vindication of the government's initiative of removing the tariff determination from the parliamentary sphere.

The ability of the commission to take a comprehensive purview of the whole tariff issue was reflected in its report, which discussed

the tariff in relation to, for example, the conflicting interests of different industries, the cost of raw materials, salaries and wages, efficiency of workers and local prejudice against the use of Australian goods.<sup>140</sup> It is clear that the Inter-State Commissioners 'accepted protection, but not naively'.<sup>141</sup> The critical and scientific approach of the Inter-State Commission to the tariff was far from universally appreciated, however. At a time when protection had become a 'faith and dogma',<sup>142</sup> *The Age*<sup>143</sup> claimed to identify in the Inter-State Commission's report 'numerous anti-Protectionist' arguments while even mild criticism of manufacturing industry efficiency aroused displeasure.<sup>144</sup> The Inter-State Commission's conclusions did not convince parliament that 'Protection involved anything else but protection' and the Fisher Government, returning to office in 1914, implemented their own tariff which was not altered as a result of the Inter-State Commission's report.<sup>145</sup>

The determination of the tariff was still a highly sensitive political issue. The delegation of the tariff issue to the Inter-State Commission, however practically justified and scientifically desirable, aroused great resentment on two counts – first, it created a perception that the Cook government was neglecting its responsibilities<sup>146</sup> and secondly, it fuelled the view that the role and duty of parliament was being seriously invaded by the Inter-State Commission.<sup>147</sup> These complaints were buttressed by *ad hominem* attacks on two of the commissioners<sup>148</sup> which made it inevitable that some stigma would attach itself to the institution of the Inter-State Commission and its public perception. Increasingly, parliamentarians saw the Inter-State Commission's work on the tariff as encroaching upon the legislature's responsibility and came to view the Inter-State Commission as a distinct threat to their sovereignty. As one pompous member put it:

I do not want the opinions of Mr. Piddington and Mr. Swinburne on these matters. My electors sent me to this House because they know what opinions I hold on the Tariff question, and I am prepared to decide on the evidence and not to allow the Inter-State Commission to think for me.<sup>149</sup>

It was most unfortunate that the Inter-State Commission's first and by far its most extensive task should generate such hostility to the body. It could not but affect and damage its public image in this vital formative period. In the course of the following years, the Inter-State Commission undertook a series of reports including on new industries, British and Australian trade in the South Pacific and an inquiry into the cause of increased prices.

### The Wheat Case

Of more significance than any of its reports though also connected with the war-time situation, was the Inter-State Commission's involvement in the so-called *Wheat Case* (*NSW v Commonwealth* (1915) 20 CLR 54) in which the Commonwealth, acting on behalf of several Riverina wheat growers, brought a complaint before the commission in its 'judicial' capacity relating to the NSW Wheat

Acquisition Act (1915). This Act permitted the New South Wales Government, after due Gazette notification, to compulsorily acquire wheat produced in NSW in return for 'appropriate' compensation. The question which arose was whether this Act operated to validly prevent the making of a contract for an inter-state sale of wheat or whether such a contract and course of dealing was protected by s 92 of the Constitution.

This case was highly significant for the following reasons: (i) it determined the fate of the Inter-State Commission as far as its judicial functions, contained in Part V of the Inter-State Commission Act, were concerned; (ii) as a consequence of (i), it provides us with the only opportunity to compare approaches taken by the High Court and the Inter-State Commission to the same matter. Furthermore, it discloses somewhat imperfect reasoning on the part of the majority of the High Court in what turned out to be a critical and fatal decision as to the Inter-State Commission's constitutional role.

In this essentially mercantile matter, the Inter-State Commission by a majority of two to one (Piddington in dissent), invalidated the NSW statute, finding it obnoxious to the central principle contained in s 92 of the Constitution. 'In matters of foreign and inter-state trade,' wrote Lockyer, 'there are no States.'<sup>150</sup> Swinburne, cynical of the NSW Legislature's purported rationale (the exigencies of war) offered a frank assessment of the situation, undistracted by legal precedent:

The evidence given was that there was a considerable inter-state market for wheat at the time of the passing of the Act, which the Act stopped; in fact, there was little wheat business doing in N.S.W., as the best price given to N.S.W. buyers was 5s. to 5s. 1d. per bushel on truck at station, compared to 5s. 6½d. per bushel on truck at station by inter-state buyers.<sup>151</sup>

Lockyer was equally candid in stating his view that the effect of the Act was to 'sever N.S.W. commercially from the remaining States of the Commonwealth'<sup>152</sup> and he thus refused to permit the circuitous curtailment of the positive declaration enshrined in s 92. Clearly the emphasis behind the judgments of the two non-legal members of the commission was born of commercial insight, assisted by a flexibility of approach to the problem. Even in his dissent, it could be said that Piddington was guided by these two considerations for his decision was dictated by the exceptional circumstances of wartime 'synchronised with an unusually poor harvest'.<sup>153</sup> It was on this basis that he justified NSW's temporary<sup>154</sup> assertion of the right of 'eminent domain.'

Under s 73(iii) of the Constitution, appeals to the High Court on questions of law are permissible from a decision of the Inter-State Commission, and an appeal was lodged by the New South Wales Government. The *Wheat Case*<sup>155</sup> appeal has been described as 'a landmark appeal in the history of Australia because its constitutional implications had a supreme effect on the perception of the whole framework of the Constitution'.<sup>156</sup> At stake was not only the

immediate future of NSW wheat but the whole judicial competence of the Inter-State Commission. Of the five questions the High Court was required to consider on appeal, the first was the most fundamental:<sup>157</sup>

Had the Inter-State Commission jurisdiction to hear and determine the petition, to grant the injunction or to make the order for costs.

In other words, could the Inter-State Commission validly exercise the judicial power of the Commonwealth? An ambiguous affirmative response is suggested by consulting the Convention Debates of the 1890s. Mr Kingston remarked that ‘we are conferring on the Inter-State Commission judicial powers of the highest order’,<sup>158</sup> whilst George Reid noted that the ‘tribunal would have the independence of a High Court.’<sup>159</sup> The High Court, however, in 1903 had denied themselves recourse to the Convention Debates for the purpose of ascertaining the intention of the ‘founders.’<sup>160</sup> Matthews’s (member for Melbourne Ports) caution of 1912 – ‘neither the Attorney-General nor anyone else can say what the High Court will determine with respect to any power that we may desire to confer on the Commission’<sup>161</sup> proved well-founded for, in the event, a majority of four High Court judges held that the judicial power of the Commonwealth had been invalidly conferred on the Inter-State Commission. Isaacs J considered that ‘very explicit and unmistakable words would be required’<sup>162</sup> for the Inter-State Commission to exercise judicial power and concluded that these were not present in s 101 of the Constitution. Hence, Part V of the Inter-State Commission Act, purporting to confer judicial power on the commission, was held by a majority to have no constitutional basis. Isaacs’s conclusion was totally at odds with not only the express reference to ‘adjudication’ in s 101 but also with the constitutional commentary of Quick and Garran to the effect that s 101 ‘clearly enables part of the actual judicial power of the Commonwealth to be vested in the Inter-State Commission.’<sup>163</sup>

The High Court’s decision in the *Wheat Case* embodies an intriguing personal clash between Isaacs and Barton (who delivered the leading judgments for the majority and minority respectively). The decision of Isaacs, whom Deakin had described as ‘dogmatic by discipline, full of legal subtlety



and the precise literalness and littleness of the rabbinical mind,’<sup>164</sup> in effect left the Inter-State Commission as nothing more than a standing commission of inquiry.<sup>165</sup> The net effect of this decision coincided with aspirations Isaacs expressed some eighteen years previously as a young Victorian delegate in the Melbourne Convention Debates:

I want to eliminate the constitutional creation of the Inter-State Commission. I think it a great mistake that we should erect this body – a fourth branch of Government.<sup>166</sup>

On the other hand it will be recalled that it was under Barton’s first federal government that a Bill to establish an Inter-State Commission (with full adjudicatory functions) was introduced. Barton’s forceful dissenting judgment in the *Wheat Case*, described by Sawyer as ‘particularly brilliant’<sup>167</sup> and by Coper as ‘blistering’<sup>168</sup>, was also significant in view of his reputation as the ‘concurring’ judge.<sup>169</sup>

Two particular points made by Isaacs in his judgment warrant close attention. Taking up the stated constitutional function of the Inter-State Commission ‘...to execute and maintain laws relating to trade and commerce with such powers of adjudication and administration ...’, Isaacs stated that ‘these words imply a duty to actively watch the observance of those laws, to insist on obedience and to take steps to vindicate them if need be. But a court has no such active duty.’<sup>170</sup> In doing so, Isaacs held that the Inter-State Commission’s curial powers were inappropriate and invalid. The question arises, however, as to exactly how any body could ‘insist on obedience... and take steps to vindicate the observance of laws’ without the

type of judicial powers contained in Part V of the Inter-State Commission Act – specifically the power to award damages (s 30); grant injunctions (s 31); make declarations (s 32); and fix penalties (s 34).

Isaacs, by acknowledging that a court was not competent to perform the function of ‘execution and maintenance’, but at the same time denying the Inter-State Commission the powers required to fulfill this role, unwittingly touched upon the very legacy of the High Court’s decision in the *Wheat Case*, namely the creation of a major constitutional vacuum. The commissioners were acutely aware of this and claimed, at length, in their second annual report,<sup>171</sup> and yearly thereafter, that the decision emasculated the



Inter-State Commission and effectively prevented it from being an active watchdog of inter-state trade and commerce.

The second and somewhat ironic issue to note from Isaacs J's judgment in the *Wheat Case* stems from the following observation:

Indeed, in reply to a question the Court, learned counsel for the Commonwealth claimed that the Inter-State Commission could now validly try such a case as the *Vend Case* or Customs Prosecutions. It would be rather remarkable to permit two laymen to overrule a lawyer in a criminal case.<sup>172</sup>

The obvious corollary to this may be stated rhetorically – 'would it not be equally remarkable to allow lawyers to rule on violation of s 92 of the Constitution in respect of what the High Court many years later in *Cole v Whitfield* appreciated and identified as an essentially factual inquiry concerned with economic protectionism?' It is appropriate to note here that, perhaps not surprisingly, the High Court's decision on the facts of this case differed to that of the Inter-State Commission majority.

The High Court's decision may be construed either as an inchoate expression of the strict 'separation of powers' doctrine enshrined in the *Boilermakers' Case*<sup>173</sup> or else, in the colorful words of Sugden, as an exercise of 'judicial virtuosity'<sup>174</sup> resembling very much 'the action by which some medieval court of law endeavoured to stultify a rival court.'<sup>175</sup> Professor Colin Howard has put it rather more bluntly – 'The High Court disposed of the invasion of its own area of interest by deciding that s 101 did not mean what it said.'<sup>176</sup>

## Demise

In one swoop, then, a majority of the High Court had stripped the Inter-State Commission of that feature which distinguished it from any other board or commission and which made it constitutionally unique. The despondent commissioners stated frankly, in a letter to the prime minister (14 April 1915) that 'the practical utility to the Commonwealth of the Commission has now been so reduced as to hardly warrant its continuance.'<sup>177</sup> Their importunate correspondence with the prime minister and various ministers regarding their diminished powers and, by dint of this, responsibility, did not receive attention commensurate<sup>178</sup> with the commission's urgings. A proposal to circumvent the High Court's decision by referendum<sup>179</sup> was postponed, presumably due to the pressures and demands of war-time<sup>180</sup> and references to the commission's hamstrung state occurred in every annual report from 1915. A ray of hope that the Inter-State Commission's judicial powers might be restored glimmered by way of a June 1918 letter from Acting Prime Minister Watt to Piddington to the effect that:

Ministers are willing to consider at a suitable time the bestowal by statutory enactment of judicial and other related powers upon the Commission but, before determining that matter, have asked me to invite you to enumerate the functions which, in your opinion, the Commission could beneficially discharge if clothed with such additional authority.<sup>181</sup>

Cabinet decided not to introduce legislation dealing with the matter, however.<sup>182</sup>

The tone of a letter from Swinburne to Defence Minister Pearce, soon after his resignation from the commission in December 1918, was a far cry from his enthusiastic correspondence of 1913, previously cited: 'The Commission, with its powers depleted, became merely a very expensive permanent Enquiry Board without much reason for existence, and for such I had no inclination. My two colleagues were also very dissatisfied with the position in which they found themselves.'<sup>183</sup>

The final death knell came for the Inter-State Commission when, in March 1919, commissioners Piddington and Lockyer together with Deputy-Commissioner Mills<sup>184</sup> were requested by the government to inquire into the sugar industry, not under the auspices of the Inter-State Commission but as a royal commission. Despite assurances<sup>185</sup> from the minister, Massey Green, that this was no reflection on the Inter-State Commission nor a pointer as to its future, as the commissioners feared,<sup>186</sup> no reason was supplied as to why the inquiry should be styled a royal commission rather than an investigation under s 16.

Parliament's final verdict on the Inter-State Commission's performance was passed in the November 1920 session of the 8th Parliament. Sir Littleton Groom had introduced a Commonwealth Court of Commerce Bill, taking up a suggestion of Justice Powers<sup>187</sup> and heeding the insistent requests of the commissioners, to restore the Inter-State Commission's judicial powers. By this Bill, the president of the Inter-State Commission would also be a judge of the Court of Commerce and, in this way, the legalistic peccadillo raised by the majority of the High Court in the *Wheat Case* could have been circumvented.<sup>188</sup> This Bill received minimal support, however, and its reading in the House of Representatives afforded various members the opportunity to make a frank assessment of the Inter-State Commission's performance.

Mr Bamford described it as 'the most useless body that was ever created by this Parliament'<sup>189</sup> and 'if abolished today', claimed Mr Page, 'no one would be any the worse off.'<sup>190</sup> Sir Robert Best, who was responsible for the 1909 Bill, expressed 'distinct opposition to the continuance of the Inter-State Commission and to the creation of a Court of Commerce.'<sup>191</sup> while Mr Fleming concluded that 'we have never had a body polity in this community which has been of less real service than that Commission, and if its life can be judiciously ended now, it would be wise to end it.'<sup>192</sup> Parliament's verdict was clear enough.

The newspapers were rather more penetrating in their analysis of the commission's failure and more balanced in their assessment of its performance. *The Age* acknowledged that the commission's weakness stemmed from the government's 'refusal to carry out many of its recommendations, thus robbing the work of much practical value.'<sup>193</sup> The commission, as it stood in 1919, was not the august body contemplated by the framers of the Constitution

‘possessing power to promote the public welfare’, rather ‘its findings and recommendations were destitute of force and could be ignored with impunity by all concerned in the maintenance of laissez-faire.’<sup>194</sup>

The issue, as presented by the press, was whether the Inter-State Commission should be ‘mended or ended’.<sup>195</sup> Although the position seemed clearer cut<sup>196</sup> in the parliament than the papers, nevertheless the general thrust of newspaper opinion was that the commission should be put out of its misery and ‘cast out into the lumber room of so much official machinery. It is questionable whether there is any real need for the Commission’s existence.’<sup>197</sup> The *Sydney Daily Telegraph* was rather more forthright:

Instead of a Bill to provide relief work for the unemployed Inter-State Commission, the taxpayers would better appreciate legislation that would relieve them of the expense of maintaining its barren existence.<sup>198</sup>

When Piddington’s constitutional term of seven years expired in August 1920, no new appointments were made to the commission which was left in a state of ‘suspended animation’,<sup>199</sup> there being a commission but no commissioners.<sup>200</sup>

## Conclusion

Why was it that this body which was deemed sufficiently vital as to warrant formal inclusion in the Constitution and which, upon its inception, was hailed as a ‘great institution’,<sup>201</sup> indeed as ‘a necessary adjunct to the Constitution’,<sup>202</sup> suffered such an early and undistinguished demise?

Colin Howard has summarised the inherent problems which the Inter-State Commission faced by stating that ‘if it is to be given any effective powers, which the Constitution certainly contemplates, it is bound to interfere with a number of other powerful, vested interests.’<sup>203</sup> Kolsen has put it another way: ‘The Inter-State Commission ... was allowed to disappear, one fears, because it was grinding no-one’s axe.’<sup>204</sup> That the Inter-State Commission was a threat, real or perceived, to other established power bases, either because of its wide constitutional jurisdiction or its guaranteed independence, is perfectly plain. The enormous grant of power in s 101 of the Constitution, reflecting the important role the Inter-State Commission was intended to play in the federal compact, was paradoxically responsible for its weakness. Furthermore, the very width of the constitutional grant of power, as exploited in the 1912 Act, was also responsible for blurring the original purpose of the Inter-State Commission to act as a constitutional and independent watchdog of s 92. The chief consequence of this was that the Inter-State Commission’s historical role was lost sight of.

Apart from its paradoxical constitutional weakness, in its statutory form, the Inter-State Commission was fatally flawed. It fell victim, as Mr Kelly (member for Wentworth) had predicted in 1912, to ‘the thing which invariably happens when too much sail is carried in a

very strong wind.’<sup>205</sup> So wide were the terms of the 1912 Act (for reasons already explored – notably the Fisher Labor government’s political frustration with the High Court) that the Inter-State Commission was never able to establish an identity and thus assert its value in protecting the public interest. It was over burdened with a veritable miscellany of tasks, most of which were unrelated to the central role which the federation delegates had envisaged for the commission as ‘an active guardian of the Constitution’ and ‘watch-dog over inter-state trade.’ Parliament’s unappreciative and, at times, hostile reception of various commission reports, notably the monumental tariff inquiry, reveals a resentment at the apparent erosion of a staple parliamentary function, and the vested interests of business did nothing to encourage the existence and survival of a nascent regulator.

Furthermore, the High Court’s decision in the *Wheat Case* is susceptible of an interpretation of institutional rivalry and a concern on the part of the majority of the High Court to prevent an encroachment into its jurisdiction. It is certainly intriguing to speculate whether the tortured history of the interpretation and application of s 92 of the Constitution in the High Court up until the 1988 decision in *Cole v Whitfield* (1988) 165 CLR 360 would have been the same had the very body designed principally to administer its application survived and been permitted to perform its intended constitutional role. In *Riverina Transport Pty Ltd v Victoria* (1937) 57 CLR 327 at 352, Latham CJ observed (without any attendant legislative reaction) that section 92 is:

not a completely self-executing provision. It may operate to invalidate Federal or State statutes, but it cannot, of its own force, deal with cases of, e.g., discrimination in the administration of valid legislation. *If sec. 92 is to be fully operative, it needs an administrative organization to deal with and to correct interferences with the freedom of inter-State trade and commerce which are the result of administrative action under legislation which is not itself an infringement of sec. 92. The Inter-State Commission is that administrative organization, but it cannot function unless there are laws for it to “execute and maintain.”* [emphasis added]

A further and personal element should not be overlooked when analysing the demise of the Inter-State Commission. It will be recalled that it was WM Hughes who introduced the 1912 Bill and Hughes whom it was rumoured would be the Inter-State Commission’s first president. In so far as his support for the Inter-State Commission arose from a personal motivation, by 1919–1920, Hughes had achieved leadership and personal success in the political field, both at home and on the international stage. The importance of the Inter-State Commission may well have diminished in his influential eyes, especially in view of a more co-operative attitude of the High Court to government initiatives during the war years. Furthermore, Piddington’s failure to be re-appointed to the commission in 1920 may itself be attributed to a personal clash with Hughes dating back to early 1913 when Piddington’s resignation from the High Court had embarrassed

the then attorney-general. Indeed 'Hughes was scathing about Piddington, whom he described as having resigned from his great office like a panic-stricken boy'.<sup>206</sup> Piddington's actual leadership of the Inter-State Commission may also be questioned for Sir Robert Garran, when writing Piddington's obituary many years later, did not list the presidency of the Inter-State Commission amongst his many achievements.<sup>207</sup>

### Postscript

The Inter-State Commission was briefly re-established in 1983 by the Hawke government but, within a few years, it was subsumed by the Industry Commission, a successor to the Industries Assistance Commission, in turn the successor of the Tariff Board. The restrictive interpretation given to s 101 of the Constitution by the majority of the High Court in the *Wheat Case* was never tested or revisited.<sup>208</sup>

### Endnotes

1. Cited in JA La Nauze *The Making of the Australian Constitution* Melbourne 1972, p.35. (For a discussion of the history of the precise wording of section 92, see JA La Nauze 'A Little Bit of Lawyers Language: The History of "Absolutely Free" 1890-1900' in AW Martin *Essays in Australian Federation* Melbourne 1969).
2. Cited in La Nauze *op cit* p.112.
3. *Ibid.*, p.34.
4. e.g. Official Report of the National Australasian Convention Debates, Adelaide 1897 (hereafter cited as Convention Debates, Adelaide) pp.1118-9 per BH Wise.
5. National Australasian Convention Debates, Sydney 1891 per Sir John Donaldson p.667.
6. Commonwealth Parliamentary Debates Vol. 3, p.3097 per Sir George Reid.
7. See generally NG Butlin *Investment in Australian Economic Development 1861-1900* Cambridge 1964, pp.321-333.
8. Convention Debates, Adelaide p.1127.
9. *Ibid.*, p.1116.
10. *Ibid.*, p.1128.
11. Convention Debates, Melbourne (1898) p.2283 per Sir Josiah Symon, 'It would introduce political questions and matters of policy that would tend to derogate from the position which the High Court should occupy under this Constitution.'
12. Compromise was a critical feature of the Convention Debates. La Nauze *op cit* entitles his ninth chapter 'Crisis and Compromise' and writes (p.160) that 'members had learned during the weeks in Adelaide that there must be compromise, that questions must not be pushed to such an extreme that solutions completely unacceptable to some of the states would be forced on them by mere numbers.'
13. Cited in La Nauze *op cit* p.156 (clause 96).
14. Convention Debates, Adelaide p.1128.
15. *Ibid.*, p.1139.
16. La Nauze *op cit* p.216.
17. 21 February 1898 – 25 February 1898.
18. Convention Debates, Melbourne p.1513 per Sir Charles Kingston - 'if we intend to have an Inter-State Commission, let us say so in the Constitution in the plainest possible way.'
19. e.g. Sir Edward Braddon, Convention Debates, Melbourne p.1537 – 'Never mind what appeal there is to the High Court, I object that we are giving to this body the responsibility of deciding in matters of

every sort relating to trade and commerce.'

20. See Convention Debates, Melbourne p.1529.
21. per Sir John Quick CPD Vol. 5 p. 5657.
22. CPD Vol. 69, p.7142. See also CPD Vol. 6, p.7070 per Sir John Poynton.
23. Convention Debates, Melbourne p.2276 per Henry Dobson.
24. *Ibid.*, p.2283 per Sir Josiah Symon.
25. Background material on these two models is provided in J. Quick and RR Garran *The Annotated Constitution of the Australian Commonwealth* 1901 ed. Sydney 1976 pp.896-901.
26. Convention Debates, Melbourne p.1529.
27. Quick and Garran *op cit* p.899.
28. *Ibid.*, p.921.
29. Convention Debates, Melbourne p.1515 per Sir William McMillan.
30. *Ibid.*, p.1521.
31. e.g. F Alexander, *Australia Since Federation* Melbourne 1972; R. Ward *The History of Australia: The Twentieth Century* New York 1977 p.12.
32. Barton was leader of the Conventions in Adelaide in 1897 and Melbourne, 1898. Sir Samuel Griffith, who would become the first chief justice of the Commonwealth in 1903, had been leader of the 1891 Sydney Convention.
33. 29 and 30 March 1901.
34. *Sydney Morning Herald* 18/1/1901.
35. *Ibid.*
36. Commonwealth Parliamentary Debates (CPD) Vol. 2, p.2668.
37. e.g. CPD vol. 2, pp.2678-82.
38. per Edmund Barton CPD Vol. 6, p.7070.
39. CPD Vol. 5, p.5664.
40. per Mr Batchelor CPD Vol. 6, p.7073.
41. e.g. Barton: 'There is no intention on the part of the government to abandon the Bill, or to defer its consideration until another session.' CPD Vol. 3, p.3273.
42. G Sawyer *Australian Federal Politics and Law 1901-29* Melbourne 1956 p.26.
43. The 'Braddon Clause' (after the Tasmanian premier) is s 87 of the Commonwealth Constitution and provides that:  
  
During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, of the net revenue of the Commonwealth from duties of customs and excise, not more than one fourth shall be applied annually by the Commonwealth towards its expenditure. The balance shall, in accordance with this Constitution, be paid to the several States.
44. See G Sawyer *op cit* p.28 – 'Turner forced his fellow Ministers to exercise the utmost economy in the running of their Departments. Some federal services were unduly starved ...'
45. *Ibid.*, p.24.
46. e.g. Mr Wilks CPD Vol. 6, p.7063.
47. e.g. McLean CPD Vol. 6, p.7064.
48. Higgins CPD Vol. 6, p.7035.
49. TV Matthews *Business Associations and Politics* PhD Thesis (Syd.) 1973 p.161.
50. SMH 12/7/1901 provided a schedule of protesting shipping firms. These included: The Australian United Steam Navigation Company Ltd. Burns, Philp and Company Limited. The Adelaide Steamship Company, Limited. Australian and East African Line The China Steam Navigation Company The White Star Line Peninsular and Oriental Steam Navigation Company Ltd. The Anglo-Australasian Steam Navigation Company.

51. SMH 13/7/1901.
52. Ibid.
53. Ibid.
54. Ibid.
55. *The Age* 16/7/1901.
56. Ibid.
57. SMH 11/7/1901.
58. *The Age* 18/7/1901, SMH 11/7/1901.
59. CPD Vol. 6, p.7075.
60. CPD Vol. 3, p.3273.
61. CPD Vol. 12, p.11238.
62. In the light of the Shipowners' tremendously effective campaign, it is worth noting Sawyer's (*op cit* p.48) comment on the Second Parliament – 'Federal control of inter-state and overseas navigation in Australia, proposed in the first Parliament, was again postponed when the Watson Government referred to a Royal Commission a Navigation Bill introduced by the first Deakin administration.'
63. CPD Vol. 46, pp.15781-2.
64. Henry Cyles Turner *The First Decade of the Australian Commonwealth* Melbourne, 1911 p.55.
65. G Sawyer, *op cit* p.40.
66. CPD Vol. 52, p.4009.
67. SMH 11/10/1909.
68. Ibid.
69. Ibid.
70. per Senator Sir George Pearce CPD Vol. 52, p.4445.
71. Sawyer *op cit* p.73.
72. Reported in SMH 20/10/1909.
73. *Inter-State Conference Proceedings* (p.vi).
74. SMH 23/10/1909.
75. *The Age* 13/10/1909.
76. CPD Vol. 52, p.4441.
77. *The Age* 14/10/1909.
78. CPD Vol. 52, p.4433.
79. *The Age* 13/10/1909.
80. per Senator Pearce CPD Vol.52, p.4429.
81. per Sir John Quick CPD Vol. 5, p.5657.
82. CMH Clark *A Short History of Australia* London 1964 p.195. 'In a sense, White Australia was one gigantic act of Protection.'
83. Views of JJ Fraser *Australia: The Making of a Nation* London 1910, cited in FK Crowley (ed.) *A New History of Australia* Melbourne 1974 p.309.
84. Described by A Deakin *Federated Australia* as 'an open wrestle for mastery.' p.94.
85. See C Joyner 'Attempts to Extend Commonwealth Powers 1908-19' in *Historical Studies* Vol. 9 pp.295-307. Joyner (*passim*) points especially to the on-going clash between Holman (NSW Premier) and WM Hughes.
86. See DL Wright 'The Political Significance of Implied Immunities' in JRAHS Vol. 55, pp.380-99. At p.395 'The overall effect of the doctrine was to sustain State powers and restrict those of the Commonwealth.'
87. Brian Galligan *Politics of the High Court* St Lucia 1986 p.91.
88. e.g. *Webb v Outrim* [1907] AC 81. Wright *op cit* at p.387 - 'To prefer the Privy Council to the High Court was also a way of indicating dislike of all things associated with the Commonwealth and was comparable to the tendency exhibited in some other disputes to emphasize the Imperial connection at the expense of Federal ties.'
89. (1909) 8 CLR 115.
90. For a succinct description of the facts and decision in this case, see M Coper *Freedom of Inter-State Trade* Sydney 1983 pp.11-12. This case provided the High Court with their first opportunity to interpret s 92.
91. *The Age* 16/11/1912.
92. CPD Vol 65 p. 2361.
93. The Bill had its first reading in the House of Representatives on 11 December 1912 and was assented to less than two weeks later on 24 December.
94. CPD Vol. 69, p.7071 per Alfred Deakin.
95. R Ward *The History of Australia - The Twentieth Century* New York 1977 p.76.
96. PH Lane *A Manual of Australian Constitutional Law* Sydney 1984 (3<sup>rd</sup> ed.) p.68.
97. *R v Barger* (1908) 6 CLR 41.
98. (1909) 8 CLR 330.
99. For a useful discussion of these decisions and their political ramifications, see B Galligan *op cit* pp.86-89.
100. CMH Clark *op cit* p.194.
101. *Attorney-General (C'wth) v CSR Co. Ltd* (1913) 17 CLR 644.
102. *Adelaide Steamship Co. Ltd v R. and Attorney-General (C'wth)* (1912) 15 CLR 65.
103. This sentiment, summarised in *Labour Call* 13/3/1912: 'The powers of the Federation have been cut down by successive decisions of the High Court until at present they are admittedly futile,' cited in B Galligan *op cit* p.90.
104. Galligan *op cit* p.87.
105. Figures for this referendum are set out in Appendix A of F Alexander *Australia Since Federation* Melbourne 1972.
106. CMH Clark *op cit* p.199.
107. C Joyner *op cit* pp.297-302.
108. e.g. *Launceston Examiner* (1/10/1912); *Sydney Morning Herald* (12/12/1912) and (13/3/1913) *Argus* (4/3/1913); *Hobart Mercury* (24/3/1913).
109. e.g. JP Cochran (MLA – NSW). See SMH 13/3/1913.
110. SMH 12/12/1912.
111. Hughes first put such arguments in his famous *Case for Labor*: See *Sydney Daily Telegraph* 9/10/1907, 21/12/1907, 1/2/1908, 3/4/1909.
112. CPD Vol. 94, p.6173.
113. DI Wright in Hodgins, Wright and Heick *Federalism in Canada and Australia: The Early Years* Canberra, 1978, has described WM Hughes (p.224) as 'the leading representative of a new generation of politicians who were unwilling to let constitutional forms stand in the way of achievements of their social ends.'
114. Powers and Rich JJ.
115. For Referenda results, see F Alexander *op cit* Appendix A.
116. CPD Vol. 65, p.2361.
117. *Inter-State Commission Act* (No. 33 of 1912) Part III.
118. Ibid.
119. Ibid., Part IV.
120. Ibid., Part V.
121. per Mr. Archibald CPD Vol. 69, p.7078.
122. CPD Vol. 69, p.7070.
123. Ibid.
124. CPD Vol. 69, p.7130.
125. CPD Vol. 69, p.7113.
126. CPD Vol. 69, p.7609.
127. CPD Vol. 69, p.7118.
128. SMH 12/12/1912.
129. This loss meant that the Labor Party had forfeited the opportunity to appoint three men to high quasi-judicial office - a cause for regret. In the next parliament, Carr (Member for Macquarie) said '... I think we were foolish not appointing the ISC when we had the chance. I make no bones about it.' CPD

- Vol. 70, p.728.
130. CPD Vol 6, p.7065.
131. Bold because earlier in 1913, Piddington resigned on a point of honour from the High Court bench, only days after his appointment amid a hostile professional reaction and media attack. For a general account, see Graham Fricke, *Judges of the High Court* Melbourne 1986 (Chapter 8 - 'Albert Piddington: The Judge who Never Sat') and also see the entry for Piddington in the *Oxford Companion to the High Court of Australia* as well as David Ash's companion piece in this issue of *Bar News*.
132. Swinburne had been a prominent Victorian (Liberal) State politician whose appointment to the ISC may have been based on his expertise in relation to the River Murray. He had been minister for public works and agriculture and was responsible for the establishment of the State Rivers and Water Supply Commission. For a more general account see EH Sugden and FW Eggleston *George Swinburne - A Biography* Sydney 1931.
133. Sir Nicholas Lockyer was a career public servant who had been NSW's first commissioner of taxation and collector of customs. At the time of his appointment to the ISC he was Commonwealth comptroller-general of customs. For further information, see *Australian Dictionary of Biography* Vol. 10, pp.130-131.
134. Letter from Swinburne to Mr J Coates - cited in Sugden and Eggleston *op cit* pp.314-315.
135. Recorded in ISC First Annual Report (21/10/1914) p.1.
136. per Alfred Deakin CPD Vol. 69, p.7074.
137. per Mr Kelly (member for Wentworth) CPD Vol. 69, p.7082.
138. *The Age* 16/1/1914.
139. Minutes *op cit* p.199.
140. Tariff Investigation Report *op cit* (passim).
141. JA La Nauze 'The Inter-State Commission' in *Australian Quarterly* Vol. 9, No.1 (1937) p.52.
142. WK Hancock *Australia* London 1929, p.77.
143. *Age* 29/4/1915.
144. Leon Glezer *Tariff Politics* Melbourne 1982, p.8.
145. Minutes *op cit* p.270 record correspondence from minister for trade and customs, Frank Tudor (10/8/1915) stating that 'it had been decided that the tariff schedules, as presented to the House of Representatives, should stand for the present.' i.e. They would not be adjusted in the light of the Inter-State Commission's recommendations.
146. e.g. Mr Page CPD Vol.70, p.861: 'We have been told that something will be done when the ISC has dealt exhaustively with the Tariff. No doubt, Ministers thank God that there is an ISC. They are able to get over the fence, under the fence;-round the fence and through the fence now that they have it to put everything on.'
147. e.g. Mr Higgs CPD Vol. 2567: 'I should like to warn the Australian manufacturers that he must not depend on the Inter-State Commission but that he should continue to demand from this Parliament a revision of the Tariff ... referring the Tariff to the Inter-State Commission has not settled the fiscal question. It has to be fought out.'
148. *contra* Piddington CPD Vol.74, p.1572; *contra* Swinburne CPD Vol. 74, p.1038.
149. per Mr. Catts CPD Vol. 74, p.1634.
150. *Inter-State Commission Seizure-of-Wheat-Case Decision* (14/4/1915) p.41.
151. *Ibid.*, p.36.
152. *Ibid.*, p.40.
153. *Ibid.*, p.8.
154. *Ibid.*, p.27.
155. *NSW v Commonwealth* (1915) 20 CLR 54.
156. per Everett J in 'Role and Activities of the Inter State Commission' Bureau of Transport Economics Transport Outlook Conference Canberra 1984 p.6.
157. 20 CLR 54 at 57.
158. *Melbourne Convention Debates* (1898) p.2459.
159. *Ibid.*, p.1529.
160. *Tasmania v Commonwealth* (1904) 1 CLR 329 at 332.
161. CPD Vol. 69, p.7112.
162. 20 CLR 54 at 90.
163. J Quick and R Garran *The Annotated Constitution of the Australian Commonwealth* 1901 (ed) reprinted Sydney 1976 p.900.
164. JA La Nauze (ed) Alfred Deakin *The Federal Story* Melbourne 1944 p.70.
165. Piddington, in a letter (14/14/1915) to Fisher candidly stated (Inter-State Commission Minutes) the consequences of the High Court decision - 'There is thus nothing we can do which could not be done from time to time at much less expense to the country by a Parliamentary Committee or a Royal Commission.'
166. *Melbourne Convention Debates* (1898) p.2279.
167. G Sawyer *Federalism - An Australian Jubilee Study* Melbourne 1952, p.259.
168. Coper *op cit* p.17.
169. G Fricke *op cit* p.21.
170. 20 CLR 54 at 93.
171. Inter-State Commission second annual report (4/11/1915) p.3: 'This decision affects so fundamentally the future functions and the utility of the Commission ...'
172. 20 CLR 54 at 93.
173. *R v Kirby: ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
174. Sugden and Eggleston *op cit* p.322.
175. *Ibid.*, p.307.
176. C Howard *Australia's Constitution* Melbourne 1978, p.50.
177. Inter-State Commission Minute Book *op cit* pp.253(a-d).
178. Between 14 April 1915 and 11 March 1920 no less than twenty items of correspondence are recorded dealing with this issue. Minute Book *passim*.
179. Minutes p.262. It was proposed that the Constitution be altered in the following way: s 71 would provide that 'The judicial power of the Commonwealth will be vested in a Federal Supreme Court and the Inter-State Commission ... ' s 101 would provide that: 'There shall be an ISC with such judicial power and such powers of administration ... '.
180. As per correspondence - Hughes to Piddington (26 August 1915) Minutes p.273.
181. Cited in *Royal Commission into the Constitution* (1929) Evidence p.177.
182. As per correspondence - JA Jensen (Minister for Trade and Customs) to Piddington (22 August 1918) Minutes p.326 B.
183. cited in Sugden and Eggleston *op cit* p.352.
184. Mills, deputising for Swinburne, was the Commonwealth comptroller-general for customs.
185. Correspondence (28 March 1919) Minutes p.332 B.
186. As per correspondence - Piddington to Greene (20 March 1919) Minutes p.332 B.
187. *NSW v Commonwealth* (Wheat Case) 20 CLR 54 at 107.

188. According to G Sawyer *op cit* p.204, fn.134: 'It is probable, though not certain, that the proposed scheme (an ingenious subterfuge) would have been constitutionally valid.'
189. CPD Vol. 94, p.6166.
190. *Ibid.*, p.6168.
191. *Ibid.*, p.6167.
192. *Ibid.*, p.6170.
193. *Age* (17/1/1919).
194. *Mining Standard* (30/1/1919).
195. *Argus* (20/3/1919).
196. *The Age* 1/3/1919).
197. *Ibid.*
198. *Sydney Daily Telegraph* (4/4/1919).
199. Phrase used by Sir Robert Garran in the course of giving evidence to Royal Commission into the Constitution (1929) p.54.
200. The 1912 Act was officially repealed in 1950.
201. per Alfred Deakin CPD Vol. 69, p.7075.
202. per Sir John Quick CPD Vol. 5, p.5655.
203. Howard *op cit* p.50.
204. Kolsen and Docwra "Constitutional and Institutional Problems in Regulating Inter-State Trade" in Twohill (ed) *Government Regulation of Industry*, 1981. p.69.
205. CPD Vol. 69, p.7081. That the commission, as provided for in the 1912 Act, carried 'too much sail' was confirmed by the significant fact that many of its designated functions were taken over in the 1920s by full-time bodies such as the Tariff Board and the Development and Migration Commission. These were statutory bodies and, not being rooted in the Constitution, were entirely subject to parliamentary control.
206. Fricke *op. cit* pp.81-83.
207. 19 ALJ 69.
208. For an account of the Inter-State Commission in its second re-incarnation, see M.Coper 'The Second Coming of the Fourth Arm' (1989) 63 ALJ 731.

## Australian Miscellany at Law

TK Doyle was a Victorian barrister who practised in the mid-twentieth century. An opponent stated some proposition of law. Doyle asked him: 'What is your authority for that?' His opponent replied: 'The best of all authorities, common sense.' Doyle said to the judge: 'Your Honour will note that my learned friend has not brought his authority to court with him.'

Owen Dixon, in one of his addresses, told the story of an occasion when counsel appearing before Sir Thomas a'Beckett in a patent case quoted from a well-known book on patent law. A'Beckett asked if it were a reputable book. Counsel asked why not. 'Oh,' answered a'Beckett, 'I thought that the last passage you read must be wrong. It sounded like common sense.'

In *McLaughlin v City Bank of Sydney* (1912) 14 CLR 684 at 700 Griffith CJ observed that: 'The law of England is generally consistent with common sense and common honesty, and if there are any exceptions I am not disposed to take an original part in adding to the list.'

This is an extract from a work in progress being compiled by Leslie Katz and Keith Mason, provisionally named *An Australian Miscellany at Law*. The authors would welcome information about anecdotes, cases and histories illustrating the humanity of those who practice the law. Please contact them at keith.mason.2@gmail.com





## The judicial disposition of cases: dealing with complex and specialised factual material

The following address was delivered by the Hon Justice James Allsop at the 7th Annual University of South Australia Trade Practices Workshop on 17 October 2009 on the topic of how courts deal, in the exercise of judicial power, with factual material of a specialised or expert nature.

A topic in respect of which I have had an interest for some time, and continue to have an interest is how the courts deal, in the exercise of judicial power, with factual material of a specialised or expert nature. It is a topic central to the administration of civil justice in this country, not just competition cases. I will, however, focus my remarks upon that latter topic.

### The nature of judicial and non-judicial power

One needs to begin by recognising the basic constitutional architecture in Australia in which judges, here federal judges, work. The importance of this in considering procedural reform is often lost on commentators. The Federal Court is not the Competition Tribunal. The fundamental differences in their institutional and governmental character must be appreciated before one discusses procedural change.

Chapter III of the Australian Constitution provides for a basal distinction between judicial and non-judicial power. This is both elementary and elemental.

Only judges and courts can exercise federal judicial power. Those judges and courts may belong to the Commonwealth polity, state polities or territory polities. The Australian Constitution, unlike the United States Constitution, provides for Commonwealth judicial power being exercised (at the choice or will of the Commonwealth Parliament) by state courts. From the earliest days of federation this has been done.<sup>1</sup> One consequence of the use of this mechanism is that the Commonwealth Parliament must take the state courts as it finds them. Another consequence of this is that acting or part-time judges sitting as Supreme Court judges can hear cases in federal jurisdiction.<sup>2</sup>

On the other hand, federal judges under s 72 of the Constitution, cannot be part-time or acting.<sup>3</sup> Thus, in a Commonwealth or federal court, judicial power must be exercised by a judge. There is now an exception to this by the recognition that registrars may do so, but only in circumstances of the effective supervision by review by a judge.<sup>4</sup>

For present and practical purposes, this means that in the federal judiciary only judges can decide competition cases, to the extent that they are required by law, or chosen by parliament, to be heard in the exercise of judicial power.

The fact is, of course, the very same question can often be decided judicially (by a court) or non-judicially (by a tribunal). For example, many questions under the *Trade Practices Act 1974* (Cth) may be dealt with by the Competition Tribunal: for example, s 50.<sup>5</sup> In other fields, such as taxation and intellectual property, virtually the same

question can be committed for apparent resolution to a court or to an administrative decision-maker.

What is this 'judicial power' then? Is it a trick? If the tribunal can deal with the same issues, what is the difference and what is happening?

Commonwealth judicial power (in the present context, exercised by the Federal Court) derives from Ch III of the Constitution. Commonwealth executive power (in the present context, exercised by the Competition Tribunal) derives from Ch II of the Constitution.

Executive power and judicial power, as species of power, can both affect the individual or the group. It is important to understand the nature of each, because non-judicial power (other than such power ancillary or incidental to the exercise of judicial power) cannot be conferred on a federal court or a state court exercising federal jurisdiction; and judicial power cannot be conferred on a body which is not a court (federal or state) within the meaning of s 71 of the Constitution.

Section 61 (in Ch II of the Constitution) provides as follows:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Executive power can simply be seen as power, other than legislative and judicial power, conferred by law.<sup>6</sup> This tripartite division of governmental authority (legislative, executive and judicial) is one upon which, in important respects, the Australian Constitution and system of government is founded.<sup>7</sup>

Executive power derives from the Constitution, from statute, and from the prerogative of the Crown. The executive power relevant for present purposes is the power exercised by officers of the Commonwealth who are authorised by Commonwealth legislation, in this context, the *Trade Practices Act*, to make decisions under that Act in the tribunal.

Judicial power is a concept not easily defined. Indeed, cases of the highest authority warn against attempts at exhaustive definition.<sup>8</sup> No single simple encapsulation is possible. Central to the notion, however, is the adjudication and conclusive settlement of controversies or disputes between parties as to their rights and duties under law.<sup>9</sup>

The notion of 'controversy' is central.<sup>10</sup> Courts do not advise Parliament or the executive. They resolve argued controversies. Yet, this is not the determinant of judicial power. Administrators

sometimes deal with controversies, as is well illustrated by the kinds of application decided by the tribunal.

The notion of rights is central. This means existing rights.<sup>11</sup> Again, this is not the determinant of judicial power. Administrators sometimes deal with people's rights.

The notion of 'binding and authoritative' refers to conclusiveness, even if subject to appeal. It means not open to collateral review.<sup>12</sup> This is closer to a determining factor. Administrators generally do not decide matters in a way that is not open to collateral attack, especially if a method of compulsory enforcement is given to the decision.

The paradigms of power belonging to the three arms of government are easy to recognise. Take these hypothetical examples:

1. Parliament's exercise of power to enact legislation – for instance creating a right with certain characteristics.
2. The executive's power granted by statute that if in all the circumstances, in the national interest and in accordance with prevailing government policy, it is satisfied that the statutory privilege be granted for three years. The executive makes that decision and grants that right.
3. The courts' power to declare that as a matter of statutory construction non-citizens cannot seek the statutory privilege in question or that the right purported to be granted by the executive is in fact outside the terms of the statute and so is unauthorised.
4. Only courts, with or without juries, can adjudicate criminal guilt or innocence.
5. The executive, not the courts, can dispense the prerogative of mercy.

These are fairly clear examples. Often the characterisation of the power is not so straightforward. Section 61 of the Constitution, in describing the executive function, refers to the execution and maintenance of the Constitution and of the laws of the Commonwealth. In carrying out that function the executive (officers of the public service) must, every day, make decisions about legal rights. If a customs official decides to levy duty at X per cent on your imported goods, he or she is not usurping the courts' exercise of judicial power of the Commonwealth. Yet he or she has, as between you and the Crown, decided that the law is such as to lead to the conclusion that you must pay duty of \$Y. There may be an 'appeal' to a reviewing officer who may have the function of examining or even remaking the decision. There may be an 'appeal' to the Administrative Appeals Tribunal. In all this, there may be an element of a controversy; there may be an element of someone making a decision about rights, about the meaning of a statute and about the consequences of such. There will, however, be no conclusiveness. In part, this is by reason of who is deciding it – by definition it cannot be conclusive, meaning that the decision

is always open to collateral challenge because the customs officer is not a judge. One may detect a degree of circularity in all this. There is an element of the asserted or agreed characterisation of the type of power being exercised affecting the content of the power being exercised. So, if we are all agreed that the decision is being made by a clerk behind the counter at Customs, we know that he or she cannot make a decision settling a controversy about present rights according to law in a way that is immune from challenge.

Another way of looking at the issue is to say the customs officer has not decided any rights, he or she has merely purported to apply or execute the law which either does or does not provide for that result.

Sometimes, administrators can be seen to be creating, or doing acts as part of the creation of, rights or liabilities. This can be seen to be distinct from adjudicating on present rights conclusively. Sometimes, one will be able to see the hallmark of the conduct of the administrator as not so much deciding something on the basis of rights, but on the basis of policy of such a broad social or political (in the broad sense) character that a decision so based could not be other than administrative or the act of the executive government.

Yet sometimes the courts also exercise wide discretions; sometimes they make orders which, at least in point of practical substance and sometimes in point of law, create new rights and liabilities; and sometimes they take policy into account.

Sometimes, the answer as to whether something is an exercise of judicial or non-judicial power is not provided merely by a priori reasoning. Notions of history, tradition, method, technique and procedure are important. For instance, advisory opinions are generally considered outside judicial power but courts have historically permitted trustees, liquidators and court appointed receivers to approach them for advice and directions. Also, the declaration is a remedy of wide scope. In public interest cases where locus standi is broadly viewed, the notion of settlement of a controversy can be flexible.

For present purposes, it is a helpful taxonomy to divide functions into three categories: those that can only be conferred on courts; those that can only be conferred on administrators; and those that can be given to either.<sup>13</sup> It is the third category with which we are primarily concerned. The framework of analysis in dealing with this third category was laid down in High Court and Privy Council cases in different generations that concerned tax 'appeals' and intellectual property 'appeals'. In a series of cases the High Court recognised that there were some powers not distinctively judicial or administrative which could be assigned to either arm of government subject to certain requirements. An examination of the main tax and intellectual property cases suffices to explain the approach.

This overlap in the third category appears in many contexts: tax,

intellectual property and competition amongst them.

Essential to the distinction is the choice of which power is to be exercised. It is not just a matter of labelling, or of incantation of a legal spell. It is related to how the power, which is of a kind which can be exercised by one or other (or both) arms of government, is exercised, in order to understand what power is being exercised.<sup>14</sup> In *R v Spicer; Ex parte Australian Builders' Labourers' Federation*,<sup>15</sup> Kitto J, at 305, explained the importance of the character of the repository of the power in a way that bears repeating:

The reason for concluding in some such cases that the judicial character of the repository imparts a judicial character to the power is simply that the former provides a ground for an inference, which in those cases there is nothing or not enough in other considerations to preclude, that the power is intended and required to be exercised in accordance with the methods and with a strict adherence to the standards which characterise judicial activities.

The circumstances in which the power is to be exercisable may be prescribed in terms lending themselves more to administrative than to judicial application. The context in which the provision creating the power is found may tend against a conclusion that a strictly judicial approach is intended. And there may be other considerations of a similar tendency.

Having decided, however, that a controversy is to be decided by judicial power, one must conform to the methods of exercise of that power.

### The constrictions of judicial power

Principally for the present debate that means that the court cannot be constituted by part-time or acting judges chosen for their specialised knowledge in economics or other subject matter. The Federal Court cannot therefore be adorned in a competition case by having Professor Maureen Brunt or Professor David Round sitting as a judge, as can take place in a New Zealand Court. That is a fundamental difference between the tribunal and the court. Of course, judges sit on the tribunal, but they are *not* exercising judicial power in that role. They function as part of the executive in that role.

A Federal Court judge, alone, must decide the controversy if it has been committed to the court for resolution.

This may, perhaps, be seen to pose two difficulties for the Federal Court. The two difficulties are related and derive from the fact that many important, indeed central, factual questions are referable to, or answerable by reference to, concepts from one or more separate sciences – the social science of economics, the sciences of mathematics and statistics and theories of human behaviour. The concepts of markets, market power, competition, lessening of competition, substantial lessening of competition, market concentration, import competition, substitutability, vertical

integration, cost, profit, etc. are all in this category.

The nature of these issues calls unquestionably for expert consideration and evidence.

The two related difficulties are (a) the need to receive, understand, digest and synthesise often complex expert evidence; and (b) the question of the degree of specialisation that judges who do these kinds of cases should exhibit.

To a significant degree the second issue has reached a measure of resolution in the court. Panels exist in the court for judges to hear these cases. Though, that said, the development of expertise in these cases requires time and experience. Not all judges start from any base of formal training in economics, let alone statistics or mathematics. There is, however, nothing like the degree of expertise as exists in some other jurisdictions.

It would not be appropriate for me, as a judge from another court, to say any more about this, beyond saying that the balance of this discussion will assume a body of judges who have variable but more than passing familiarity with economics and related disciplines from the developing to the highly developed.

The first difficulty is the reception and utilisation of often complex evidence. The judge in the exercise of judicial power must decide on the basis of evidence placed before the court and any legitimate judicial notice. That means he or she must understand and deploy the evidence put before him or her.

We are all familiar with the range of evidence being spoken of: the social science of economics, mathematics, statistics, psychology, human behaviour, game theories and other. What are the satisfactory mechanisms of assisting judges understand, synthesise and deploy such material?

The judicial process has developed a number of mechanisms of bringing expert assistance to the court.

### Expert evidence

At one end of the spectrum, there is the traditional presentation of privately chosen and retained expert evidence given in the case of each party. Each side's lawyers cross-examine, and the judge is left to assess, weigh and choose from amongst the competing opinions.

This process epitomises the resolution of disputes by the adversarial system. It can lead to a degree of tension in its undertaking. Sometimes that tension derives from a failure by lawyers to understand what the experts in these cases are setting out to achieve. I discussed this in the *Liquorland* case [2006] FCA 826 at [836]-[842]. What I there said was not novel. Other judges of the Federal Court have said similar things. Some commentators ignore the recognition that the Federal Court has given to the character of the expert evidence before it in competition cases. Let me set out

what I said in *Liquorland* at [838]-[840] and [842]:

[838] In cases such as this dealing with a social science, the views of Professor Brunt expressed, if I may respectfully say so, with her customary clarity in chapter 8 of the helpful compendium of her work *Economic Essays on Australian and New Zealand Competition Law*, illuminate one aspect of the helpful, indeed essential, role for expert evidence in this field. In that chapter, Professor Brunt quoted Keynes at page 358, where that learned economist said:

*The Theory of Economics* does not furnish a body of settled conclusions immediately applicable to policy. It is a method rather than a doctrine, an apparatus of the mind, a technique of thinking, which helps its possessor draw correct conclusions.'

[839] The 'economic' questions here involved the assessment of the purposes of humans working in a commercial environment and the appropriate economic framework in which to discuss them.

[840] With the taxonomy of expert evidence of fact, assumptions, reasoning process and opinions as an accepted (indeed necessary) framework, one then comes to the role of the economist in a case such as this. Because it is a social science, and because it is a way of approaching matters and a way of thinking about matters, there is a role, for the economist to assist the court by expressing, in his or her own words, what the human underlying facts reveal to him or her as an economist and what it reflects to him or her about underlying economic theory and its application

...

[842] The recognition of the place of expert economic assistance in the manner described by Professor Brunt means that often the point of the expert opinion is to give a form or construct to the facts. It may appear to be an argument put by the witness. So it is. The discourse is not connected with the ascertainment of an identifiable truth in which task the Court is to be helped by the views of the expert in a specialised field. It is not, for example, the process of ascertaining the nature of a chemical reaction or the existence of conditions suitable for combustion. The view or argument as to the proper way to analyse facts in the world from the perspective of a social science is essentially argumentative. That does not mean intellectual rigour, honesty and a willingness to engage in discourse are not required. But it does mean that it may be an empty or meaningless statement to say that an expert should be criticised in this field for 'putting an argument' as opposed to 'giving an opinion'.

### Concurrent evidence

A modern variation to the calling of separate expert evidence, pioneered by the tribunal in the 1970s and 1980s by Professor Brunt and justices Woodward and Lockhart and which has been taken up energetically by the Federal Court and the New South Wales Supreme Court is the 'hot tub' (a ghastly sobriquet). It is the use of privately retained expert evidence, controlled to a greater degree by the court through conclaves, joint reports and concurrent

evidence. Space and time do not permit a detailed discussion. It is now widely used in Australia. It is no longer novel. Recently, in a medical negligence case, a judge in the Supreme Court of New South Wales took evidence concurrently from 11 specialist medical practitioners concerning the brain damage of a plaintiff.

There is often a complaint by lawyers that they feel a loss of control over 'their' experts. They do lose a significant measure of control. That is the idea. There is intended to be a reduction in the emphasis on cross-examination, and an increase in emphasis upon professional dialogue.

There can be problems; but the technique has great potential. I do not intend to discuss it in detail here, beyond making one point that is often lost sight of. For the process to be effective, the judge has to be well prepared and very familiar with the technical issues in order to absorb and participate in the professional exchange. The hot tub is not necessarily the best way of filling an intelligent vessel with expert knowledge.

### The single expert

One technique used in some courts is the ordering of one single expert. This requires statutory authority because it deprives the parties of calling evidence. Its utilisation in competition cases would be problematic. The difficulties of deriving assistance from only one witness in any discipline is immediately appreciated if one recognises what Professor Brunt said in *Economic Essays on Australian and New Zealand Competition Law* at 358 set out above in *Liquorland* and if one recognises the argumentative and contestable character of much of the relevant evidence of a social science nature. Unless the relevant field is relatively stable in principle and technique (such as valuation of land) the choice of the single expert may go a long way to determine the answer to the question under consideration.

In these circumstances, a single expert is not likely to be illuminating of the relevant full range of possible views.

### The court expert

Next, there is the court expert. In addition to the expert witnesses called by the parties, the court can direct the calling of an expert. Under the Federal Court Rules Order 34 rule 2, if a question for an expert witness arises in a proceeding the court may appoint an expert as a court expert to inquire into and report upon any question and upon any facts relevant to the inquiry. The court may direct the court expert to make a further supplemental report or inquiry and report and may give such instruction as the court thinks fit relating to any inquiry or report of the court expert. These instructions may include provision for experiment or test. Under Order 34 rule 3, the court expert is required to send his or her report to the court and the report shall, unless the Court otherwise orders, be admissible in evidence on the question on which it is made, but shall not be binding on any party except

to the extent to which that party agrees to be bound by. Under Order 34 rule 4, upon application to the court, the court may permit cross-examination of the expert either before the court or before an examiner. Under Order 34 rule 5, the remuneration of the expert is to be paid jointly and severally by the parties, unless the court otherwise orders. Under Order 34 rule 6, where a court expert has made a report any party may adduce evidence of one or other expert on the same question, but only if he or she has at a reasonable time before the commencement of the trial given to any other interested party notice of an intention to do so.

I have not seen the court expert provision used. Inherently, it may contain a degree of inflexibility. It may duplicate costs. Further, it takes the expert assistance given no further than the receipt and employment of further evidence. It may, however, solve a problem of intransigent or intractably positioned experts.

#### **The expert assistant**

More flexible assistance may be derived from the use of the expert assistant pursuant to the Federal Court Rules Order 34B. Under Order 34B rule 2 the court or a judge may at any stage of the proceeding and with the consent of the parties appoint an expert as an expert assistant to assist the court on any issue of fact or opinion identified by the court or judge (other than issue involving a question of law).

The primary restriction on this mechanism is the requirement for the consent of the parties. If that is forthcoming, there is a helpful degree of flexibility built into the use of such an expert assistant. If it is not, the mechanism is unavailable.

Order 34B rule 2 prohibits a person who has given evidence or whom a party intends to call to give evidence from being appointed as an expert assistant. The expert assistant must give the court a written report on issues identified by the court or judge. Order 34B rule 3 requires that the expert assistant state in the report each issue identified and give a copy of the report to each party. The court must give each party a reasonable opportunity to comment on the report and may allow a party to adduce further evidence in relation to an issue identified in the expert assistant report. The party, however, is not permitted to examine or cross-examine the expert assistant. A party must not communicate directly or indirectly with the expert assistant about an issue to be reported on without the leave of a judge. The expert assistant is not to give evidence in the proceeding. See generally Order 34B Rule 3. Order 34B rule 4 provides for an order for the remuneration of the expert assistant.

This order brings in a degree of flexibility, although once again, the report is in terms of written material which is given to the judge. It is implicit within the order that the judge may rely upon this material.

I have never seen the order used.

#### **The influence of case management and of the fact of penalty hearings**

Before turning to some more controversial and different mechanisms, it is worth saying at this point that there is an extra dimension to the use of the above mechanisms by the current active case management which modern judges employ. Where full case management powers are available, and used properly, experts can be brought together early, primers developed, issues defined and refined and reports prepared with a knowledge of the boundaries of the dispute. The court can control the deployment of the expert evidence under such case management powers.

One significant qualification to this must be made in that many competition cases are penal in their character and there is a difficulty forcing admissions of fact and evidence from parties who may not have to give evidence at all and may not be prepared to assist with the sensible deployment of evidence when they are facing multi-million dollar penalties.

The three further mechanisms that I wish to discuss are referees, assessors and the use of more than one judge.

#### **Referees**

The Australian Government has proposed to amend the *Federal Court of Australia Act 1976* (Cth) to specifically provide for rules in relation to referees.<sup>16</sup>

The Supreme Court of New South Wales has been using referees for many years in commercial disputes, in particular building, technology and construction disputes. I will first explain what a referee is. I will then describe how the Supreme Court of New South Wales has utilised the facility. I will then discuss how referees, when introduced in the Federal Court, may assist in the disposition and resolution of competition claims.

#### **What is a referee?**

In *Buckley v Bennell Design & Constructions Pty Ltd*<sup>17</sup> Stephen J and Jacobs J explained the history and nature of references and referees. The court was dealing with a provision of the *Arbitration Act 1902* (NSW), s 15 which provided that the court might at any time order the proceedings or any question or issue of fact arising therein to be tried before an arbitrator agreed on by the parties or before a referee appointed by the court. The power could be used compulsorily in both respects – arbitration or reference.

A question arose as to the principles by reference to which an award by an arbitrator made after an order under s 15 had been made could be set aside. The Court of Appeal in New South Wales said that the principles were the same as applied in the case of an arbitration pursuant to a submission. This was overruled in the High Court. Although the case concerned an arbitral award, the discussion also concerned references.

Stephen J described the hearing before the arbitrator or referee as a

‘trial’. It was a form of special trial. He said that in such a reference the court’s procedures of adjudication are not abandoned in a favour of extra-curial settlement of the dispute; rather, the court directs that for better resolution of the particular proceedings initiated before it, resort should be had to this special mode of trial which the legislation made available. Stephen J then discussed the origin and development of this mode of trial and how distinct it was from conventional arbitration.

Time and space do not permit a discussion of this history, but the above pages of the reasons of Stephen and Jacobs JJ make valuable reading for the recognition that the reference is not the abandonment of the method of resolution by the judicial arm, rather it is the use by the judicial arm of a special method of trial for the particular dispute.

In New South Wales, the rules made under the authority of relevant legislation enable a degree of flexibility to be employed by the referee in how the inquiry is undertaken. Under Part 20 of the Uniform Civil Procedure Rules provision is made for the referring out of proceedings or parts of proceedings to a referee for a report: see Uniform Civil Procedures Rules, Rule 20.14. Any person may be appointed a referee whether legally qualified or not: Rule 20.15. The choice of person depends upon the nature of the dispute. Two or more referees can be appointed: Rule 20.16. An inquiry and report can be directed: Rule 20.17. Provision is made for the remuneration of the referee: Rule 20.18. The court may give directions for the provision of services of officers of the court or courtrooms or other facilities for the purpose of any reference: Rule 20.19. The court may give directions with respect to the conduct of proceedings under the reference and the manner in which the referee may conduct himself. Included in this is the question whether the referee will be bound by the rules of evidence and how he or she may inform him or herself in relation to any matter: Rule 20.20. The court may at any time and from time to time on application of the referee or a party give directions in respect of any matter arising under the reference. The court may of its own motion or on application vary or set aside any part of any order for referral: Rule 20.22. The referee must submit a written report: Rule 20.23. The court may on a matter of fact or law or both do any of the following in relation to the report: adopt, vary or reject the report in whole or in part, require an explanation by way of report from the referee, remit for further consideration by the referee the whole or any part of the matter referred for a further report or decide any matter on the evidence taken before the referee with or without additional evidence and make such order as it thinks fit: Rule 20.24.

The court has on a number of occasions identified the considerations which will be taken into account in the review of the report. In *Bellevard Constructions Pty Ltd v CPC Energy Pty Ltd*<sup>18</sup> Chief Justice Spigelman and I discussed these authorities.<sup>19</sup>

The general principles are that questions of law will be reviewed

by the court as on a rehearing. As to questions of fact the court generally needs to be persuaded of the clarity and seriousness of any error before even considering entertaining a rehearing on the facts. The degree of scrutiny will depend upon the individual case.<sup>20</sup>

The court is exercising a form of discretion when it adopts or varies the report. It is to be recalled that a (special) trial has been held, not the mere production of evidence.

The success of this procedure in the Supreme Court of New South Wales can be measured by the huge extent of the building, technology and construction list. Any perusal of the newspapers, generally on a Friday, will indicate a huge number of matters in the list. However, there has not been a judge hear the factual basis of a building case in the Supreme Court for some years. The court effectively acts as a clearing house for such disputes with careful supervision of directions and references to a wide variety of referees. An enormous body of work is dealt with to the general satisfaction of the commercial community, which brings disputes from all over Australia to be dealt with in this fashion.

Turning to the use of referees in competition matters, when the power is given to the Federal Court, it is necessary to consider a matter that has concerned people in the past as to the constitutional validity of the use of references when the matter is one of federal jurisdiction. My predecessor, Keith Mason, when he was president of the Court of Appeal, dealt with this matter in some detail in *Multicon Engineering Pty Ltd v Federal Airports Corporation*.<sup>21</sup> His views had the concurrence of Gleeson CJ and Priestley JA.

The argument was that the judge hearing the application to adopt the referee’s report was obliged to conduct a hearing de novo having received a report from a referee in a matter in federal jurisdiction. Whilst the decision is in relation to state courts exercising federal jurisdiction, properly understood, it assists in any argument that might be made in the Federal Court. As I have previously said, in the Federal Court registrars can exercise judicial power. In *Harris v Caladine*<sup>22</sup> the High Court indicated that as long as there was a requirement of appropriate control and supervision, the exercise of federal jurisdiction and powers by a registrar could be permitted. As Mason P said<sup>23</sup> in *Multicon*, nothing in *Harris v Caladine* indicates that a full de novo hearing is required for validity. Once one understands that the reference is a special form of trial having a history of some centuries the legitimacy of the procedure in federal jurisdiction can be seen as based on facts other than the delegation of hearing.

The control and supervision discussed in *Bellevard* is such that it remains flexible and responsive to the needs of particular circumstances. *Multicon* is authority for the proposition that the use of references with appropriate court supervision in accordance with established principle does not violate the requirements of Chapter III in the exercise of federal jurisdiction.

What then can referees be used for? In the building, technology and construction list they are used for the resolution of whole disputes. I would not suggest that is appropriate in the context which we are discussing – competition cases. But there is no reason why a judge could not appropriately fashion orders during the case management of the case for a report to be brought forward on particular issues that have been identified through case management procedures for resolution. These issues might be interlocutory or they may be part of the final trial. Issues of discovery, issues of appropriate scope of evidence, issues of market, issues of competition and product substitutability may well be able to be sent off to referees for a report or for reports which can then form part of the fabric of the trial process.

Likewise questions of damages, often complex and time consuming could be dealt with by the process of reference.

The use of such procedures could, in many cases, be distinctly advantageous. To the extent that a judge wished to have an issue or issues masticated or partly-digested by a specialist before considering the matter the special trial could take place. Whilst one way of using references is to have a bias in favour of adoption, another way might be to use the process as an initial digestion process giving wider or more flexible rights to the parties to contest aspects, thereby shortening judicial consideration, but enabling the parties to engage the judge with the report at a more detailed level than might otherwise be the case in other contexts.

I should say that there may be seen to be disadvantages in this process. In my personal experience, the hard work in understanding the market evidence provides one with a base of deep knowledge when one comes to understand the actions of the individual parties in the living market. Having deeply engaged in the factual understanding of a particular market, the actions of the impugned participants often become pellucid with that deep knowledge. If an expert or commercial person has prepared a report on the market, that deep imbibing of the underlying facts may be lacking in the judge and that may bring about a disadvantage in the ability to perceive the reasons for action and thus to assess the purpose involved in any particular body of circumstances.

Nevertheless, I think Federal Court judges armed, as in all likelihood they will be in due course, with powers to refer out to referees have a highly advantageous tool to enable them more efficiently to deal with complex factual and technical issues.

### Assessors

In the *Patents Act 1990* (Cth), s 217 the following appears:

A prescribed court may, if it thinks fit call in the aid of an assessor to assist it in the hearing and trial or determination of any proceedings under this act.'

No rules or further explanation are given by the Patents Act or

the Patent Regulations. In *Genetic Institute Inc v Kirin-Amgen Inc* (No 2)<sup>24</sup> Heerey J in a patent case dealing with biotechnology made an order under the Patents Act, s 217 for an assessor. The making of the order was contested. It was argued that Order 34 of the Federal Court Rules (the court expert) somehow overrode or modified the effect of a law of the parliament (the Patents Act, s 217). This submission, unsurprisingly, was rejected. Heerey J referred to the New Zealand decision in 1980 of *Beecham Group Ltd v Bristol-Myers Co*<sup>25</sup> in which Barker J made an order under the relevant provision in the New Zealand Act providing for the appointment of:

... an independent scientific advisor to assist the court or to enquire and report on any questions of fact or opinion not involving questions of law or constructions.

Heerey J found that the use of an assessor as an assistant for him was conformable with the exercise of federal judicial power. One aspect of the matter which was complained of was that the consultation would take place privately between the judge and the assessor. This was inimical, it was said, to the exercise of judicial power. Heerey J rejected this. In doing so he called in aid what Mason J said in *Re L: Ex parte L*.<sup>26</sup> There Mason J discussed the proscription of persons communicating with the judge about his or her decision. His Honour said:

This proscription does not, of course, debar a judge hearing a case from consulting with other judges of his court who have no interest in the matter or with court personnel whose function is to aid him in carrying out his judicial responsibilities ...

Heerey J said that an assessor appointed under s 217 was to be included in the category of court personnel referred to by Mason J. Heerey J went on to say:<sup>27</sup>

How the assessor appointed under s 217 performs his or her role in the actual conduct of this case will of course be governed by law, including the rules of natural justice. It is not appropriate at this early stage to lay down any detailed prescription. Suffice to say that the practical experience of Beecham shows how an appointment can work well and be of great assistance to a trial judge, without infringing natural justice.

There was an application for leave to appeal to the full court. The Court (Black CJ, Merkel and Goldberg JJ)<sup>28</sup> refused leave. The court said:<sup>29</sup>

... the questions of the role of the assessor, and of the potential impact of that role on the parties' rights of natural justice and his Honour's obligations to perform his judicial functions fairly and independently, were considered and addressed by his Honour before the commencement of the trial. Against this background we are not persuaded that any aspect of his Honour's conduct with respect to the assessor provides a basis for leave to appeal.

To understand what an assessor is and how in competition cases

this facility (of course with any necessary statutory authority) could be of help, it is of utility to examine the historically most used type of assessors – in shipping and Admiralty cases.

### The assessor in maritime cases

The function of assessors in Admiralty is explained in Roscoe's *Admiralty Practice* 5<sup>th</sup> Ed at 330-331, McGuffie *British Shipping Laws* Vol 1 *Admiralty Practice* at [1212] ff and [1331] and Australian Law Reform Commission Report 33 on Civil Admiralty Jurisdiction [288]-[291].

Assessors in maritime cases were brought in when questions of seamanship were in issue – especially in collision and salvage cases. The assessors in England were the Elder Brethren of the Corporation of Trinity House. This was and is an old body whose first official record was a charter from Henry VIII on 20 May 1514 to regulate pilotage. In 1604, James I conferred rights of compulsory pilotage and rights to license pilots in the Thames. The corporation remains a maritime specialist organisation able to provide skilled assistance to the courts and the commercial community generally.

The function of assessors was to advise the court upon matters of nautical skill. The responsibility for the decision and the weight to be attached to the advice of the assessor remained with the judge. In *The Nautilus* [1927] AC 145 the House of Lords made clear that the judge must not surrender to the assessor the judicial function of determining the issue before him, however technical it may be.

There are number of expressions in the English cases that assessors provided a form of evidence of an expert character. In *Richardson v Redpath, Brown & Co* [1944] AC 62 at 70-71 this view was heavily criticised by Viscount Simon. I will come back to Viscount Simon's views shortly. The view that the assessor's advice was evidence sits uneasily with the reality of his or her contribution. They could assist an appellate court (the Court of Appeal or the House of Lords) in understanding the evidence led below. Further, there was no right of cross examination, indeed assessors were not sworn as witnesses. Nevertheless, when assessors assisted the court, without the leave of the court, the parties were not permitted to call their own expert evidence.

Assessors were used in other countries in Admiralty claims. In the United States their use was, however, discontinued in the nineteenth century. New Zealand and Australia no longer make use of them. This is in part because of the dearth of collision and salvage cases, at least in Australia. Canada, however, has always made more use of assessors than its Commonwealth cousins. Its Admiralty rules provide for them, encouraging both the use of assessors and expert evidence in the same case.

You have not all gathered here this weekend in Adelaide to hear me speak on maritime law and procedure. However the tool of the assessor, if carefully and thoughtfully used, could be of great utility to the modern judge hearing a case about any expert



Trinity House, Trinity Square, City of London, 1821. Photolibary.com

discipline, in particular in my view, competition cases. One of the most helpful discussions of the place of the assessor can be found in a Canadian case: *The Ship 'Diamond Sun' v The Ship 'Erawan'*<sup>30</sup>. There, Collier J surveyed the variety of procedural approaches to the use of assessors. In that survey, Collier J cited Viscount Simon in *Richardson v Redpath, Brown & Co* to which I have already made mention. *Richardson* was not a shipping case. It was a workers' compensation case in which the practice that had grown up in England (and seemed to be a very sensible practice) of using medical assessors to assist judges in dealing with workers' compensation claims was discussed. It is worth setting out some of the views of Viscount Simon. As one reads the words of Viscount Simon one can immediately see their relevance, and the utility of the assessor to fields such as competition cases. Viscount Simon said the following:<sup>31</sup>

... to treat a medical assessor, or indeed any assessor, as though he were an unsworn witness in the special confidence of the judge, whose testimony cannot be challenged by cross examination and perhaps cannot even be fully appreciated by the parties until judgment is given, is to misunderstand what the true functions of

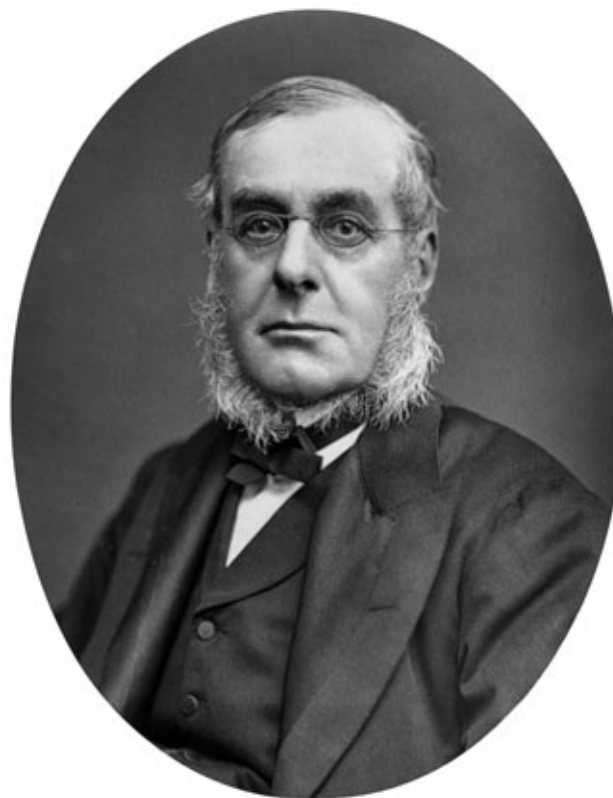
an assessor are. He is an expert available for the judge to consult if the judge requires assistance in understanding the effect and meaning of technical evidence. He may, in proper cases, suggest to the judge questions which the judge himself might put to an expert witness with a view to testing the witness's view or to making plain his meaning. The judge may consult him in case of need as to the proper technical inferences to be drawn from proved facts or, or as to the extent of the difference between apparently contradictory conclusions in the expert field. ... It would seem desirable in cases where the assessor's advice, within its proper limits, is likely to affect the judge's conclusion, for the latter to inform the parties before him what is the advice which he has received. ...'

This is a very helpful and clear expression of the consultative non-evidential task of the assessor.

The modern English practice can be seen in cases such as *The 'Bowspring'*.<sup>32</sup> There the Court of Appeal of England and Wales examined the question of the use of assessors against the common law principles of natural justice and article 6 (1) of the European Convention on Human Rights. The principle of fairness, it was said, required that any consultation between the assessors and the court should take place openly as part of the assembling of the evidence.

I am not sure that is not putting the matter too highly. It goes without saying that statutory authority would be required, but as long as it is clear that the task of consultation and its extent is to be disclosed, it is difficult to see why the judge should not have the availability of the assessor out of court as well as in court. The scope and difficulty of the evidence in many cases, including competition cases, is such that a single judge is often left with a vast task which can take months to unravel. The availability of a consultative agency such as an assessor would be of considerable assistance. It is not as if judges do not talk to others.

Let me give you an example. My late colleague, Justice Peter Hely, heard a particularly difficult collision case involving the ramming of a coal berth at Port Kembla by a 140,000 tonne bulk carrier. The case involved a matrix of conflicting human evidence of crew, pilot and bystanders as well as a significant body of technical evidence around the subjects of close ship handling, pilotage practice, the handling of tugs and the forces of tide and wind on a large object such as a bulk carrier in a confined water space. His Honour did his customary magnificent job at first instance in marshalling the facts. I sat on the appeal. After we finished the appeal (upholding all his findings of fact) I asked him whether he would have preferred to have the assistance of an assessor. He was unequivocal in his expression of view that this would have been of great assistance. The fact was that night after night, week after week this diligent, hugely competent man struggled with his 28 year old associate to understand the detail and complexity of the lay and expert evidence. His judgment was a masterpiece of careful organisation and thoroughness. Many judges would not have been able to do



Admiral Sir Richard Collinson, KCB, FRGS, Deputy-Master of Trinity House, 1877. Artist: Lock & Whitfield. Photolibrary.com

what he did. It would have been of great assistance to him had he had a generalist maritime assistant familiar with charts, familiar to a degree with ship handling, familiar to a degree with bulk carriers and tugs to help him marshal and interpret the evidence before him. In some of my competition cases I had the benefit of associates with sophisticated economic training. In others, I did not.

There is, of course, an overlap between evidence and interpretation of evidence. But the world is not perfect. Judges are not super human. A degree of assistance in the interpretation of expert evidence would often be of significant assistance to the judge making it likely that time taken to resolve cases would be shorter and the physical energy demanded of judges to command the facts would be relieved.

If one contemplates the size of many competition cases, the sometimes platoon-like manning of each side with expert witnesses, solicitors, junior counsel, senior counsel and the recognition that one judge will decide the case at first instance leads one to conclude that it is often quite unfair to expect a judge to be able to deal with these without some degree of assistance.

One of the loneliest feelings in the world is finishing a long case

having had the assistance of the teams and platoons from both sides for weeks, or months and then hearing the court door close behind you realising that the thousands of pages of transcript and of exhibits are now yours, and yours alone, to understand, to distill and to deploy in a synthesised way to reach an answer. Your only friend may be the associate or tipstaff who has been with you during the case. There is no one to talk to. The task and its difficulty should not be underestimated.

### More than one judge

I will raise briefly one other issue which I have spoken of in various contexts before. Some cases (perhaps only the exceptional) are so large and so complex that it is simply unfair to burden one person alone with the responsibility of writing. I am firmly of the view that in some cases a second judge could usefully be allocated to the hearing of the matter. This person could play a number of functions. First, both judges could be responsible for distilling and assessing the evidence. Of course, one must have dispositive capacity in one judge because there may be disagreement. However, the presence in a working capacity of a colleague could be extremely valuable. Also, people die. There is often not much choice when this occurs. Long cases can cost many millions of dollars. The second judge can step in.

I have not had much success in persuading anyone that long difficult trials could legitimately attract this additional judicial function. It would cost money within the judicial budget. It could be used flexibly, perhaps merely having the second judge as a sounding board on a formal basis and able to step in if the primary judge becomes ill or otherwise infirmed.

I raise it because one day a long case will have a significant effect on the health of a judge. In administration speak, it can be seen as an OH & S 'issue'. The difficulty and weight of many of these cases is not appreciated by the general community, is not appreciated by the commercial community, is not appreciated by counsel and solicitors. It should be. Using, in the very exceptional case, more than one judge may be one mechanism of ensuring that not only the possibility of which I just spoke never occurs, but also that more expeditious resolution of very long cases can occur.

### Conclusion

These are some ideas for discussion and consideration by superior courts generally. They are, I think, worth considering. They may help to alleviate the hand-wringing that tends to occur about expert evidence.

1. *Judiciary Act 1903* (Cth), s 39 (2).
2. *Forge v ASIC* (2006) 228 CLR 45.
3. *WWF v TW Alexander Ltd* (1918) 25 CLR 434.
4. *Harris v Caladine* (1991) HCA 172 CLR 84.
5. See *AGL v ACCC* [2003] FCA 1525; 137 FCR 317.

6. See Renfree *The Executive Power of the Commonwealth of Australia* (Legal Books, 1984). As to the lack of an accepted definition, see *Davis v The Commonwealth* (1988) 166 CLR 79, 92-3 and 107 and M Sunkin and S Payne *The Nature of the Crown: A Legal and Political Analysis* (Oxford 1999) pp. 78-87.

7. *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Limited* (1970) 123 CLR 361, 389-97 per Windeyer J.

8. See *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 391 per Windeyer J.

9. Griffiths CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*: '[T]hat the words "judicial power" as used in sec. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

10. *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

11. *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434.

12. *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530.

13. See *British Imperial Oil v Federal Commissioner of Taxation* (1926) 38 CLR 153 (the Second BIO case) at pp 175-76.

14. *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 189; *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617, 628; and *Re Ranger Uranium Mines* (1987) 163 CLR 656, 665.

15. (1957) 100 CLR 277.

16. *Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008*.

17. (1978) 140 CLR 1 at 15-22 and 28-38, respectively.

18. [2008] NSWCA 228.

19. See generally *Chocolate Factory Apartments Pty Ltd v Westpoint Finance Pty Ltd* [2005] NSWSC 784 at [7]. *Super Pty Ltd v S J P Formwork (Aust) Pty Ltd* (1992) NSWLR 549 at 562-565 (Gleeson CJ with whom Mahoney JA and Clarke JA agreed); *Chloride Batteries Australia Ltd v Glendale Chemical Products Pty Ltd* (1988) 17 NSWLR 60; *White Constructions (NT) Pty Ltd v Commonwealth of Australia* (1990) 7 BCL 193; and *Foxman Holdings Pty Ltd v NMBE Pty Ltd* (1994) 38 NSWLR 615.

20. See *Nicholls v Stamer* [1980] VR 479.

21. (1997) 47 NSWLR 631 at 639-642.

22. (1991) 172 CLR 84.

23. *Ibid.*, at 640-641.

24. (1997) 78 FCR 368.

25. [1980] 1 NZLR 185.

26. (1986) 161 CLR 342 at 351.

27. *Ibid.*, at 372.

28. (1999) 92 FCR 106.

29. *Ibid.*, at 118.

30. (1975) 55 DLR (3d) 138.

31. [1944] AC at 70-71.

32. [2005] 1 Lloyds Rep 1 at [57] - [65].

## Australia's first litigants

By Ian Temby QC

### Henry and Susannah

Henry Cabell was convicted of burglary on 1 February 1783, when he was 19 or 20 years old. He and two others, his father (also Henry Cabell) and Abraham Carman, had broken into a shop and stolen a haunch of pork, a leg of lamb, a brass saucepan, a feather mattress, blankets, sugar, soap and sundry other items. All three were sentenced to death, and the two older men were hanged. His sentence was commuted to transportation to the American colonies for 14 years.

Susannah Holmes had earlier been convicted on a charge of theft, from the home of Jabez Taylor, where she worked as a servant. She was sentenced to death, but the judge recommended a reprieve, which was granted. Her sentence was also commuted to transportation to America for 14 years.

Henry and Susannah probably met for the first time in Norwich Gaol. Meet they certainly did, as Susannah was delivered of a child on 17 February 1786, he was christened Henry, and the older Henry was always acknowledged as his father.

The three of them remained in custody, while the authorities decided what to do in consequence of loss of the American colonies. By early 1787, a decision had been made to set up a new colony at Botany Bay, and Sir Arthur Phillip RN received instructions from the king on 23 April 1787 and his commission as governor four days later. At that time there were four women being held at Norwich Gaol awaiting transportation, and as the new settlement needed females, it was decided that three of them including Susannah should be sent. The fourth was too old and left behind. So was Henry: male prisoners were in plentiful supply, and he was not chosen.

### Plymouth to Australia

When the time was approaching for the Botany Bay fleet to depart, the three women and little Henry were taken to board the *Charlotte*, accompanied by a turnkey named John Simpson. As he had no papers for the child, the ship would not receive the child and Simpson had to bring him back to shore leaving Susannah on the ship. These distressing circumstances caused him to travel by coach from Plymouth to London to wait upon the home secretary, Lord Sydney. Perhaps surprisingly, Simpson managed to gain an audience and returned to Plymouth with written directions from Sydney's private secretary that both mother and child were to go to Australia, on the *Friendship* (a hospital ship) and that Henry Kable (the older) was also to go to that place on that ship.

Certain newspapers became aware of and wrote up this romantic tale, Lady Cadogan took up a public subscription, and £20 was raised and spent on items which the family could use in Australia. They were entrusted to Rev. Richard Johnson who in turn gave them to the master of the *Alexander*, a man named Sinclair.

The voyage took 36 weeks, and for the greater part of it Henry,



The *Charlotte*, at Portsmouth, prior to departure in May 1787.

Susannah and child Kable were on the same vessel. However, because certain of the women convicts on the *Friendship* behaved in a manner which outraged morality, even at sea and for the time, all of them were taken off the *Friendship*. They were replaced by livestock, and taken to other ships. Susannah and her child arrived in Sydney Cove on the *Charlotte*. Some time after that it was discovered the parcel of goods which was supposed to be the Cabells' was missing – perhaps stolen, perhaps lost, or perhaps thrown overboard by somebody who thought felons should not be encouraged to rise above their station.

### The first civil case

There were early criminal cases. To give but one example, in the words of the judge-advocate, David Collins:

The month of May opened with the trial, conviction and execution of James Bennett, a youth of 17 years of age, for breaking open a tent belonging to the *Charlotte* transport, and stealing thereout property above the value of five shillings. He confessed that he had often merited death before he committed the crime for which he was then about to suffer, and that a love of idleness and bad connexions had been his ruin. He was executed immediately on receiving his sentence, in the hope of making a greater impression on the convicts than if it had been delayed for a day or two.

The first civil case in the new colony was commenced by Henry Cable and Susannah Cable on 1 July 1788. (They generally called themselves Kable after he was pardoned some years later, and the spelling was sometimes Keable, but in the proceedings, *Cable* appears). They petitioned the judge-advocate to have Sinclair, master of the *Alexander*, appear to show cause why their goods 'which were collected and bought at the expence of many charitable disposed persons for the use of the said Henry Cable, his wife and child' and shipped on the *Alexander* were not 'duly

and truly delivered in that ample and beneficial a manner as is customary in the delivering of goods. And also humbly prays you will on default of the parcel not being forthcoming take and use such lawfull and legal means for the recover or value thereof, as your honour shall think most expedient’.

It is interesting to note that each of Henry and Susannah signed the petition by subscribing a mark, that is to say a cross. It is also interesting, and may be significant, that after formalities the petition commenced in this way:

Whereas Henry Cable and his wife, ~~new settlers of this place~~, had before they left England a certain parcel ...

Commentators on the case have opined that the words were struck out because of their misleading nature, and nothing inserted in their stead because an honest word to use in lieu would have been ‘convicts’ which would have brought the law of attainder into operation: received doctrine was that those sentenced to death for a felony ceased to exist in law so they could neither sue nor hold property until pardoned. Probably this was known to Collins, although he was a military man, not a lawyer. It may be that judgment was given in knowledge that the attainder operating upon each of the plaintiffs existed but ought be ignored as more than half of those belonging to the new colony were convicts.

According to *Blackstone’s Commentaries on the Laws of England*, I, 107:

... if an uninhabited country was discovered and planted by English subjects, all the English laws then in being, which are the birth-right of every subject, are immediately then in force. But this must be understood with very many and very great restrictions. Such colonies carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony; ... What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the king in council ...

It is known that Collins had *Blackstone* with him in Sydney.

The court comprised Collins as judge-advocate, the Rev. Richard Johnson and John White, the Surgeon-General. On 1 July, the court issued a warrant under the hand and seal of the judge-advocate, directed to the provost-marshal, commanding him to bring Sinclair before the court the following day. On 2 July, the matter was stood over until 5 July, when the provost-marshal did as the warrant instructed. According to the records, Sinclair ‘joined issue on the business’, evidence was given by the first mate of the *Alexander*, a steward of that ship, and John Hunter, the captain of the *Sirius*, after which the court ‘found a verdict for the plaintiff, to the value stated by him in the complaint’, that is to say £15. Kercher, ‘Debt, Seduction and Other Disasters’, at xix, was surely right in saying:

This was a great victory for the two illiterate convicts, who managed

to overcome the restrictions of English law, the military tone of the colony and the court, and the vast legal and social gulf between them and Sinclair. In its first case, the civil court had implicitly declared that New South Wales was to be subject to the rule of law, rather than being administered in an arbitrary or military way. The decision showed that the law was represented in the penal colony not only by punishment through exile, the lash and the gallows, but also by enforceable rights which were available even to those at the bottom of the social heap. It was a local version of law, however, one which was not recognised officially in England. There was not a town or a courthouse at Sydney Cove in July 1788, not even a bridge across the Tank Stream, but there was already a functioning legal system to resolve civil legal disputes.

Who put the Cabells up to it? Who wrote out the petition? To what extent was the governor an acquiescing party? The answers to these questions cannot be provided with confidence, but it seems likely Rev. Johnson played an important role. He had placed the parcel of goods with Sinclair, and not being a military or naval man may well have been offended by the attitude displayed by Sinclair to loss of the goods. But if this surmise is right, the fact Johnson sat as a member of the court must give rise to disquiet. It seems obvious the plaintiffs had one or more friends in high places: it often helps.

### Prosperity, decline

Henry Cabell and Susannah Holmes were married, at Sydney Cove, on 10 February 1788, in a group wedding. This was the first wedding ceremony in the new colony. They had 11 children, only one of whom died in infancy. The second child, Dianna, commonly called Dinah, was the second white person born in Australia. The fourth child, James, was born on 19 August 1793, and murdered by Malay pirates in the Malacca Straits in 1809 or 1810. According to the online edition of the *Australian Dictionary of Biography*, Henry Jnr. and James were mariners, commanding vessels owned wholly or in part by their father. This seems improbable in the case of James, as at the time of his death he was only 16 or 17: would a youth of that age have been entrusted with command of even a small trading vessel?

Henry Kable, as he was known from the mid-1790s to the end of his long life, was appointed by the governor as an overseer, then a constable and nightwatchman, and later chief constable, being dismissed on 25 May 1802 for misbehaviour after being convicted for breaching port regulations and illegally buying and importing pigs from a visiting ship. He became a publican – his first hotel, The Ramping Horse, was opened in 1798 – a merchant and a ship owner. Kable went into partnership, first with the boat builder James Underwood and later with him and Simeon Lord, a trader. Lord, Kable & Underwood were involved in whaling, sealing, sandalwood and other trading both wholesale and retail. Lord withdrew in 1808 and Underwood split from Kable in the following year. Shortly beforehand Kable disposed much of his

property to his oldest son, Henry. In February 1810, he announced that such son had taken over the entire management of his Sydney affairs, and in the following year he moved to Windsor where he operated a store and brewery. The divestiture seems to have been a good move, as a judgment of more than £12,000 – a fabulous sum – was awarded to Lord against Kable in 1811. Kable Snr. did remarkably well for a man who was functionally illiterate, but he did know how to add up a column of figures.

Kable was granted farms at Petersham Hill in 1794 and 1795, and bought out several others in the vicinity shortly after land was granted to them. By 1809, he also held five farming lots in the Hawkesbury region, and 300 acres at the Cowpastures, together with real estate in Sydney. At one time the family were housed in northern George Street, on the site on which the Regent Hotel was later built: (the hotel restaurant Kable's is named after him).

Susannah Kable died on 8 November 1825, at the age of 63. Henry lived on until 16 March 1846, and was buried at Windsor. It may not be a matter of dishonour that Governor Bligh imprisoned him and others for a month, and fined each £100, for sending Bligh a letter 'couched in improper terms'. But the records show that Kable was a highly litigious man, and he seems to have been not very nice.

#### **A personal note**

When I was young, living in Perth, our family was regaled from time to time about a lineal ancestor who was on the First Fleet as a convict, having been a highwayman, sentenced to death, but instead sent to Sydney in chains. We were told he fathered a child by another convict, they were to be sent to different places, and that the chaplain of the fleet hired a horse to ride to London, where he spoke with the secretary of state for the colonies, who said he did not care where they went, but all three were to go together. Also that the former highwayman – we had the name, Henry Kable – prospered so mightily he must have been a remittance man. The fact he managed to impregnate a fellow convict was a matter of some pride, but more so the fact that he carried Governor Phillip ashore at Sydney Cove. That was and is the family legend.

Much of this, while not nonsense, is exaggerated to the point of error. But there may be something in the last contention. Dinah Teale (nee Kable) died in 1855, and her death was marked in the local Hawkesbury newspaper by a story, which read:

#### **DEATH OF THE OLDEST WHITE AUSTRALIAN**

On Friday last, Mrs. Dinah Teale, widow of the late John Teale, Miller, of Windsor, died at her residence in Macquarie Street. Mrs. Teale was the second white person born in Australia and the first to live to maturity.

Mrs. Teale's father, the late Henry Kable, was the first man of Governor Phillip's party to set foot ashore at Sydney in the name of the British Government.

As others have pointed out, there must have been people still living in 1855, including First Fleeters, who might have had cause to dispute the claim, but nobody seems to have done so.

Finally in what is effectively a personal postscript, I live with my family in a house in Kensington Road, Summer Hill which we discovered, after we had moved in, is on land which was granted to a couple of soldiers in 1795 and within days transferred to Kable. He also owned the land on which the Summer Hill railway station is situated, and from which I catch the train to work.



## The Hon Justice Michael Slattery

Michael Slattery QC was sworn in as a judge of the Supreme Court of New South Wales on 25 May 2009.

His Honour was educated at St Ignatius' College, Riverview and studied arts/law at the University of Sydney. His Honour was called to the bar in May 1978 and appointed queen's counsel in 1992. His Honour's father, the Hon John Slattery AO QC, had been appointed a judge of the Supreme Court in 1970.

His Honour was involved in some longer running commercial cases of the 1990s, including the *Tourang v John Fairfax* litigation in 1994. Between 1998 and 2001 he was involved in several cases involving the competition and telecommunications sector, and in 2004 appeared for the Medical Research and Compensation Fund before the 2004 commission of inquiry conducted by David Jackson QC regarding the asbestos liabilities of James Hardie Industries.

His Honour played an active role in the Naval Reserve from 1989, serving as the head of the Navy Legal Panel between 2002 and 2006, and during 2005 and 2006 was principal counsel assisting the Naval Board of Inquiry into the crash of a Sea King helicopter on Nias Island, Indonesia.

His Honour was a councillor of the Bar Council and served as president of the Bar Association from November 2005. He is one of the trustees responsible for the Mum Shirl Fund created in 2002, and for many years was the chair of the association's Equal Opportunity Committee.

Attorney General John Hatzistergos spoke on behalf of the New South Wales Bar and Joe Catanzariti spoke for the solicitors of NSW. Slattery J responded to the speeches.

The attorney adverted to his Honour's time as president of the Bar Association:

As is traditional regarding matters touching on law and public policy you were ... a thorn in the side of the government of the day regarding issues such as the abolition of the double jeopardy principle, majority verdicts and various arrangements for the courts. We, of course, hold no grudges here, but being on the losing side of an argument never blunted your advocacy on the part of your members nor the importance you placed on maintaining cordial relationships with those who had opposing views.

Mr Catanzariti said:

I must start by that in preparing for this speech, I spoke with many members of the legal profession, far and wide, who have had the privilege and pleasure of working with your Honour at some point in their career. Not one was surprised by your appointment to this bench, and not one expressed the view that your appointment was anything less than a due recognition of a person who has been a beacon to the profession; whose temperament, character, comportment and extraordinary skill-set have come to epitomise the very essence of what it means, not only to practise as a barrister in this country, but what it means to be a member of the legal profession in this country.

Both the attorney general and Mr Catanzariti referred to his



Honour's involvement in the Bar Association's Rhetoric Seminar series. Mr Catanzariti also said:

But if we wish to find the genesis for your extraordinary success as a legal practitioner and the reason why you are held in such high esteem across the entire profession of law – by both barristers and solicitors – we must look to the way your Honour has adopted and adhered to the basic principles that underline our legal profession.

It is not surprising to learn that your Honour has a great love for the philosophies of the great Roman and Greek thinkers. And indeed your Honour's love for Aristotle's *Art of Rhetoric* provided the very impetus for the most popular seminar program ever held in the Bar common room about the need for the profession to go back to the classics and rediscover the importance of rhetoric. But I am keen to drawn another parallel out of this love for Greek and Roman theory and practice. Your Honour, like your respected philosophers, is not just committed to the skill of advocacy per se, but to the service of justice and the rule of law. Like Plato, Aristotle's famous teacher, justice for your Honour 'is like a manuscript that exists in two copies. It exists in both the individual and the society where each individual functions not for itself but for the health of the whole.' If your Honour requires any evidence of this your Honour only need look to the way you have, through both your individual and collective actions, enhanced the standing and calibre of the entire profession, both that of solicitors and barristers through your own work as an advocate.

Mr Catanzariti also referred to his Honour's efforts to set up a pro bono legal representation scheme during the 2000 Olympic Games, to provide legal representation for athletes asked to appear before the Court of Arbitration for Sport.

Slattery J said:

It was undoubtedly my father's example that had the most profound influence on my decision to go to the bar. He is known affectionately to so many here. His vigour at the age of 90 is legendary. I am told

chief justice, that when you announced to the Equity judges' lunch last Wednesday who was to be the new judge, wishing to eliminate any possible misunderstanding, you explained to them all, 'The government has just appointed Slattery to the division,' and then you paused and said, 'Michael, not Jack.'

As a 15-year-old I attended his swearing in ceremony in the old Banco Court on 10 February 1970 and today I took an oath on the same Bible that he used in that ceremony which occurred before Chief Justice Herron. One can glean just a little of the somewhat different relationship between the media and the judiciary 39 years ago from the simple fact that a family photograph of the swearing in including myself and my three sisters appeared on the front page of the early editions of the *Sydney Morning Herald* the following day.

His Honour also referred to his progress at the bar after admission in 1978, which he hoped contained

some immediate comfort for the very junior bar right now. Shortly after my admission to practice Australia went into a severe economic recession. Perhaps it is the contrarian in me but I took silk in 1992, also in the middle of a recession. And now I come to this court in a – well we all know what it is, don't we? The past two recessions were survivable at the bar. I am sure the present one will be too.

I recall that in 1980 I took my anxieties about recession affected work levels to my father hoping he had a solution. Instead he rather thoughtfully said to me, 'Let me tell you about the late 1940s.' And so I learnt from him that the whole of the law lists in the late 1940s occupied only three column inches of space in the *Herald* and that young barristers would spend days in a café near the site of this court called Mokbels, waiting for a brief, any brief to arrive. I realised that in 1980 things could have been a lot worse and I suspect that the same is probably true of 2009.

His Honour referred to his masters, Peter Capelin QC who taught him jury advocacy and how to cross examine with passion, and Justice Peter Young, who taught him:

the subtleties of a full equity practice and how to survive the competence tests being administered by the then chief judge in Equity, Justice Helsham. An incidental benefit of reading with him was that I also learned a great deal about trams and buses. He generously gave his time to correcting my opinion work; a generosity that I expect he will still now afford me from the Court of Appeal.

## The Hon Justice Monika Schmidt



On 27 July 2009, the Hon Justice Monika Schmidt was sworn in as a justice of the Supreme Court of NSW in a private

ceremony. Prior to her Honour's appointment, her Honour was an acting justice of the Supreme Court for an earlier period of time in 2009.

The appointment is one of many contributions her Honour has made as an active judicial officer to the NSW justice system. In 1993, whilst still in her early 30s, her Honour was appointed as a judge of the Industrial Court of NSW and a deputy president of the Industrial Relations Commission of New South Wales. In 1998 her Honour was also appointed as a deputy president of the Australian Industrial Relations Commission of NSW.

In her prior judicial roles, her Honour's contribution to the development of jurisprudence in industrial and

employment law matters was second to none. Her Honour's reputation has always been that of a hardworking, polite and even tempered judge.

Continuing a pattern of service and leadership to the justice system, her Honour has also been a member of the Judicial Commission's Standing Advisory Committee on judicial education since 1996 and has facilitated continuing education programs for judicial officers. Her Honour has also sat as a member of the Conduct Division of the Judicial Commission dealing with complaints concerning judicial officers.

There is no doubt that her Honour will bring the same enthusiasm, work ethic, leadership and skill to her new role in the Supreme Court of NSW.

## The Hon Justice David Davies

On 29 June 2009 David Davies SC was sworn in as a judge of the Supreme Court of New South Wales.

His Honour obtained a music scholarship to Trinity Grammar School and then studied arts/law at Sydney University, also obtaining a postgraduate qualification in theology. His Honour was admitted as a solicitor in 1975 and practised for a year, having been employed as an undergraduate with the firm Stephen Jaques and Stephen. His Honour was admitted to the Bar in 1976, joining the 13<sup>th</sup> floor of Selborne Chambers, and was appointed senior counsel in 1996.

Davies J had been a member of one of the Bar Association's Professional Conduct committees since 1994, a member of the Education Committee, a member of the Equal Opportunity Committee, convenor and chairman of the Examinations Working Party since 2003, and was involved with the approval of the Professional Standards Scheme.

In welcoming Davies J, the chief justice referred to his Honour's breadth of practice at the bar, which the chief justice described as 'actually quite unusual in these days of specialisation'.

The honorary treasurer of the New South Wales Bar Association, Alexander Street SC spoke on behalf of the bar. Joe Catanzariti spoke for the solicitors of NSW. Davies J responded to the speeches.

Street SC compared the modes of transport chosen by respectively Harrison J and Davies J:

Your Honour has arrived for this morning's ceremony at what was hitherto known as the judges' car park but which must now hereafter accommodate a new chapter of law lords by a means of transportation that Justice Harrison has described as 'a monster'. It is rumoured that Harro said, 'Davies' wheels are possibly more powerful than the yellow Monaro'.

I have identified the sales pitch that appealed to your Honour: there's no going back; the line of the toughest, naked bikes, combined with the performance of fair powered bike; high handlebars for top precision handling; a long wheelbase for maximum riding stability; brakes like anchors; engine speeds which will give you goose pimples; high precision handling at all speeds; ultimate dynamics; maximum control in any situation and unique technical features.

The words 'precision handling', 'maximum control', 'ultimate dynamics' and 'unique technical features' tell us much more about the rider than they do about the 1200cc machine. Precision handling, your Honour's care and attention to your Honour's briefs; maximum control, your Honour's craft and command of witnesses; ultimate dynamics, a versatility of style, pace and content in the sanguine and measured path for successful advocacy; unique technical features – here the accolades of juniors, colleagues, bench and solicitors are too numerous to list.

Street SC referred to his Honour sharing a room with Harrison J on 13 Selborne:

I gather that your Honour developed what I am told is a healthy



ritual of sustaining the morning and afternoons with scones and tea, which I assume is a habit that your Honour quickly adopted to overcome the burdens of co-sharing a room shortly after you joined the 13th floor with a dour and droll colleague, the fabled Harro, as his Honour was affectionately then known. I believe your Honour's penchant for scones and tea probably developed from his Honour Justice Harrison's renditions of the Monty Python's Flying Circus lyrics that included 'and have buttered scones for tea'.

Your Honour formed a powerful triumvirate with Harrison and Hallen, vanquishing opponents in the courtroom and wielding control in the spiritual corridors of camaraderie at the bar. At this stage only the duumvirate has been restored on the bench.

Mr Catanzariti referred to having briefed his Honour:

in one of your most famous cases, *Perpetual Trustee Co Limited v Groth & Ors*, where your successful representation on behalf of the Trust of the Art Gallery of New South Wales saw the administration of the Archibald Prize monies transferred to the Art Gallery.

Justice Powell did not accept the argument that these works of art had become little more than cave paintings. He said, 'Then it matters not that the popularity of portrait painting, as such, may have declined over the years, or that, in the view of some, the quality of any particular winning portrait may have been dreary and uninspired or negative, indeed quite insipid, or that those who may have attended any particular exhibition were motivated to do so, not by any desire to improve their appreciation of portrait painting but by some current controversy as to the winning portrait, although I would suggest that even those who came but to stand and stare

must learn something'. I am sure that the last statement is also true of your Honour's art collection, which I believe includes two-times Archibald Prize winner Judy Cassab.

Mr Catanzariti also referred to his Honour's interests outside the law:

A man of many talents, your musical and liturgical interests could have also taken you into a different field of endeavour. Your many years as an organist and choirmaster at St Peter's Cremorne and as assistant organist at Christchurch St Lawrence, coupled with appointments as parish counsellor, Synod representative and nominator, have given expression to both your musical interests and religious beliefs, as has your membership of the New South Wales Bar Choir and your lesser known but well-developed skills as a trombonist.

In replying to the speeches, Davies J referred to his interview for the position of associate to Sir Garfield Barwick:

I was short-listed for the position and went nervously to be interviewed by him at his chambers in the old High Court in Darlinghurst. The interview went swimmingly, and then he asked me what I thought about the Woodward Commission report into the desirability of a national compensation scheme to replace tort law for personal injury. Being still full of Whitlamesque zeal and assuming that national compensation was part of the zeitgeist I waxed lyrical about the benefits of such a scheme, justice and compassion for all, the minimisation of lawyer involvement, et cetera. A chill fell on the room, and in a matter of minutes I was told rather abruptly that I would be notified about whether or not I had been successful.

His Honour also adverted to his early days at the bar:

The first brief arrived in a matter of days from my friend and fellow solicitor at Stephen Jaques, Geoff Pike. You can imagine my trepidation to find that it was a brief to appear before the full High Court without a leader, and my opponent was Peter Hely, and of

course that interview had only been a few months earlier. It was one of those then prevalent applications under the Judiciary Act to remove a matter that had been legitimately commenced in the High Court by a resident of one state against a resident of another to a more appropriate state Supreme Court, and I was for the applicant/defendant.

I managed to sit at the wrong end of the bar table and I did not move to the centre lectern when I rose because I had no idea that was where the recording microphone was. But Sir Garfield, presiding with four others, was infinitely kind. He gently gestured me into the correct position. I said who I appeared for. He said, 'And you are seeking an order under s 44 of the Judiciary Act remitting this matter to the Supreme Court of New South Wales?' I mumbled a Yes, but before I could utter another word he turned to someone I supposed was Mr Hely and said, 'And why should this order not be made?' This hapless person said, 'Mr Hely will tell your Honours why when he arrives.' Sir Garfield said, 'But I should like to know now'. The perspiring creature at the end said, 'Mr Hely asked me to say that he should be here by 10.30'. Sir Garfield said, 'Mr Doe, if you or Mr Hely can't tell me now we will have to make the order' and the order was duly made.

But it was not a complete triumph. Perhaps because he remembered the interview or perhaps because I was looking a bit too smug, Sir Garfield asked if I sought costs of the application. I hadn't even thought of it but I remembered that someone had told me, 'Always ask for costs', so I did. Sir Garfield smiled very sweetly and said, 'An applicant does not get costs on these applications. Costs in the cause'.

## The Hon Justice Stewart Austin

On 13 July 2009 Stewart Greg Austin was sworn in as a judge of the Family Court of Australia at a ceremonial sitting held in the District Court at Newcastle. Chief Justice Bryant referred to the need to occupy a District Court room, because the Family Court Building in Newcastle was inadequate to hold the numbers attending.

His Honour attended Kurri Kurri High School and studied law at the University of New South Wales, graduating with a Bachelor of Jurisprudence and a Bachelor of Law. He was admitted as a solicitor in 1984, and worked with Baker Love and Geddes Solicitors. In 1989 he commenced work with Damian Burgess, developing into the partnership Burgess Austin Solicitors that continued for eight years, where his Honour worked on a range of legal matters including criminal trials, commercial litigation and family law.

In 1997 his Honour commenced practice at the bar, reading with Ralph Coolahan, now Coolahan DCJ, and Kingsford Dodd SC, now a leading member of the Common Law Bar. His Honour's practice encompassed criminal, family and some commercial law.

His Honour was for over a decade the Bar Council's contact point for the Newcastle Bar, in which role his Honour attended numerous awards ceremonies at the University of Newcastle and helped to organise continuing professional development mini conferences.

Solicitor-General Stephen Gageler SC spoke on behalf of the Australian Government. Mark Sullivan spoke on behalf of the National Family Law Section of the Law Council of Australia. The president of the Bar Association, Anna Katzmann SC, spoke on behalf of the Australian Bar Association and the NSW Bar. Joe Catanzariti spoke for the solicitors of NSW. Austin J responded to the speeches.

The solicitor-general referred to his Honour having become known as:

one of Newcastle's most able and versatile barristers known to be as comfortable running a criminal matter in a District Court as ... running an equity or a commercial matter in the Supreme Court or ... running any matter in the Family Court. You would become known and respected not only for your sharp mind and your high level of personal integrity, but for your considerable communication skills that have allowed people dealing with you, clients and others, to know that they have been heard.

Possibly the greatest measure of a barrister is how he is known by his peers. Your Honour's peers have praised your diligence, your even temperament and your fair dealings. Indeed your Honour has been referred to by another barrister as a role model for the profession. The characteristics that have led to your Honour's success in a profession will ensure your Honour's success in the court. There is no doubt that you will continue to inspire respect and confidence as a judicial officer.

Your Honour has a life outside the law and your Honour will continue to have a life off the bench. Your Honour is known as a



dedicated family man who has managed to achieve something extremely rare in the law, something that I am told is called a work life balance. May it continue and may you find time for those frequent family ski trips that your Honour is fond of taking in Canada.

Justice Mullane referred in his recent retirement speech to the many challenges that were facing the Family Court, particularly here in Newcastle where he identified those challenges as perhaps more acute than in any other areas of Australia. Your Honour, by reason of your experience, by reason of your temperament and by reason of your affinity for the local community, is particularly well equipped to take on those challenges and to address them.

Referring to Austin J's local practice and connections, Mr Sullivan said:

It's a privilege to have the opportunity as one of Justice Austin's contemporaries in the Hunter region to welcome him to the bench of the Family Court. It's a credit both to his Honour and to the attorney-general that his appointment has been so warmly received by the legal profession and is regarded widely as a quality choice. Today is a day of optimism for his Honour and for all those associated with the Family Court in Newcastle, whether as lawyers, judicial officers, employees or the punters.

I am happy to greet your Honour today at the start of your judicial career with the words emblazoned on Kurri Kurri High School's emblem 'Courage Honour Service'.

In Newcastle, Sydney and Parramatta interest was widespread about who might be selected for the new position of Family Court judge. In conversations I heard speculation of the rich talent being considered and your name was referred to on occasion. If I knew then what I know now I would have collated a form guide, looked for a bookie and made an investment in Austin Futures. The attorney-general announced your appointment as the first for the Family Court made under the government's new transparent process for judicial appointments. My form guide would have lifted the veil even further on transparency.

...

Your Honour's past form is only a guide. I have confidence however that Justice Austin will enrich the reputation of the Family Court Bench and compliment the talent and hard work of Newcastle's judicial officers. He is highly regarded as a good lawyer amongst his peers, his knowledge of law and human nature is not blinkered and he has a positive and friendly demeanour. He is polite and he's local.

The president said that his Honour:

is a quiet, unassuming man. For that reason the bar might seem to have been an unlikely career move. However, a career at the bar was assured on one fateful Monday morning when the counsel your Honour had briefed in a criminal trial failed to turn up. Despite the reasonableness of your adjournment application, it was a request that the trial be stood over for one day. In the realisation of every solicitor's worst nightmare his Honour Judge Ducker no doubt fully confident in your Honour's ability to rise to the occasion refused the application and your Honour had to step into the breach.

Some suggested your Honour should retire then with a perfect score of one out of one. However, the excitement of such a win was too much to forsake particularly for a thrill seeker like your Honour.

His Honour's choice in motor vehicles attracted comment in the speeches, the president saying:

Your Honour's only discernable lapse in judgment appears to be your purchase of a four-wheel drive in what someone called an inappropriate and unnatural shade of purple. Another solicitor cognisant that he will inevitably appear before your Honour cautioned 'I think his Honour likes to call it blue'.

In responding to the speeches, his Honour said:

I have come to the view over time that the Family Court occupies an immensely important station in society's legal network. The court does not ordinarily deal with newsworthy and seductive concepts like criminal conduct and vast commercial interests which pique the public interest. Nor are the Rules of Evidence dissected and applied with the rigour found in other jurisdictions, but for me, having wondered where the real value in the justice system is to be found, realisation has come with the acquisition of experience and maturity.

What is more fundamental to the self-esteem of a society than stable and functional family units, however those family units may now be comprised in our pluralist society? What is more important than ensuring the safety and protection of children whose welfare and opportunities may be compromised by a dysfunctional family? How can individuals happily get on with their lives after matrimonial separation unless their worries about their children are sympathetically resolved and their property is fairly divided? That is the powerful unheralded work of the Family Court.

Notwithstanding nearly 25 years experience in litigation, I embark upon this new adventure with some trepidation. ...

Since my appointment I have endured a little worry about making sound and timely decisions. With that in mind I have drawn upon the wisdom of two European scholars and philosophers. Maimonides said 'The risk of a wrong decision is preferable to the terror of indecision' and Baltasar Gracian said 'Everything superlatively good has always been quantitatively small and scarce', therefore in reliance upon that sage advice I intend to write decisive, short judgments.

## Appointments to the District Court

There have been three appointments to the District Court of New South Wales from the bar so far in 2009.

### **His Honour Judge David Frearson SC**

His Honour Judge David Frearson SC was sworn in on 2 March 2009. Before his appointment, his Honour had been a deputy director of public prosecutions, since 2007. After admission as a barrister in August 1977, his Honour commenced work in the Office of the Solicitor for Public Prosecutions and Clerk of the Peace, and was appointed a crown prosecutor in 1985 and deputy senior crown prosecutor in November 2000. His Honour was appointed senior counsel in September 2004. His Honour conducted many complex trials and sensitive appellate work, including appeals in the High Court.

Mr Gormly SC who spoke on behalf of the Bar Association said that his Honour:

was regarded as a fine criminal appellant advocate, and by many as the 'the prosecutor's prosecutor'. Your style in the appellate court room has been described as concise and understated. This is matched by a remarkable capacity to remain calm, even in the face of a last minute briefing. The capacity to remain calm, much commented upon by your colleagues will hopefully not be lost in your new duties.

Mr Gormly also referred to a source, deep within the ranks of the crown prosecutors, who said that his Honour 'has just that right combination of learning, experience, instinct, flair and mischievous humour that made him an exceptional advocate and advisor'. His Honour had been a member of the Indigenous Barristers' Strategy Working Party, acting as a mentor since 2005.

### **His Honour Judge Andrew Colefax SC**

His Honour Judge Andrew Colefax SC was sworn in on 14 April 2009, at the same time as the former deputy chief magistrate, her Honour Helen Syme.

Between 1979 and 1985 his Honour was employed in the Commonwealth Attorney-General's Department, and in the Business Affairs Division of the department was involved in the Westinghouse Uranium and Trust litigation conducted in the United States. His Honour also served as one of the solicitors attached to staff of the McClelland Royal Commission into British Nuclear Tests in Maralinga, South Australia in the late 1950s. His Honour worked in private practice for a year at Dawson Waldron and then, from 1985 to 1988, at Hunt and Hunt. His Honour was admitted as a barrister in 1988, and had a practice in criminal and civil matters in nearly every tribunal, court and appeal court in the land.

His Honour was elected to the Bar Council in November 2003, and was a member of one of the Bar Council's Professional Conduct committees for about eight years.

His Honour was appointed senior counsel in 2004, and in 2008 served as counsel assisting the Commission of Inquiry Into the Conviction of Phung Ngo. The attorney-general who spoke on



behalf of the Bar Association referred to his Honour being known 'amongst his colleagues as a person who has style in the ways that really do matter – professionally and personally'.

### **His Honour Judge Michael Bozic SC**

His Honour Judge Michael Bozic SC was sworn in on 20 July 2009.

His Honour had practised at the bar for 18 years before being appointed senior counsel in 2000.

His Honour practised extensively in medical law, appearing in the Medical Tribunal, inquiries such as the Chelmsford Royal Commission and the Walker Commission of Inquiry into Camden and Campbelltown hospitals, and in many professional negligence suits. His Honour was more often than not counsel of choice for embattled medical practitioners. In recent years his Honour also mediated a number of such disputes.

His Honour also had a significant pro bono practice, complementing his Honour's commitment to civil liberties.

The president of the Bar Association described his Honour as the finest of opponents, who 'always took the right points. Never wasted time on point scoring. Never engaged in sledging ... wooed the witnesses, the judge and even your adversaries'.

## The annual Supreme Court Concert

The 8th annual Supreme Court Concert was held on 19 October 2009.

It was standing room only at the Banco Court on 19 October 2009 for the 8<sup>th</sup> Annual Supreme Court Concert, this year styled as 'The Night of Virtuosi'.

Justice George Palmer, Supreme Court judge by day and composer *par excellence* by nights was our compère. Justice Anthony Whealy inaugurated the Supreme Court concerts in 2002 and George has organised them annually since. He presented a varied and most entertaining selection of items for our entertainment this year.

The Banco Court is an ideal venue for these concerts. With the Bar Table removed, a magnificent display of flowers atop the Bench, a candelabra before the Bench, the court lights dimmed and stage lighting imported, the court was transformed from its workaday appearance.

The chief justice and the president of the Court of Appeal and many other members of the judiciary were present, along with members of the bar, accompanying persons and many members of the public.

Special guests were Matt Bailey on trumpet, David Rowden and John Lewis on clarinet, Eva Kong and Anna Yun, both sopranos from Pacific Opera, Andrew Green and Jem Harding on piano and the A Piacere String Quartet. 'Virtuosi' indeed.

Some of the material was familiar, and most welcome for that. We heard *Una voce poco fa* from the 'Barber of Seville' and the wonderful *Seguedille* from 'Carmen' (both beautifully sung by Anna Yun from Pacific Opera accompanied by Pacific Opera's Music Director, Andrew Green) and *Ah! Non credéa ... ah non*



*giunge* from 'La sonnambula' and the *Barcarole* from 'Tales of Hoffman' (also beautifully sung by Eva Kong – joined by Anna Yun for *Barcarole*).

We also enjoyed some less familiar works including the *Trumpet Concerto* by Tartini, performed by Matt Bailey on trumpet with accompanist Jem Harding with the delightful A Piacere String Quartet, and *Depuis le jour* of Charpentier's 'Louise' from Eva Kong, again accompanied Andrew Green.

However for me (and, judging by the rousing reception these works received from the enthusiastic audience, for them too) the highlights of the evening were George Palmer's own compositions.

The concert finished with the 3<sup>rd</sup> movement of George's 'Double Clarinet Concerto', a lively and rollicking piece played beautifully by David Rowden and John Lewis on clarinet, accompanied by Jem Harding.

The 'show-stopper' was the 2<sup>nd</sup> movement

from George's 'Trumpet Sonata' played by Matt Bailey, accompanied by Jem Harding. George asked us to imagine that we were in a New York Jazz Bar with the legendary jazz trumpeter Miles Davis (brought to us by Matt Bailey) meeting, as if a time traveller, the nineteenth century French composer and pianist Erik Satie (Jem Harding). It is a beautiful, moody piece and it brought the house down.

At the conclusion of the concert, an enthusiastic audience member commented that he imagined that few people normally appearing in the Banco Court received applause (and suggested that fewer yet probably deserved it) but asked 'our compère' to introduce himself and proposed he be voted a hearty round of applause.

Our compère modestly introduced himself to universal acclaim.

It was a great night.

**By James Stevenson SC**

## The Hon Theodore Simos QC

The following is an address delivered at the memorial service for Theo Simos by the Hon Justice Clifford Einstein at the St Francis of Assisi Church, Paddington on 26 June 2009.



The practice of law is an honourable profession. And there are many who make their mark in different ways. The quiet and dignified man whose memory we now honour, ranks amongst the most loved and respected barristers and judges of our time. For all his extraordinary intellect, that which marks him out may be summed up in the following words: he was a true gentleman.

The attendance today is testimony to the high regard which so many had for this so very special colleague and friend.

*Even after a strenuous day in court followed by a string of conferences he would set aside time to speak to his readers.*

It was an honour to be Theodore Simos's pupil at the bar and it is a signal honour to speak of his professional achievements. Also to comment on the type of son, husband, father and grandfather he was.

Theodore was born at the Paragon cafe at Katoomba in 1934. He attended Ms Long's School (boys up to eight, girls up to 12) in a Katoomba Church hall doing so alongside Justice Peter Young, now of the Court of Appeal. Even now one can imagine these two 8-year-olds having a quiet chat about the then recent decision

in Donoghue and Stevenson.

Theo's mother Mary always referred to him as 'My Theodore'. One can imagine the pride which she and Theo's father Zacharias would have had in seeing Theo's progression into Sydney University at the age of 15. But that was just the beginning of their son's numerous academic achievements. Few in this room could match the number of prizes he received during his period at his first University, only to be followed in 1958 by his graduating Bachelor of Letters from Oxford University, and then his graduation, Master of Laws from Harvard University.

Admitted to the Bar in 1956 he read with Sir Anthony Mason later the chief Justice of the High Court of Australia. Another close mentor was Sir Maurice Byers.

He joined the prestigious Eleven Wentworth/Selborne Chambers where he had many close colleagues and friends. This was to be effectively his second home spanning roughly 37 years. He was appointed queen's counsel in 1974.

His special area of practice was of course in equity. However he also excelled throughout his career at the bar in

commercial law, in *Silver Blaze*, a person had been able to enter the stables in which the famous racehorse was being housed at night and to do so without the watchdog's barking; therefore, that person must've been known to the watchdog. Intellectual property and administrative law, appearing in all courts and arguing many appeals before the High Court and the Privy Council. Indeed he appeared in one of Australia's last cases before the Privy Council prior to the Australia Act coming into operation: *Westpac Banking*

*Corporation and Commonwealth Steel Co Ltd* heard in late January 1986.

Time does not permit an exhaustive chronicle of the many high-profile cases in which he appeared. To name but a few, he appeared for the respondents in *San Sebastian Pty Ltd v Minister Administering Environmental Planning Act* (1986) 162 CLR 340; for the respondent in *Grant v Federal Commissioner of Taxation* (1976) 135 CLR 632; for the appellant in *Harvey v Law Society of New South Wales* (1975) 7 ALR 227 in the High Court and of course he represented the British Government in the famous *Spycatcher Case – Her Majesty's Attorney-General v Heinemann Publishers*. He assisted the Senate Committee in its examination of High Court Justice Lionel Murphy.

As all those who read with Theo will testify, he took his obligations as a pupil master extremely seriously. Even after a strenuous day in court followed by a string of conferences he would set aside time to speak to his readers. And this was not some type of superficial appraisal of the work the junior was then doing: the notion 'superficial appraisal' was certainly alien to Theo. He needed to know with precision exactly what areas the junior was engaged in and exactly what propositions the junior proposed putting forward to a court or to the solicitor seeking advice. His reader would not infrequently leave his chambers astonished at how many other faces of the problem Theo had identified. Chastened by the realisation that for all the work one believed one had carried out, in truth no more than the surface of the real problem had been examined.

But this expresses the essence of the man. As the Hon Keith Mason, a sometime reader with Theo and later president of the New South Wales Court of Appeal said at a farewell ceremony held in November 2001:

As an advocate Theo demonstrated learning which was wide and deep. His work as a barrister was marked by intense preparation, thoroughness in exposition

and a willingness (in the interest of his clients) to go the third mile in exploring settlement. An impish sense of humour contributed to a gentle and charming advocacy style.

Theo is also remembered by many as a wonderful lecturer in the Law Faculty of Sydney University. Practising lawyers would often comment on their memories of his lectures – his ability to pass on analytical skills and leave no stone unturned. I know!!!

He took his responsibilities extremely seriously. Never was there a more careful member of the bar. Never was there a more courteous member of the bar. Never was there a member of the bar less likely to have exhibited negligence in his work nor to be hurt to the core in litigation suggesting such conduct.

Paul Daley who was Theo's clerk for virtually the whole of his time spent at the bar was able to point to at least one perhaps rather unusual trait which Theo exhibited. Apparently he never sent briefs back after conclusion of the case. Perhaps this was because he always imagined that some line of authority examined in an earlier brief may prove useful to be mobilised on a future occasion.

Theo was finally persuaded to join the Equity Division in January 1995 serving under chief justices Gleeson and Spigelman. He sat continuously in that division for six years with an occasional foray as an acting judge of appeal.

On the court he approached his work exhibiting the very same dignity which was the lodestar of his stellar career. He listened very carefully to the respective submissions and produced judgments which were models of clarity, dealing with the essential points in issue. There was no chance that any litigant before him would leave the court fairly claiming that he or

she had not been heard.

Returning to the more private aspects of the man it is clear that he was certainly not a carouser. He took very great pride in the achievements of his children Jack, Paul and Elizabeth and their families including his eight grandchildren.

He was passionate about travel. He offered advice to many colleagues for their trips.

He was a veritable fount of knowledge with regard to the United States, especially Boston, which he dearly loved.

He was fascinated by New York and particularly the service as provided by the New Yorkers. As mentioned, the multiple photos of food showed that he was the true son of restaurateurs!

Helen was always uppermost in his thoughts. He considered their marriage

never said a bad word about anyone – he would rather not comment at all.

As his terrible illness progressed, he struggled to concentrate for longer periods. Helen would read to him – law journals and the like. After a while, even with his great intellect, he could no longer focus and would ask her to stop. He remained in touch with the world through the radio.

During his illness, Theo appreciated every single message and letter he received. However he did not want to be seen in decline. He wanted to be remembered by his friends and colleagues as the person they always knew.

His family who stood behind him and supported him for so many years may now rest in the knowledge that he is finally at peace.

*Apparently he never sent briefs back after conclusion of the case. Perhaps this was because he always imagined that some line of authority examined in an earlier brief may prove useful to be mobilised on a future occasion.*

the greatest love affair of our times. He would offer a toast to the most beautiful woman in the world ... and then Helen.

Helen confided in me that Theo always commented that she was 95 per cent right – but with a gleam in his eye he would say, 'Ah, but that last five per cent'.

When he was offered a position on the bench, one of his first thoughts as he considered the workload ahead was 'Helen, what are we going to do with you if I go on the bench?'

Theo was very much a family man and as we all know, a very private person. He

I earlier mentioned that Theo's mother Mary always referred to him as 'my Theodore'. In truth he was also 'my Theodore' to every single friend who has honoured his memory by being present today.

The likes of Theodore Simos will not often pass through the corridors of Counsel's Chambers, but many will profit by the example of excellence which he set.

The law has lost one of its most illustrious sons.

## David Grant Lukins

David Lukins, formerly of Edmund Barton Chambers, died on 22 May. The following eulogy was delivered by Philip Doherty.

David Lukins would like to apologise for the inconvenience he's caused you all this afternoon. After what he's been through in the last couple of years, especially the last few months, dying has become life's greatest blessing. It makes you realise that growing old is a privilege.

He did say he felt a bit cheated – another 15 years or so would have been nice. And there's no doubt he had a few things left on the bucket list. But he also told me that when he was born, by urgent caesarean section, he was 'in extremis'. He survived. Maybe the last 55 years have been a bonus. And what a bonus for us!

If the value of life is measured by the length of years, he was short-served. If it's to be measured by quality instead of quantity, David Lukins was an old man.

Before I met him he loved rugby. He'd toured New Zealand twice as Under 18 captain of NSW. He always played half-back. During his HSC year, he again captained the NSW under 18 side to Queensland. Seeing a gap between the scrum base and the centres he darted through – only to be crunched by several nasty Queenslanders.

His right knee was stuffed. Permanently. I'm not saying he would have played for the Wallabies, protected by Steve Finnane. I'm not saying he wouldn't have either.

He spent half of year 12 on crutches.

He wanted to be a doctor, but missed out by two marks. I'm personally very glad he missed out on medicine as our paths may have never crossed. Or, worse still, he could have been standing over me wearing rubber gloves.

But our paths did cross – in the Supreme Court Section of the GIO. It was about 1975. We had long hair and short teeth. Our beards were black.

He'd just married some terrific sort and even though he was a quiet man, he wasn't quiet about that.

They were heady days. Luko had an unstoppable desire to understand the

cases, summarising them in copperplate handwriting. They were days of impossible workloads and fantastic circuits where lifelong friendships were forged with the likes of Flannery, Murray, O'Reilly, Coleman and Wheelahan.

Brian Shirt, unbeknowns to us, had just gone water skiing on Tuggerah Lakes. We laughed loudly when Godders was unanimously overturned by the Court of Appeal then unanimously upheld by the House of Lords.

Luko went to the bar in 1981. Read with Flannery. Lived in the broom closet on the fighting Eighth. Then he was seduced by Wheelahan to join some satellite floor on 43 MLC. At the bar, where egos can swell and tongues can kill, he was admired and respected and I dare say loved especially by the guys and gals of 43.

After 17 years at the bar, he gave himself almost full-time to sailing. What a great decision. Down at the RPA Yacht Club, he didn't just teach kids how to sail, he taught them to love sailing. As a result, more than a few of his charges have been and still are live wire representatives of Australia in the hunt for places in the World Championships and Olympics. At the pre-Olympics in Sydney he was an international umpire.

The Royal Prince Alfred Yacht Club recently announced the establishment of a perpetual trophy for class match racing. It will be called the David Lukins Memorial Trophy.

He never ever beat his own drum. His exquisite humility was in being completely unaware of just how good he was. He continually expected perfection of himself.

You should know that there are a couple of bibles written about sailing on the East Coast of Australia. Unsurprisingly, from his own markings and observations, Luko set about correcting the apparently sloppy navigational entries in these tomes.

Then in 2007 he was told he had cancer of the oesophagus. While in the grip of this terrible pernicious disease, he set about

writing the Lukins family history. As you would expect it's not a graphic of a tree with dates of birth written on the leaves, it's the stories of the Lukins lives and times from the earliest days in Australia meticulously researched and recorded over hundreds of pages.

He certainly glowed with sheer enjoyment when Shane, Cara and their princess, Alyssa Molly, arrived to see 'Poppy'. He'll miss the arrival of his first grandson in a few weeks. And he was tickled pink when Kylie and her man, Myles, announced their engagement in early April. He was extremely proud of you two kids. What selfless devotion you have applied in the last few months.

As for Kay, his lifelong mate of three and a half decades, you were married when you were children, what love he had for you. He told me that if it hadn't been for you he would have died long before now. He couldn't believe how he deserved such devotion and kindness from another human being. How poetic that he married a champion. We will never forget him, Kay. And while he's remembered he'll never be gone. High authority has it that love is stronger than death.

As for the rest of you, ring up Kay Lukins from time to time to say 'How ya going? No, not tomorrow. But over the next few months and years.

Spare a thought for Luko's mum and dad, Marge and Warwick. The grief that we all feel is multiplied times over by seeing their son losing his hold on life itself. It breaks all the rules when a child dies first. If you pray, say a prayer for them. If you hug, give them a hug today and tell them you knew their boy.

Luko, you had every gift but length of years. You judged yourself more critically than any person here.

You gentle, beautiful man. Rest now my friend. Your quest for perfection is over.

## Bullfry contemplates BarCare

By Lee Aitken (with illustrations by Poulos QC)



He hummed quietly to himself as he waited for the 389, in the pouring rain.

'You're where you should be all the time/ and when you're not,/ you're with some underworld spy/ or the wife of a close friend, wife of close friend ...'.

That about summed it up for him. The second Mrs Bullfry had certainly lived in the next street but one. But had the 'underworld spies' been such a good source of work? It was always a pleasure to receive a large number of 'bricks' in a used *Streets* ice cream container but contact with a 'spy' brought all sorts of extra stresses and strains to a practice – defending an armed robber wasn't quite the same thing as removing a caveat. Was he ever in danger of living off the proceeds of armed robberies, as Lord Justice Lawton had once caustically suggested decades ago, about certain members of the English Bar? And why had a prominent member of the Court of Appeal referred to him obliquely as 'something of a gangster'?

He thought back to those happy days,

prosecuting before the ACT Magistrates' Court. An incident involving one of the most experienced magistrates had always seemed to capture the pleasure of legal practice. The distinguished beak was about to fine a saw doctor for some minor infraction.

By small degrees, he had fallen into a modest criminal practice. Of course, the spies had a talent to amuse – as a matter of personality they were much more interesting companions than, say, someone from the bank's credit control team, or an AGS man in a grey cardigan –

*Bullfry had never really had to work for it – appearing in any court, great or small, was always a singular pleasure as all advocates knew. In what other business would you be overpaid for talking and drinking coffee?*

'How much do you earn a day?'

'About \$45'.

'That's more than I'm getting'.

'Yes, but I have to work for it!'

Bullfry had never really had to work for it – appearing in any court, great or small, was always a singular pleasure as all advocates knew. In what other business would you be overpaid for talking and drinking coffee? In what other calling could you reach the age of 58 before you realised that you were a total failure?

constantly before the duty judge justifying the appointment and re-appointment of administrators to companies on the verge of failure – or resisting an Anton Piller by going straight to court – or seeking to prevent certain named 'federal agents' from seizing your client's documents, and personal DVDs – or explaining why your client had visited a borrower's office with a baseball bat – sadly however, a perverse *noscitur a sociis*, or *qui se rassemblent*,

*s'assemblent* began to operate – you paid a high price for always obeying the ‘cab rank’ rule which is why, no doubt, so many disobeyed it – (in Queensland, once, at an arbitration, a young female barrister had told him without a blush that she would ‘never act against the Bank of Queensland’! but Queensland was a very small jurisdiction) – there were many who would ‘avoid’ having to appear in an unpopular cause, or for a doubtful client, by a simple invocation of one of the many bar rules which permit a refusal of a brief.

If you obeyed the cab rank ‘rule’, eventually the Big Four tired of your being on the ‘wrong’ side and cut you off – bankers were the simplest of men; they could not understand that barristers are the most meretricious of tradesmen, ready as instructed for a fee, either to put a family and its chattels into the street with a *Dobbs* certificate, or give a bank manager a heart attack by relentless cross-examination – no ideology attached to a practice (except, perhaps, for those who prospered by appearing only for one of the many groups of ‘victims’ which proliferated in a modern society).

Sadly, there was no such ‘victim’ category for men like Bullfry and his closest companions – men who had lived not wisely, but too well - ageing, genderist, fat, balding, ‘happy imbibers’ – ‘victims’ all, indeed, but of what? Looking around in the street, he passed a sizeable cohort of them every day, each man ruefully concealing his innermost fears and anxieties from his colleagues until – perhaps – too late? Barristers had the dangerous stoicism of all Australian males. You could attend a succession of floor dinners, or football matches and never perceive those colleagues on the point of despair, or madness. You would learn much about a colleague’s technical knowledge of offspin bowling, and nothing about his children’s delinquency, or his spouse’s wantonness. Was it time to consult BarCare?

Should he specialise and get rid of the



general flotsam, jetsam and ligan in his practice? Would he be ‘grandfathered’ into some specialisation? He looked doubtfully at the possible categories on the list. Everybody whom he knew did ‘equity and commercial’. It sounded so much better than confessing at a cocktail party that one spent most afternoons waiting to get on before a District Court arbitrator!

*Sadly, there was no such ‘victim’ category for men like Bullfry and his closest companions – men who had lived not wisely, but too well - ageing, genderist, fat, balding, ‘happy imbibers’ – ‘victims’ all, indeed, but of what?*

But in the quiet watches of the night, were even those with the most ‘impressive’ practice really content? As Learned Hand said many years ago, practising law involves nothing more than the production of a forensic artefact, good for here and now, and important to the parties, but ultimately of no interest to anyone else at all. ‘Who wants to know

that a man spent 28 days investigating the building of a public pier, when a contractor wanted \$600,000 more than the county council was prepared to pay?’ No one. He thought of Owen Dixon’s comment on Adrian Knox – ‘an intellectual man but with no intellectual interests’. Knox resigned as chief justice of the Commonwealth the day after the death of a colliery millionaire under whose

will he shared considerable residuary estate – that put holding the highest judicial office in the land in its proper context!

It was something to compose other men’s quarrels – but even that had its dangers. How could he ever forget the intimated Commercial List summons that had alleged he had been guilty

of exercising physical duress on the defendant at the mediation involving the bouncing cheques? In all cases, there was a line, frequently a very thin one, between demonstrating well-simulated regret, or animus, with respect to the facts, and the opponents, and crossing over into that netherworld in which real emotion entered, and the speech became intemperate, and veered towards invective. He had been but twice threatened with contempt, and immediate removal by senior members of the Equity Bench. In each case the admonition was well-deserved, and the apology prompt. On another unfortunate occasion he had returned after a bibulous lunch to be told by the clerk to go forthwith to take an entirely unexpected judgment from a pietistic member of the Equity Division (long dead) who expected possession of a pub to be restored to the tenant in twenty minutes! Bullfry had swiftly disabused him of the practicalities of such an overly ambitious order. His less than coherent but immediate appeal, to the president, by telephone, from Level 8 had disquieted the doves in the highest levels of the judiciary. But all had worked out in the end.

And who but a saint could keep his temper when the matter was unsettled because the instructing solicitors for the other side had run up a notional bill of 85 'gorillas' for a one-day case involving an easement? Long experience had taught him never to underestimate by an iota the cupidity of the cadet branch.

He fought his way aboard the bus. It was never wise to take the red bag home. Concealed in a damaged tray case at the bottom was the wig (c. 1947) which he had inherited from the judge for whom he had first worked as an associate 33 years before. It had been regussetted at great expense and now resembled the bedraggled forelock of some dead marsupial – but looking at it always brought back happy memories. What a worker that judge had been – in chambers



until midnight and back at seven in the morning – he set a terrifying pace which it had been impossible to emulate. Cold and forbidding to outsiders, but a wonderful mentor to those he knew well. He had shared chambers with Sir Garfield in the glory days of the Sydney Bar – then the largest firms gradually got hold of most of the work and talent, and began to treat the practice of the law as just another arm of business, before the partners decamped to an investment bank.

Bullfry rummaged at the bottom of his sack – the flask was still securely stoppered, as were the sandwiches he had made for himself (the second Mrs Bullfry had departed to her mother's house on the Central Coast leaving him uncossessed and restless). He thought back to the halcyon days – the Common Room downstairs athrong on a Friday – the smoke, the camaraderie, the badinage, the calls for endless extra wine, the very occasional female diner – all changed, changed utterly. Now there was a monthly 'lunch' organised at a café in the City –

he never went – you never knew who would be there, or where you would sit. He thought back fondly to the Readers' Dinner years ago where he had surprised a teetotal senior appellate jurist in the act of moving his name card when he realised that he was sitting next to Bullfry! That was the sort of reputation which he strove constantly to maintain.

The bus lurched to a halt, jolting him from his reverie. The day stretched before him with nothing but preparation and paperwork to beguile him. The despond, and anomie, that are the constant companions of all counsel, settled upon him. Was it time to discuss again with Ms Blatly their joint 'work-in-progress' over an iced bottle of champagne at lunch, at that little place in Elizabeth Street? The second Mrs Bullfry wondered why his mobile was occasionally switched off, and not without cause. Perhaps a call to BarCare could wait.

## Don't Leave Us with the Bill - The Case Against an Australian Bill of Rights

Julian Leaser and Ryan Haddrick (eds) | Menzies Research Centre | 2009



In a world of finite resources and finite wisdom, the exercise of a 'human right' involves four things, protecting one's own freedoms, protecting one's own property, interfering with another's freedoms, and interfering with another's property.

Some systems – systems based on class or ethnicity or ideology – believe interference is the better tool for apportioning rights. Our own common law tradition is a system which believes in the supremacy of weakness, and in the fallibility of power. It prefers not to moralise, and therefore not to interfere. Rarely will our civil law interfere *quia timet*; it prefers to await the wrong and to compensate the injured. Rarely will the criminal law interfere with the liberty of someone who has not yet committed a crime; it prefers to wait for the crime and to punish the criminal. In this cautious, haphazard, piecemeal and often unsatisfactory way, our system tries to ensure that the protection of one person does not become the oppression of another.

Upon this system it is proposed to graft a regime of declared rights. This is the result urged in the Human Rights Consultation Committee report, delivered to the attorney on 30 September 2009. It is a plea for universality.

The attraction of universality is not limited to moralists, of course. Capitalism has known for well over a century that the manufacture of ten mediocre products will yield a greater profit than the manufacture of one lasting one. Indeed, it is something of an irony that those in favour of globalised morality and those in favour of globalised economies often regard themselves as poles apart.

For those of us who remain suspicious of the universal and who prefer the cautious, the haphazard, the piecemeal and the often unsatisfactory, there remains available a valuable collection of essays against a charter, *Don't Leave Us with the Bill – The Case Against an Australian Bill of Rights*.

In it, David Bennett explores the perils of universality: 'The primary objection to a bill of rights is a philosophical one which may be summarised by saying that there is no reason why the principle should always prevail over the exception – indeed the nature of exceptions rather makes the contrary a more logical position.'

The yeas and the nays are all agreed that an ability to check government is a *raison d'être* of a civilised society. It's the means which causes the difficulty. A theme of these essays is a sense that the means lies within our collective us. Sir Harry Gibbs's off-quoted observation is in the introduction, 'If society is tolerant and rational it does not need a bill of rights. If it is not, no bill of rights will preserve it.'

The corollary of this sense is a concern expressed by many authors about the intrusion of law into what they see as a policy issue. For example, Archbishop Pell introduces his chapter with a warning that it is too easy to assume that lawyers are more trustworthy when it comes to protecting rights than politicians.

I confess to finding Pell's attitude generous to politicians. It will be recalled that 2007 brought His Eminence the curious experience of facing a humanists' inquisition, his sin being to engage robustly in a robust public debate over

stem-cell research. He opined that 'Catholic politicians who vote for this [stem cell] legislation must realise that their voting has consequences for their place in the life of the church'. For this, he was threatened with contempt by the Legislative Council. Fearing the contempt of the community, the council sensibly changed tack.

Be this as it may, Pell – with many other essayists in this book – suggests that our politicians are better placed than our judges to make policy decisions. It is not so much that there is something inherently wrong with an unelected person wielding power. Rather, it is the fact that the persons who get their power from elections are necessarily more mindful of electors' views. Some of us seem to hold that politicians should be immune to changing policies to meet changing views of an electorate, a view that steadfastly ignores La Rochefoucauld's maxim that hypocrisy is the tribute vice pays to virtue.

Pell is not the only religionist; Jon Levi reflects on the biblical roots of our rights and Jim Wallace gives a spirited assessment of why Christians should be concerned about a bill. I confess to finding the committee's view on religion odd. On the one hand, it reports that 'For centuries many thinkers who considered questions to do with justice and rights took as their starting point the idea that all human beings were created by God and were thus endowed with particular gifts and divinely commanded to live in a particular way. Such thinking holds little sway in the public domain today, even if some religious people still find it convincing.' On the other, it regards as holy writ Article One of the 1948 Universal Declaration, 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.' Pray tell the difference between this bold and value-drenched assertion and the assertions of the

debunked religionists? The only one I can see is that I have a choice about rejecting the latter.

The only particular criticism I would raise against the book is the general (but not universal!) acceptance that there must be human rights at all. As the report fairly includes in its own potted history of human rights, there is Alisdair MacIntyre's view that 'There are no such rights, and

belief in them is one with belief in witches and in unicorns'.

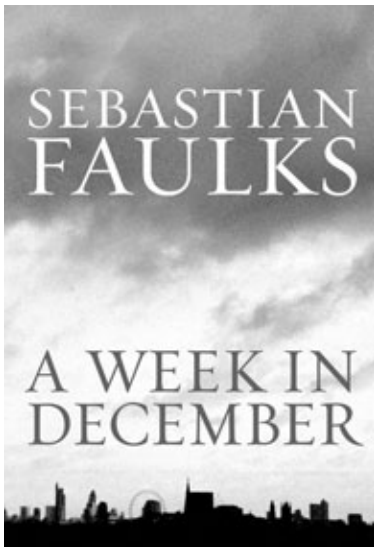
If you take the view that the effect of the committee's report has moved a bill from 'if' to 'when', then the book is a waste of money. And if you are a barrister who is opposed to the bill, your time is better spent working out how to deal with the cry of 'hypocrite' when the cab rank rule requires of you that you formulate your

client's claim against the Department of This or That for its egregious breach of your client's rights. I must confess a sadness that we regard ourselves collectively as so ignorant of the things which each of us should value that we require them to be legislated for. The proper exercise of the rule of law requires due deference to its own anonymity.

**Reviewed by David Ash**

## A Week in December

Sebastian Faulks | Hutchinson | 2009



Sebastian Faulks' latest novel is an exploration of troubling themes in the modern age. Set during the week before Christmas in 2007, Faulks focuses on a group of Londoners, each of whose

separate lives is a vehicle for a portrayal of an aspect of modern urban life. Greed, materialism, Islamic extremism and the dehumanising effects of the electronic age feature strongly. Bear Stearns and Lehman Brothers are still to collapse, but the financial world is beginning to unravel and hedge fund managers and investment bankers continue to trade ever more artificial financial instruments, which they well know will cost someone dearly – some day, somewhere.

Gabriel Northwood, an almost penniless barrister, and a somewhat endearing character in the book, captures one of Faulks' central themes, when he ponders: "Somehow money had become the only thing that mattered. When had educated people stopped looking down on money and its acquisition? When had the civilised man stopped viewing money as a means to various enjoyable ends and started to view it as the end itself?"

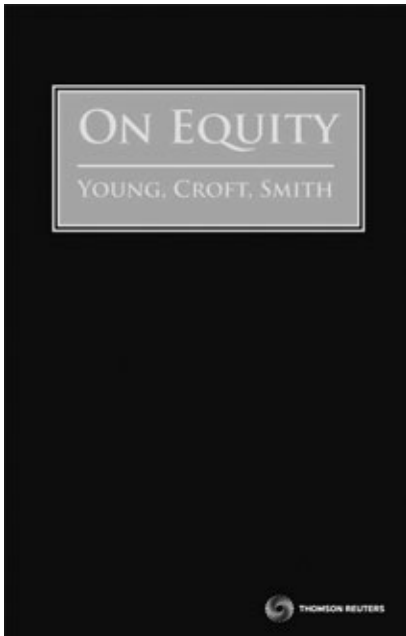
Meanwhile, Farooq al-Rashid, a Bradford Pakistani, chutney magnate and benefactor to the Conservative Party, is preparing for his investiture at Buckingham Palace, to receive an OBE. Part of his preparation involves lessons from a literary consultant so that he may discuss books with Her Royal Majesty while she pins a gong on his chest – if the conversation happens to move in that direction. At the same time, his son Hassan, who has been drawn into extremism at his local mosque, is preparing to do what he believes the Koran commands: "Woeful punishment awaits the unbeliever".

Women who do not eat, children who take drugs, virtual reality and psychiatric imbalance constitute threads in the dysfunctional relationships that make up this disturbingly realistic novel by a master story teller.

**Reviewed by Michael Pembroke SC**

## On Equity

The Hon Peter Young AO, Clyde Croft SC and Megan Smith | Thomson Reuters | 2009



*On Equity* opens with a statement of its aim. It is 'to provide a comprehensive, one-volume book covering the whole of the subject of 'equity''.

Given that aim, *On Equity* inevitably draws comparisons with, among others, *Meagher Gummow and Lehane: Equity Doctrines and Remedies*, Australia's seminal equity text since its first edition in 1975.

Michael Kirby recently observed that 'there are few areas of law that generate so many passions as equity'.<sup>1</sup> *Meagher Gummow and Lehane* evokes these passions. It particularly condemns 'fusion fallacy'. *Meagher Gummow and Lehane* created that expression as a reference, after the Judicature Act reforms, to 'the administration of a remedy, for example common law damages for breach of fiduciary duty, not previously available at law or in equity, or the modification of principles in one branch of the jurisdiction by concepts that are imported from the other and thus are foreign, for example by holding that the existence of a duty in tort may be tested by asking whether the parties concerned are in fiduciary relationships'.

The overwhelmingly prevalent view

in Australia is that the Judicature Act reforms did not fuse principles of law and principles of equity but merely allowed for their concurrent administration in the same court. The orthodoxy in *Meagher Gummow and Lehane* is particularly zealous. Those who commit a 'fusion fallacy' are said to be 'culprits' whose state of mind 'cannot lessen the evil of the offence'. The views of these culprits, if implemented, would 'wreak havoc on

'restitutionist school' (identified as those who look for unjust enrichment as the element triggering a right to relief in the case of what can loosely be described as 'unfair conduct', as opposed to 'equity traditionalists' who look to base relief on conscience). Where *Meagher Gummow and Lehane* speaks of 'proselytising members of the restitution industry (academic division)' (an extension to a phrase earlier employed by Heydon JA in *Brambles*

*On Equity shares the orthodoxy of Meagher Gummow and Lehane, but generally not the ferocity of its expression.*

the expectations of litigators and their advisers'. In the case of Lord Cooke in New Zealand, '[t]hat one man could, in a few years, cause such destruction exposes the fragility of contemporary legal systems and the need for vigilant exposure and rooting out of error'. In England, Lords Denning and Diplock were apparently latter-day 'cultural vandals'. Lord Diplock's pronouncement in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 at 924, that 'to speak of the rules of equity as being part of the law of England in 1977 is about as meaningful as to speak of the Statute of Uses or of *Quia Emptores*', is identified as the 'low water-mark of modern English jurisprudence'.

*On Equity* shares the orthodoxy of *Meagher Gummow and Lehane*, but generally not the ferocity of its expression. For example, in the end *On Equity* comments that argument about fusion fallacy might be described as 'much ado about nothing'. While there was no fusion, its authors accept that the dual administration of law and equity has led to increased absorption by the common law of principles that were previously only considered in equity and vice versa.

But on occasion *On Equity* makes colourful references. This includes to some in the

*Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 at 183 [93]), *On Equity* speaks of 'fundamentalist members of the restitutionist school [who] have proceeded on the basis that equity does not exist, or at least should cease to be recognised, as a discrete body of principles'. *On Equity* dismisses this as an 'idle pretence'. But generally the language in *On Equity* about the 'restitutionist school', and other topics, while often direct, is much more muted than that in *Meagher Gummow and Lehane*.

*On Equity* is a very useful contribution to equity literature, including for the following reasons.

First, it is relatively comprehensive. This is despite the ready acknowledgement by its authors that to provide the aimed-for comprehensive single-volume work on equity 'is really an impossible task'. Thus in the case of trusts, equitable property and equitable remedies, the authors have, they say, dealt only with the basic principles, so that the balance of the subject of equity can be treated 'fairly comprehensively'. Because of the authors' aim noted above, in many ways the structure of *On Equity* is similar to that of *Meagher Gummow and Lehane*. There are lengthy chapters on, for example, the maxims of equity, fraud (including unconscionable conduct,

undue influence and mistake), fiduciary relationships, property in equity, equitable assignments, miscellaneous equities, various remedies and equitable defences.

Secondly, *On Equity* deals with a number of substantive areas of the law which, at least in part, are not part of 'classical' equitable jurisdiction. *On Equity* commonly does so because nevertheless those parts of the law are typically administered by equity divisions of courts. These are topics not dealt with, or only dealt with lightly, by other Anglo-Australian texts. These include sections on the following:

- The protective/*parens patriae* jurisdiction – not originally part of the court's equitable jurisdiction, but historically delegated to the chancellor and so today usually exercised by the equity division of the court.
- churches – with a cross-over of various legal sources.
- probate and administration of estates – again, probate historically was an area of law separate from equity, but the probate jurisdiction today is usually exercised by the equity division of the court.

Thirdly, *On Equity* contains a useful series of historical perspectives on the development of equity.

Fourthly, *On Equity* places considerably more emphasis on the procedure of equity than do other Anglo-Australian texts.

Fifthly, and by no means least, *On Equity* is crisply written, in an accessible style and format. There is great clarity on many fundamental principles of equity.

The final chapter of *On Equity* looks at new developments and the future of equity. A large 'chunk', under the heading 'Equity in a Fast-Changing World', is an updated version of the paper presented by Lord Browne-Wilkinson in 1996.

Young, Croft and Smith then discuss the future of equity under the heading 'Whither Equity?'. That has been the title of the several papers given over the last 50 years about the future of equity. Young, Croft and Smith note four principal developments over the last 20 years. First, equity has become much more involved with commercial transactions. Secondly, there have been new developments in constructive trusts. Third, there has been a return to considering conscience as the basic principle of equity. Fourth, there has been the challenge to 'traditional equity' by 'academics of the restitutionist school ...' The authors conclude that 'equity is not beyond the age of child-bearing – she continues to produce many and varied offspring'.

Of particular interest to *Bar News* readers is *On Equity's* proposition that New South Wales 'may well be' the place for the growth of equity. The authors contend that the New South Wales Equity Bar 'is the primary producer of the judges of superior courts and its members 'think equity''. The authors concede that it is 'really foolish to attempt to predict what developments might occur'. However they cautiously predict that basic principles will continue to be observed, but will be applied to deal with new social situations.

Just as *On Equity* opens with a statement of its aim, so it closes with another statement of its aim. It has been 'to identify those basic principles [i.e. which will continue to be observed] and shear them of excrescences that came about because of social factors in the nineteenth and twentieth centuries in order that lawyers in the twenty-first century can continue the process of building upon them'.

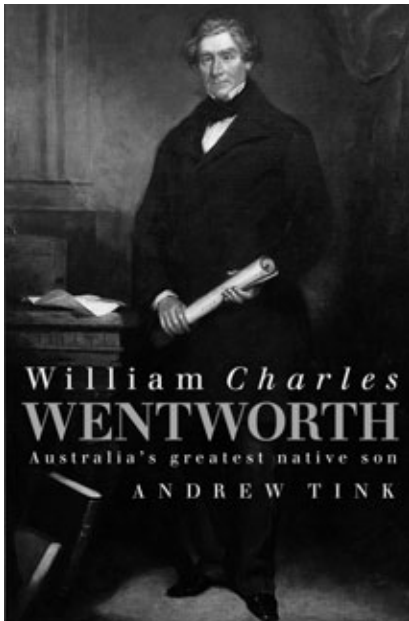
**Reviewed by Mark Speakman SC**

#### Endnotes

1. 'Equity's Australian Isolationism' (2008) 8 QUTLJ 444.

## William Charles Wentworth: Australia's Greatest Native Son

Andrew Tink | Allen & Unwin | 2009



Andrew Tink's fine biography of William Charles Wentworth takes its subtitle – 'Australia's greatest native son' – from Manning Clark. Wentworth was certainly one of Australia's first European native sons – or 'currency lads', to use the argot of the time – having been born in 1790. He was also a highly prominent one: when he was born the colony at Port Jackson had a population of about 1700, when he died, in 1873, at the age of 83, some 70,000 people lined the streets of Sydney to pay

*Wentworth went on to have a significant role in public life. He was an early champion for trial by jury and self-government. He was one of the founders of Sydney University.*

their respects. Whether he was also the 'greatest' is a matter on which reasonable minds might differ.

Wentworth's father, D'Arcy Wentworth, was, as Tink points out, a member of one of England's most distinguished families, however since he was not fortunate enough to inherit any of the family wealth he decided to adopt other means of sustaining himself: while living in London

he had by 1789 been arrested and tried on four counts of highway robbery – on each occasion managing to secure an acquittal. The last time, apparently recognising that things were becoming too close for comfort, he advised the court through his barrister that he had taken a passage on the fleet to Botany Bay.

D'Arcy Wentworth then travelled to Sydney in the convict transport the *Neptune*, part of the infamous second fleet. Also on board was one Catherine Crowley, a convict, 17 years old, who had been sentenced to transportation for stealing sheets and clothes from her employer. Their son, William Charles Wentworth, was born after the fleet's arrival in Port Jackson, while his parents were en route to Norfolk Island.

Two others travelling out to Australia on board the *Neptune* were the mercurial and dangerous John Macarthur and his wife Elizabeth; indeed Macarthur fought a duel – his first, but not his last – with the ship's captain.

Wentworth's unusual parentage is a key to his character. He was not quite one thing or the other: he may have become a wealthy and successful landowner and politician but his father, if not exactly a convict, was not quite a free settler either, and this, together with Wentworth's

convict mother, meant he would never be an exclusive. Certainly Macarthur never forgot Wentworth's origins; some twenty eight years after the voyage on the *Neptune* he humiliated the young Wentworth by refusing him permission to marry his daughter.

By 1813 Wentworth was twenty three and the owner of land near Penrith. He and some other local landowners,

Gregory Blaxland and William Lawson, felt themselves hemmed in by the mountains to the west, which had till then proven impenetrable; they wanted to see if there was pasturing country on the other side. On 11 May 1813 Wentworth, Blaxland and Lawson, together with four servants and a number of dogs and horses, set off from Blaxland's farm. Blaxland had identified a ridge through two rivers, which seemed to offer a chance of passing the mountains.

Tink's description of this expedition is one of the highlights of the book. He tracks the journey, marking it by contemporary landmarks: their route, he points out, closely follows the modern path of the Great Western Highway. They managed to make their way through the mountains and found grazing land on the other side. A year later Governor Macquarie toured the newly discovered area and identified the site of Bathurst.

Wentworth sailed to England. He studied law and became a barrister. While he was in England he became the first native born Australian to publish a book: *A Statistical, Historical and Political Description of the Colony of New South Wales and its Independent Settlements in Van Diemen's Land*. In 1824 Wentworth returned to the colony.

On 10 September of that year Wentworth was admitted as a barrister to the Supreme Court of New South Wales, one of the first to appear on the roll of the bar of New South Wales, following others such as Bannister and Stephen. His friend and colleague, Robert Wardell, with whom he proposed to establish a newspaper, was admitted the same day. Wardell and Wentworth's first application appears to have been on their own account: in a pugnacious start to their barristerial activity in the colony they immediately petitioned the court for an order denying solicitors the right to appear; Chief Justice Forbes dismissed the application.

Wardell and Wentworth's newspaper, *The Australian*, first appeared the following month, in October 1824.

Wentworth went on to have a significant role in public life. He was an early champion for trial by jury and self-government. He was one of the founders of Sydney University. He was not appointed silk – for that process did not come into play in New South Wales until later – but he was presented with a silk gown as a mark of his pre-eminence. He was in due course honoured by lending his name to a set of chambers in Phillip Street.

This is a meticulously researched and highly enjoyable book. Tink has skilfully introduced enough detail to bring the characters to life, but not so much as slow the narrative down or make it hard work. He brings out Wentworth's dishevelled, boozy vigour: his shock of hair, his inward turning eye, his oratory. Wentworth's opening to a speech at a bar dinner in 1829 gives some flavour of the man:

Look at me, the father of the Australian

*This is a meticulously researched and highly enjoyable book. Tink has skilfully introduced enough detail to bring the characters to life, but not so much as to slow the narrative down or make it hard work.*

Bar, yet here I stand with six bottles under my belt and none the worse.

Tink was himself a politician, and also a barrister, and one glimpses the life of a lawyer in the colony in his pages. He describes for example Wentworth spending weeknights at his chambers but galloping off alone on Friday nights to join his family at their isolated farm in Petersham.

Manning Clark's description of Wentworth as Australia's 'greatest native son' seems to have been a description of Wentworth's standing in the colony at the time – specifically, at about the time of Wentworth's marriage in 1829 – it does appear to have been intended as

some assessment of Wentworth's status in the light of history as it has unfolded to the present. Tink's balanced account of Wentworth's life does not suggest to the contrary. Indeed Tink does not shy away from the unattractive aspects of Wentworth's character. Tink observes that Wentworth could be 'intolerant, loud and self-serving'. Much worse than that, in 1845 Wentworth delivered an ugly speech in the Legislative Council against the proposition that Indigenous people should be entitled to give evidence in court cases, a speech which Tink describes as probably the most shameful to have been delivered in the 150 year history of the Legislative Council in New South Wales.

**Reviewed by Jeremy Stoljar SC**

## Annotated Conveyancing and Real Property Legislation New South Wales

PW Young, A Cahill, G Newton | Butterworths | 2009

This is useful, 'take to court' addition to the library of anyone dealing with real property matters. It gives you, in a single volume, the full text of each of the *Conveyancing Act 1919* and *Real Property Act 1900* with cross-referenced commentary and case references extracted from the LexisNexis Butterworths looseleaf service, *Conveyancing Service New South Wales*, as well as the *Conveyancing (General) Regulation 2008*, *Conveyancing (Sale of Land) Regulation 2005* and *Real Property Regulation 2008*.

The Acts were originally annotated by the Hon Mr Justice Young, now updated by Messrs Cahill and Newton.

The previous, third edition (annotated by the Hon Mr Justice Young alone) was published in 2003, so this is a welcome update. In this edition, the location of the different acts and regulations is marked for ready reference with grey shaded 'tabs', which make quickly identifying the relevant section much easier than previously. It has an index and tables of cases and statutes.

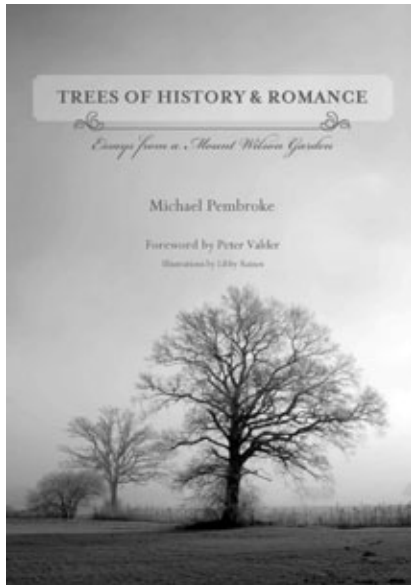
The legislation is current to 1 March 2009, and so it has unfortunately not included the *Real Property Act and Conveyancing Legislation Amendment Act 2009* assented to on 13 May 2009, parts of which commenced on assent. This amending

act made some important changes with respect to matters including the amounts recoverable from the Torrens Assurance Fund by way of compensation and the identification of mortgagees, and expressly requires a mortgagee or chargee in exercising a power of sale to ensure that the land is sold for not less than its market value.

**Reviewed by Carol Webster**

## Trees of History and Romance: Essays from a Mount Wilson Garden

Michael Pembroke | Bloomings Books | 2009



In an age when we are constantly reminded of our stressful surroundings, not the least for those engaged in the inherently stressful practice of law, it is refreshing to find that one of our colleagues has a sufficiently balanced life that he can share with his readers his passion for trees.

His is an intriguing book in many ways. It is very much a personal account of a devoted dendrologist, whose passion is to

valuable information is given about the particular botany and origins of the species, its features and characteristics, its history and folklore, details of its significance to *Hawthorn* and each chapter finishes with a selected relevant poem focussing on that particular tree.

The emphasis in the book's title on history and romance is faithfully borne out by its contents. There is some fascinating historical material, not the least the account of how Hitler's life was spared in July 1944 by the solidness of a table's oak legs next to which he was standing when Colonel von Stauffenberg set off the bomb in the briefcase.

The author also challenges various assumptions we have about particular trees. For example, the many who believe that the Bible tells us that Eve took an apple from the forbidden tree in the Garden of Eden are gently reminded that in fact the Bible gives no specific name to the fruit and there is every possibility that it was a pomegranate, quince or even a fig.

There is a deep undertone of romanticism in the book, both personal to the author and more broadly reflecting the inspiration trees have provided in literature and art. We are told, for example, that the beech

desire, ashimmer with sexual possibility'. At times the undertone of sexuality becomes even more personal. Perhaps reflecting his age, the author reminisces about his time at Cambridge in the 1970s and his appreciation of seasonal change, highlighted by how girls seen by him in the colder months wrapped in shapeless duffle coats and scarves emerge transformed in spring, displaying 'their bare arms, legs and slender waists suddenly discernable in summer dresses and little white skirts'. Maybe it was at this time that the author learned to hug trees so fervently.

The author's writing style is rich in its imagery. In the chapter devoted to maples, the author digresses and reminisces on his childhood years spent in Malaya. He describes his recollections of the endless rubber plantations on the Malay Peninsular. I especially admired the imagery in the following passage :

I used to watch the white latex oozing ever downwards along diagonal incisions in the bark, which were carefully cut into the serried trunks of the rubber trees. When the latex had circumnavigated the trunk several times, and reached the end of the incisions, it plopped rhythmically into a rickety tinned cup that was patiently waiting its arrival.

Each species is skilfully illustrated by the Mount Wilson botanical artist, Libby Raines. Without wishing to detract in any way from the valuable contribution made by her drawings, their impact would probably have been even greater if the drawings were in colour, rather than monochrome.

This is a most enjoyable and relaxing book. The author candidly describes it as a book for the bedside, rather than the coffee table. I commend it to all as a soothing and refreshing palliative, an alternative to BarCare.

Reviewed by John Griffiths SC

*The emphasis in the book's title on history and romance is faithfully borne out by its contents.*

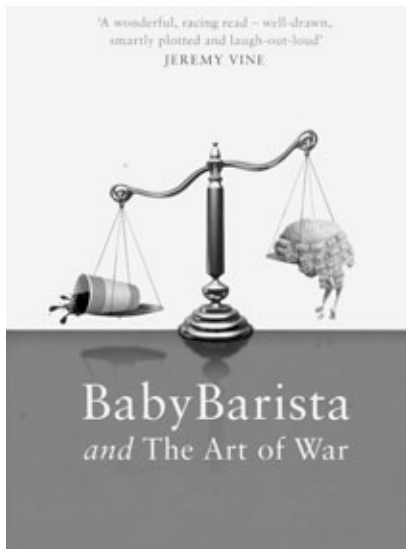
nurture and admire trees – mainly exotics – in his Mount Wilson retreat, far removed from the daily demands of his busy Phillip Street practice.

The book focuses on the various tree species planted on his Mount Wilson property. They include apples, spruce, cedars, oaks, laurels and, of course, hawthorns, after which the estate is named. Each species is dealt with in a separate chapter; the chapters share a common structure. After a brief introduction to the particular species,

tree's smooth bark tempts romantics and extroverts to record and perpetuate their thoughts and their names on its surface, leading it to be a tree which is closely associated with lovers. At times the writing is pregnant with sexual innuendo. The birch is described as being 'slim and subtle and unmistakably feminine', with its beauty lying in its 'poise, its elegance and its narrow uprightness' (perhaps now referring to the male birch). We are reminded how the birch has been described as 'the tree of

## BabyBarista and The Art of War

Tim Kevan | 2009



There are no heroes here, BabyB. We're all just shadows. Dim reflections of the real world. Sitting around packaging it all into neat and tidy little issues... I can't stand it BabyB. The law. The whole thing. It sucks the poetry from our souls. Boils it all down to cynical platitudes. You know, if it wasn't for the money ....

So laments UpTights, a senior barrister in the fictitious London chambers which is the stage for the action in Tim Kevan's very funny novel, *BabyBarista and the Art of War*.

It's no wonder UpTights is depressed. Her Head of Chambers is pompous and mediocre in equal measure. The most senior junior specialises in professional negligence of his own making, dishonesty and adultery. Another barrister is sleeping with a clerk. The most senior woman is addicted to Botox and to flirting with much younger men when drunk. Another is a Vamp, who drops her wig for every guy in town. Many of the others fret that they will turn out like the older ones when they grow up, while others fear that they are now entrenched in that ugly terrain of not being good enough for top work, but too senior for the bread-and-butter. The readers are all intensely jealous of one another, and backstab at every

opportunity. As for the rest of chambers, they are in the main all airs and graces, but no manners.

Tim Kevan has been a barrister for over 10 years, and despite the characters in his book, remarkably none of those was spent on Xth Floor Wentworth-Selborne. Having joined 1 Temple Chambers in London in 1996, and having written a number of legal texts dealing with consumer credit, personal injury and sports law, Kevan first ventured into the literary book world in 2007 with the non-fiction work *Why Lawyers Should Surf*. Written with Dr Michelle Tempest, it's a kind of self-help book for lawyers who want to both improve their legal skills and their lives. For a number of years Kevan has also written a legal blog for *The Times*, and from this *BabyBarista and the Art of War* has emerged.

*The most senior junior specialises in professional negligence of his own making, dishonesty and adultery.*

The plot revolves around the contest between four baby barristers and their year-long quest for the one available room in chambers at the end of their pupillage. Employing tactics from Sun Tzu's *The Art of War* – 'kill or be killed; the opportunity of defeating the enemy is provided by the enemy himself', etc – BabyBarista is determined to end up with the room no matter what Faustian pact he has to make. For 12 months he puts the better parts of his soul aside, summons the darker parts (and a great deal of creative energy), and gets to work on his competition.

Written in the style of a diary, the novel never loses pace, nor does BabyB run out of inventive means of undermining, tricking, demoralising and defeating his enemy. Phone taps, secret video, identity fraud and Facebook are all part of his arsenal as one by one he sets upon his fellow pupils TopFirst, BusyBody and The Worrier. BabyB may be a novice advocate, but he is a master manipulator.

There are times during his first year at the bar when BabyB meditates on whether the struggle is worthwhile. His pupilmaster, called TheBoss, who could equally be called Mr Spineless-Bastard Esq., sums up all he has to teach BabyB with this:

The law's not about ivory towers or wigs and gowns. It's about one thing and that's costs. Not justice. Not rights. Not defending the innocent or prosecuting the guilty. It's cold, hard, stinking cash. Your time, literally, is money. You sign away your life, but for a price of which even Faust himself would be proud.

Only those who oppose a Bill of Rights could sum up the profession so succinctly.

Telling a story through the mechanism of daily diary entries, and the use of nicknames as distinct from real names (OldRuin, FanciesHimself, the Vamp,

JudgeJewellery, OldSmoothie to mention a few), carries with it the risk that the characters will come across as one-dimensional and stereotypes. With great comic timing, and with as much sympathy as contempt for the actors in his novel, Kevan avoids this, and what could have been merely a series of anecdotes becomes a well rounded and sharply observed comedy about a profession the author knows very well.

Whether you think this book is merely an amusing parody of the legal profession, or a deliciously accurate portrait, all people who enjoy well-written and funny books, and even a large number of barristers, will enjoy *BabyBarista and The Art of War*. As for those members of the profession that read this book and don't enjoy it, I'm sure Tim Kevan has a very apt nickname.

**Reviewed by Richard Beasley**

## Legally Blind

Elizabeth Gasgoine | 2009



In what she describes as a 'cautionary tale', Elizabeth Gasgoine, in her debut novel *Legally Blind*, lays bare the life of a newly qualified female solicitor working in a Sydney firm. Rather than being a feminist tract, this is a comedic romp based on Gasgoine's experiences as a solicitor. Think *Bridget Jones's Diary* meets *Hell has Harbour Views*.

While lacking the polish of those two seminal works, this novel is nevertheless a solid first attempt at the genre. The plot is ambitious yet well thought out and intriguing enough to keep the reader interested to the end. There are some good lines: when the protagonist, Genevieve Selwyn, is asked whether she

remembers signing her employment contract she thinks 'all it meant to me was, 'Have job. Pay rent. Buy shoes''. The critical court room scene is particularly well written and experienced advocates will find it entirely authentic.

Some of Gasgoine's characters are well observed, in particular the three long-lunching, work-shy, male partners for whom Genevieve works. I suspect that these characterisations may have ruffled a few feathers in a particular law firm in Sydney.

*From the protagonist's self-absorbed barrister boyfriend to the brutish male counsel Genevieve instructs, barristers are cast as misogynistic, dismissive and devoid of even the most basic of people skills.*

For anyone who started out as a solicitor in a mid-to-large sized city firm this novel will resonate: impatient judges lacerating the ego; clients with dubious motives and the tyranny of accruing billable hours. One male colleague had to stop reading *Legally Blind* as it 'cut too close to the bone' in relation to his own experiences as a junior solicitor.

Warning: the New South Wales Bar is not portrayed in a favourable light in this novel. Gasgoine's rancour for its members is palpable. From the protagonist's self-absorbed barrister boyfriend to the brutish male counsel Genevieve instructs, barristers are cast as misogynistic,

dismissive and devoid of even the most basic of people skills. The members of 'Sir John Kerr Chambers' are a particularly pathetic set. I did not recognise in these characterisations any fellow members of the bar. However, I am sure that members of the bar who have been around longer than me will derive amusement from working out who is who.

So this is a cautionary tale for the bar as well. We need to think about how we treat our instructing solicitors and bear in mind that today's bumbling, inexperienced baby

solicitor is tomorrow's partner, empowered to make (what is to us) the all important decision as to who to brief.

Or empowered to write and publish a novel holding the bar up to ridicule.

*Legally Blind* is self-published and can be purchased through the web site: [www.legallyblindthenovel.com](http://www.legallyblindthenovel.com) for \$24.95 plus shipping.

**Reviewed by Melissa Fisher**

## The Suncorp Challenge Cup

Match fitness and experience gained in the Domain Soccer League helped the New South Wales Bar to a 3-1 victory over the Victorian Bar in Melbourne on 5 September 2009.

It has been a vintage year for the New South Wales Bar football team. It made its debut in the competitive cauldron of the lunchtime Domain Soccer League (the DSL), formed its first inter-state touring squad and successfully defended the annual Suncorp Challenge Cup, when it defeated the Victorian Bar for the second consecutive time.

Kick-off was at 2 pm under, for the most part, blue but chilly skies at the Darebin International Sports Centre, home of Football Victoria. The home side won the toss and elected to take advantage of the breeze in the first half.

In a gutsy, gritty and at times spirited performance, the NSW Bar fended off a number of determined incursions to down the home side 3 – 1 and retain the Suncorp Cup for another year. The win was a well-deserved team effort with leadership being provided both on and off the field by Captain John Harris who, as goalkeeper, blocked a number of impressive assaults by the Vic Bar on the visitors' goal line.

The visitors drew first blood roughly 20 minutes into the match. A melee in the Victorian goal area saw the ball cleared to sweeper Simon Philips, who was standing in an unorthodox position just outside the penalty arc. He seized the opportunity and slammed home a most impressive goal.

Ten minutes before half time, hard-working midfielders Watkins and Gibian combined to feed the ball to Patch, who passed with pinpoint accuracy to Stanton, who was hovering just to the right of the far goalpost. He made no mistake in whacking the ball into the back of the net. The home side was held scoreless at half-time.

In the beginning of the second half the visitors let down their guard, which allowed Hamish Austin of the Vic Bar to sneak one home. With the confidence of a goal under its belt, the home side made a number of determined forays. Yet, in the finest traditions of the NSW Bar, the visitors' steadfast defensive line of Marshall



The touring squad comprised John Harris(c), David Patch, Penny Sibtain, Houda Younan, Colin Magee, Carlos Mobellan, Simon Philips, Greg Watkins, Gillian Mahony, Mark Gibian, David Stanton, Scott Goodman, Cameron Jackson, John Marshall SC and Anthony Lo Surdo. Nick Tiffen (clerk, 7 Selborne Chambers) was the referee, with his daughter, Hannah, the assistant referee.

SC, Magee, Philips, Younan, Sibtain and Mahony courageously repelled each incursion.

Ten minutes before full-time the home side was desperately trying to level the score and force a penalty shoot-out. However, their fate was sealed when the NSW Bar regained possession. In a mesmerising display of one-touch passing by almost the entire team, the ball was fed to Cameron Jackson, who beat the Victorian goalkeeper with a masterful, floating shot to the far post to score the NSW Bar's third and final goal.

The visitors' man of the match went to a very deserving Colin Magee with special mention made of Gillian Mahony's unswerving commitment on the day. The home side's man of the match was Nick Terziovski.

The game was followed by drinks and presentations at Rydges on Swanston Street, sponsored through the generosity of Thomson Reuters. On behalf of the New South Wales Bar, Captain John Harris accepted the cup from Peter Agardy (the Victorian Bar's captain). Commemorative medallions, supplied with help from Suncorp, were presented by John Marshall SC to the Victorians and by Maryanne Loughnan SC (of the Victorian Bar) to

members of the New South Wales team.

A special thank you to Peter Agardy, Andrew Hanak and Tony Klotz (each of the Victorian Bar) for their efforts in organising what was a fabulous and thoroughly enjoyable contest. Thank you also to each of the members of the touring squad, who made the journey to Melbourne, and to those partners, families and friends who joined them. Each of the teams should be congratulated on the good-hearted yet spirited nature in which the match was played.

The New South Wales Bar team is looking forward to making it a hat trick when it again defends its title in Sydney in 2010. In the meantime, the team is also looking forward to again playing in the DSL competition next year.

By Anthony Lo Surdo

## Wentworth Wombats conquer the Old Dart (almost)



The Wentworth Wombats, a selection of the New South Wales Bar's finest, if not necessarily fittest, recently completed their second cricket tour of England. The 2009 Wombats arrived in England with the modest ambition of bettering the record of the 2005 'Vincibles', who won many friends but no matches on the inaugural tour.

The tour began at Trinity College Oxford with a match against the academics and postgraduate students of the Oxford Law Faculty, who came together to form the Oxford Emeriti XI. The Wombats took to the field and the sporting tone of the tour was set on the very first ball, when skipper Sullivan QC recalled Professor Andy Burrows after he had been run out without facing a delivery (a species of restitution not previously identified by the well-known legal academic). After restricting the Emeriti to 7/121, the Wombats recorded a historic first victory on foreign soil, reeling in the total in some comfort. Griffiths SC was the pick of the bowlers with a miserly 2/7 while honours were shared amongst the batsmen.

The Wombats moved on to the Cotswolds village of Ascott-under-Wychwood looking to continue their unprecedented winning

streak against a village team captained by local squire and High Court Judge Sir Peter Gross. The teams played out an epic encounter in the quintessentially English setting. The Wombats, fielding first, were uncharacteristically spry and the local top order was sent packing as sharp chances were held by Bell SC, Climpson and Hodgson (yes, Hodgson). However, after a thunderous century from the local blacksmith and some vigorous tail wagging, the locals compiled 200 before declaring. The run chase began in slapstick fashion with Ian Pike run out, having relied on a misleading and deceptive representation from his partner, Bell, responding to the first but not the second of his calls. Anxious to delay his reunion with Pike in the sheds, Bell remained in the middle and scored an entertaining 62, ably assisted by young ringer Oliver Maxwell (son of ABC commentator and Wombat supporter,

Jim Maxwell) who made 31. But the Wombats' middle order squandered the good start and with a handful of overs and fewer wickets in hand the 'bats looked in trouble. Captain for the day Holmes QC found the right time to find the middle of his bat and chalked up a quick fire 18, including one memorable six over long on. It fell to Free (48 no) and the versatile Hodgson (4 no) to play out the last over. A boundary from the final ball secured the Wombats' victory.

The team returned to Oxford to take on a Rhodes Scholars XI at the Keble College ground. The match marked the first Wombat encounter with a female cricketer and Olympian in the form of Christchurch New Zealand's mountain biker and D. Phil (Public Law) candidate, Rosara Joseph. Equally novel was the inclusion of a Tennessee Rhodes Scholar, who showed the benefits of a baseball upbringing by striking a fierce 24. But under heavy skies

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the Wombat tweekers – Bilinsky 1/24, Collins QC 3/14, Climpson 3/18 and the luckless Emmett J (0/26 off seven overs straight) – kept the Scholars to the modest total of 125. After a shaky start from the top order and the first signs of trouble from the English weather, the Wombats set about reeling in the total. Bell, Free and the artful Bilinsky each reached the retirement score of 35 and victory was secured at 7/128 in the 28th over of their stint.

Gyles SC (24) made vital middle order contributions. Hodgson played an equally decisive role, showing up so late as to justify his dropping in favour of local Kiwi medievalist Tom Rutledge, who scored a sparkling 70 not out. The Wombats finished with 8/174 off 44 overs. Once again the Wombats saved their best for the field. Free snared five wickets with his beguiling medium pacers, including one memorable caught behind taken by the spritely Ireland QC. Even the elegant

restored, the Old Emma lower order could not hold firm and the locals were all out for 80 off 32 overs. Four in a row for the rampant Wombats.

The winning streak came to an end at Pembroke College Ground two days later at the hands of The Refreshers, representing the London Bar. The Wombats started well, fielding in testing conditions as the wind whipped in from the Fens. Gyles (2/48) and Durack SC (2/43) were the pick of the bowlers. But the Refreshers gained a decisive advantage over the luncheon adjournment, having arranged for the Wombats to be plied with the ales and chilli con carne of the local publican. The Refreshers, exploiting their local knowledge, were suspiciously abstemious. In the hazy ten over spell after lunch the Wombat bowlers gave up the better part of a hundred, leaving the batsmen to chase a formidable target of 241 in 45 overs. Durack knocked a glorious century, but could not find a steady partner after Gyles SC (44) fell to a smart catch at square leg. Matthew White fell in the final over, leaving the Wombats just 15 runs short of the target.

The touring caravan moved on to the nearby village of Longstowe to confront

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The tour headed east for a match against 'Old Emma', the old boys of Emmanuel College, Cambridge. Former Emma don, Griffiths SC, led the Wombats in their determined charge to avenge the heavy defeat which Old Emma inflicted on the wounded Wombats in the dying days of the 2005 tour in which Poulos QC, this time official Wombat artist, had been the sole wicket-taker. Griffiths (16) and

batting of ageless former Derbyshire County batsman, Mr Hanson, could not stem the tide. In what is believed to be a cricketing first, play was interrupted as an Old Emma batsman was forced to make a polite request for the square leg umpire, Emmett J, to cut down on the chatter so that he could concentrate. Even with peaceful enjoyment of the square



the best of the local talent and the challenge of backing up for a second game in as many days. The Wombats batted first in the Constable-like setting. Bell laid the foundation with a commanding knock of 56, following an

not enough to secure victory. Aussie expat Tom Slater hit a glorious 131 not out, steering Longstowe to a well deserved victory of 5 for 241 with four overs to spare.

saving his best for last, smacked a rapid 33 (retired), featuring 5 fours and 1 six. This set up the Wombats' innings, and they cruised home, albeit in the final over of the match. With onfield duties complete, the Wombats moved on to a royal reception at Australia House, where the Ashes touring party was also good enough to turn up to recognise the remarkable achievement of the Wombats winning 5 from 7 matches. Sadly, it seems that none of the magic rubbed off on Ponting and co.

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By WG Grace

excellent bottle of rosé at lunch. Geoff 'Sick Note' Pike, representing the other branch of the profession, looked in fine touch and remarkably free of injury before departing for 14. Ian Pike and Matthew White came and went without troubling the scorers, but the wisdom of their hasty departure was revealed when Gyles SC strode to the crease. Gyles revelled in the conditions, slaying the bowling all over the ground. Ably supported by Tim Durack (30 not out), Gyles became only the second Wombat in history to reach triple figures in an innings of 105 which included 13 fours and 3 sixes. However, the Wombats record total of 6/235 was

The last encounter of the tour saw the Wombats taking on Greenwich Society Timothy Barnes QC Invitation XI at Eltham College ground, London. The opposition captain, Timothy Barnes QC, arrived at the ground flushed with that day's success of securing not guilty verdicts on all charges in a murder trial at the Old Bailey. The locals made 7/116 in their allotted 20 overs. Notable wickets included the director of the National Maritime Museum and Royal Observatory, Aussie K Fewster, falling to the only bowling of the entire tour by skipper Richard Bunting. The Wombats opened with the novel pairing of Sullivan QC and Hodgson. Sullivan,

## NSW Bar v Queensland Bar



On 3 October 2009 the New South Wales Bar Cricket Team travelled to Brisbane for the annual encounter with the Queensland Bar. The victorious team earns the right to hold for the following year a Greg Chappell Gray Nicolls Super Scoop Bat, once the weapon of choice for the Hon IDF Callinan QC, which was donated by the former Queensland Colts leg spinner to serve as the perpetual trophy for the fixture. It was therefore fitting that the match should take place at the Brisbane Grammar School Cricket Ground, his *alma mater*. The fixture was the 36<sup>th</sup> in succession, the first being played in Brisbane in 1973, and since that time has been the source of great friendship and camaraderie both within the respective teams, and between them.

The toss was won by NSW who took first use of the wicket in a 40 over match. Steele and Dalgliesh got the visitors away briskly taking the score to 32 off the first six overs, Steele being particularly brutal through the offside, with Dalgliesh steadily turning over the strike at the other end. Dalgliesh then fell, nicely caught in the slips by Traves SC off Williams; and Carroll, a prolific run scorer in these matches in recent years, joined Steele at the crease.

These two took the score to 1/50 off the first 10 overs, and NSW were looking at a formidable total, somewhere in excess of 200. However, the pendulum swung when Steele was well caught at extra cover off the bowling of Anderson for a stylish 41, and then Docker was removed in the following over, controversially given out LBW (for the third time in four games), to leave the visitors 3/53. It was on any view a generous act by the visitors.

Chin and Carroll then consolidated taking the score to 90 off 23 overs before Carroll was removed for 30 by a fine catch in the outfield off the bowling of Taylor. Chin went shortly afterwards followed quickly by Neil and Priestley (representing the Lismore Bar), and when Gyles was removed by Crawford for 21 the NSW innings was teetering at 7/119 off 30 overs. Thankfully some fine hitting from Eastman in the last few overs saw NSW to 9/158 off 40 overs, with Naughtin and King remaining undefeated.

The Queensland bowlers, particularly Williams, Anderson and Crawford, had bowled very well and Queensland was very happy to have restricted the visitors to that score.

To win NSW needed early wickets however the experienced Queensland opening pair of Traves SC and Taylor started very steadily advancing the score to 0/50 off 10 overs. The old warhorse, King SC, was then replaced by Docker who generated some real pace and bounce from the pavilion end, and picked up the wickets of both of the Queensland openers, Traves SC falling to a fine catch by Chin behind the stumps. At 2/55 NSW were back in the match.

Johnstone then joined former Queensland Captain Egan and the score progressed to 85 in quick time before Egan was out foxed by the wily Naughtin. However, by that stage with Johnstone scoring freely from the other end, Queensland were in the box seat. Eastman then returned for a second spell and picked up the wickets of Crawford and Johnstone, and Queensland were 5/128 although with plenty of overs to spare.

The spinners Carroll and Gyles were then introduced into the attack and managed to put some pressure on the Queensland pair of Williams and McLeod, however in the end they saw the Queenslanders home in the 35<sup>th</sup> over. It had been a very good effort by the NSW bowlers but in the end the target was probably a few runs short. All credit to the Queensland side for a strong all round performance. They were deserving victors.

In the usual way, the NSW team was treated to some wonderful Queensland hospitality that night at a dinner by the river and it was great to see two stalwarts of the fixture, King SC and Naughtin, there until the end giving as good as they got.

We all look forward to the next match in Sydney in 2010.

**By Lachlan Gyles SC**



### **Members of Denman Chambers by Simon Fieldhouse**

Jeremy Gormly SC, Jeffrey Phillips SC, Gary Wilson, Wendy Thompson (owner of the dog - Lily),  
 Bruce Hodgkinson, Kylie Nomchong, David Shoebridge, Martin Shume,  
 Ian Latham, Jim Pearce and Georgia (waiter).

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