

# Bar News

The JOURNAL of the NSW BAR ASSOCIATION

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## Cover

**From David Jones' window,**  
a painting by Grace Cossington  
Smith, reproduced with  
permission from Ann M Mills.  
The painting is the subject of  
an article in this edition by  
Gary Gregg.

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# Personal injuries: Balancing individual & community obligations

*By Bret Walker SC*

This issue of *Bar News* goes to press at a time when public liability reform, or more generally tort reform, is a topic of considerable public attention. Henry Ergas, a well-known economist, brings us an economist's perspective on the question. The President, Bret Walker SC, in his message, provides a response.

Some of the other features of this issue include Gary Gregg's item on Grace Cossington-Smith, Justice Meagher and the Bar Association art collection. The cover of this issue contains a photo of her work, *from David Jones' window*, which came into the collection of the Bar Association due to the efforts of Meagher in 1974.

Reno Sofroniou brings us an interview with Justice Peter Young which should confirm that he is not as terrifying as he may appear to many.

Geoff Lindsay SC has recently produced, through considerable endeavour, the New South Wales Bar's centenary essays, which will be launched at the end of May. The collection will be well worth acquiring. We have in this issue an extract from Justice Heydon's piece on the history of the equity Bar in New South Wales.

It is with sadness we record the deaths of Penny Wines and Peter Comans. Their passing has greatly affected many members of the Bar.

This issue concludes with an extract from the *Common law phrasebook* written by Professor Wiesel Werds of Munchen Polytechnik. Professor Werds is a well-known commentator in the area of the common law and sometime visitor to Wentworth Chambers.

*Justin Gleeson SC*

What a mixture of motives, sources and solutions has been spread over the topic now called 'tort law reform'. Given that its most recent wave of public interest started in the silly season of summer, it is actually a good thing that the latest discussions, in autumn, are somewhat more serious. Recall, if you can bear it, the nonsense pushed by the ambiguously titled Minister for Small Business, the Hon Joe Hockey MHR, from which a deal of the least sensible press and broadcasting material has stemmed.

That litigation expert identified two aspects of what he encouraged people to regard as recent reform of the legal profession, as the twin authors of the threat to community activities by reason of steep increases in public liability insurance premiums. The first was advertising by litigators, and second was the so-called 'no-win-no-fee' retainer arrangements. And the Minister can claim a political victory of kinds in that the Government of New South Wales promptly altered the law governing advertising, effectively restricting public commercial messages by personal injury litigation solicitors to plain statements of their names, addresses and areas of practice.

The Bar could afford to stand aloof from that cameo controversy, because advertising of the kind which excited the opprobrious description 'ambulance chasing' is not done by barristers. For reasons which owe far more to the nature of the market for our services than hopeful conservatives concede, very few of us have perceived value in expenditure on messages about our availability, skills and prices directed to the public at large. Notwithstanding the irrelevance in practical terms of advertising regulation for the Bar, as President I protested to the Government on certain matters of principle.

They revolve around access to justice, if I may be forgiven for continuing to use that vague but honoured phrase about which others involved in the politics of the legal system now seem embarrassed. Big business, government, and the worldly middle-class generally have little difficulty in choosing from a range of appropriate lawyers to advise or represent them in the kind of transactions and circumstances which may end up in litigation. Not so for everyone else, whose numbers are vastly greater than the big end of town and the comfortably well-off. Contrary to myths earnestly believed in

the last few decades about the reservation of litigation as an activity of the rich, the best of the few available empirical studies suggest that the demographic profile of litigants in our trial courts are a fair or near reflexion of society at large. If one removes avowedly commercial cases, the picture is even more one of ordinary people involved in ordinary cases.

An objection, of principle, to a ban on price information in advertising of any services is that it prevents the buyers' side of the market from obtaining the kind of information - of the most basic kind - that any buyer should have. Even doctors, by messages such as 'bulk billing', are permitted to signify their prices to people who may not yet have decided whether to obtain their professional services. Not so for personal injury litigation solicitors any more, who can no longer compete except to the point where a would-be client has actually come into his or her premises and is on the point of retaining the solicitor.

This distortion of ordinary commercial freedom of speech has been justified on a number of flimsy grounds, of which taste is merely the least relevant. Its detrimental effects are not merely those which are anti-competitive - although they are among the least rational. Given that there is simply no body of disciplinary case-law demonstrating common misleading or deceptive practices by the litigators who used to advertise their prices and other financial terms, one justification which should never have been advanced was that the dreaded ambulance chasers were conning their prospective clients.

That said, of course, the Bar also pointed out to the Government that the liberalisation in 1993 of advertising by lawyers was in terms which very carefully prohibited not only misleading and deceptive conduct but also advertising which might reasonably be regarded in that light. That legislation was supported by both sides of politics. Apparently, without telling anyone so, both have recanted.

To have achieved this, without ever providing even a scrap of statistical or empirical evidence to justify attributing a rising unmeritorious and expensive personal injury litigation to increased advertising by personal injury solicitors, was a real feat of advocacy by Mr Hockey.

Mr Hockey's second point had no merit at all. It was also grossly at odds with the history of

our profession. Spec briefs, being the Bar's version of no-win-no-fee arrangements, are scarcely a novelty of the late 1990s. Nor is the solicitors' allied practice. Nor are they local to New South Wales. When the High Court wrote 42 years ago of a practice which was 'consistent with the highest professional honour', they were speaking of solicitors taking the chance of ultimate payment, the only chance being payment out of the proceeds of judgment, after he or she had been honestly satisfied by careful enquiry that an honest case existed. Exactly the same principle applied then, as now, to barristers' spec briefs. The speculation must be confined to the chance of fees being paid - it does not involve actions which are merely speculative in the sense of lacking a substantiated foundation of fact and law. So much was clear in the same judgement, when the High Court insisted on the lawyer's belief that the client 'has a reasonable cause of action or defence as the case may be'.

Mr Hockey's reading in the area had either omitted one of the leading cases taught to all new practitioners as part of their ethics inculcation, or else the Minister had forgotten them. I am referring, of course, to *Clyne v New South Wales Bar Association* (1960) 104 CLR 186 esp at 203 - 205.

The Bench in question scarcely consisted of bomb-throwers, or rabid economic rationalists. Nor could they seriously be suspected of decadent American tendencies. It comprised Dixon CJ and McTiernan, Fullagar, Menzies and Windeyer JJ. The expressions I have quoted above were cited by their Honours from English and New Zealand authorities from the early years of last century. There is no reason to believe that in 1900 Lord Russell LCJ was blessing a very recent development in legal ethics: rather, his Lordship was undoubtedly praising what he regarded as a well established tradition.

Long may it continue. I think that the New South Wales Bar will always practise it, and defend it. Given the state of legal aid, how could we do otherwise, in the public interest, and the interests of the administration of impartial justice?

But this short-lived effusion of fallacy from

a junior federal minister lacks importance, relative to more recent developments. What the citizens of New South Wales, and the Bar as an institution, should be grappling with are the complexities of a common law of tort (particularly negligence) based on individualist ideology, and micro-economic realities (including governmental intervention in the form of compulsory insurance for professionals) which present in the nasty form of huge increases in annual insurance premiums.

At an earlier stage in this part-heard debate, it might have been tempting to suggest a bromide for those excited in a tabloid way about the death of local community fairs and other innocent ways of breaking children's necks. After all, we have got over the loss of bull-baiting as part of our culture's fabric, without denouncing its historical opponents as vandals intent on destroying important social values. And, seriously, there have been no doubt some local fêtes where some version of the coconut-shy or the mud-jump truly should not have been allowed, and should not be lamented if an insurer's risk-management policies discourage it.

The real political issue is far more profound. I believe we should resist the temptation to see the present stage of the insurance industry cycle, the collapse of HIH, (as I write) the mooted collapse of UMP, and the winter round of premium hikes, as short-term phenomena which we can survive by ignoring. In other realms of social conflict, we expect Government to respond in quick measure to problems with such obvious human and financial implications as these recent events manifestly carry. So the Bar should not feel put upon when the pressure of public debate focusses on the activity of litigation which is the peak experience in the social dealings giving rise to the insurance problem in the first place.

Probably most of us at the Bar grimace somewhat at what we might term the lay press and broadcasting reports of supposed horror stories involving lunatic verdicts. But maybe our grimaces have discrete motives: on the one hand, much of the reporting is exaggerated, incomplete, or plain wrong; on the other hand, some of the accurately reported court results involve findings of negligence which at least raise a decent query whether hindsight has not taken the counsel of perfection.

It is a long time since the term 'common law' was a decently precise label for the cause of action in negligence or breach of statutory duty involved in most personal injuries litigation. The abolition by statute of contributory negligence as a complete defence, the statutory availability of contribution between tortfeasors and the liability of the

Crown in tort are vitally important illustrations. So, too, is the entirely statutory no-fault workers' compensation field. It is therefore appropriate always to consider the possibility of further legislative adjustment, by way of trade-offs in the usual way of good government, in the field of rights to claim damages for bodily injury caused by other people's carelessness.

For present purposes in relation to the Bar and the Bar's interests (and duties), this is particularly so in relation to the compulsory insurance we must buy every year against our potential liability to compensate clients who may suffer loss by our own negligence. In my opinion, there can be no argument in principle against a trade-off being granted: barristers must buy insurance, thereby removing (almost, but not quite) the risk of a defendant's insolvency from client-plaintiffs; in return, members of the public benefitting from that protection could suffer eg a statutory limitation of a barrister's liability, say, to a sum equivalent to proceeds of the compulsory insurance policy (assuming it were to answer to the claim) and the fees charged together with interest. This may be a pipe-dream, but it is the kind of politics the Bar should be ready to practise.

Paramount above all these considerations, which vary from *buffo* to grave, is the overarching principle for which the Bar should remain a champion. A decent society does endorse standards of conduct between people in their relations with others. When the relations are not pre-agreed, are involuntary or are not governed by a contract, those standards should require reasonable care by some in relation to others. Within the ambit of that duty, negligence should therefore always be a social wrong - unless the relationship (such as parent and child, or judge and litigant) is such as to defy any virtue in making shortcomings actionable. Generally, otherwise, the social wrong of negligence should be recognised and sanctioned - by the familiar device of shifting its cost from the victim to the wrongdoer.

Unfortunately, the words 'fault liability' are uttered by pundits today as if they were nothing more than the artificial construct of venal forensic gladiators. In truth, they describe a civilised norm which balances individual and community responsibilities - rights and obligations. I hope the New South Wales Bar will never be embarrassed to defend its role in civil government, viz the administration of justice, in connexion with these fundamental values. Even, dare I say it, given that it is how we earn our living.

...some of the accurately reported court results involve findings of negligence which at least raise a decent query whether hindsight has not taken the counsel of perfection.



# Public liability: An economist's perspective

By Henry Ergas\*

A chorus of concern has arisen on both sides of politics on the issue of rising premiums for public liability insurance. The Premier of New South Wales, the Hon Bob Carr MP and The Prime Minister, the Hon John Howard MP, both agree that 'something must be done' to rein in these costs. The Assistant Treasurer, Senator Helen Coonan, has convened a national forum on rising premiums for public liability insurance.

Given that some small businesses have recently been hit with premium increases of up to 300 per cent and a February survey showed an average increase in public liability premiums of 28 per cent, it is perhaps not surprising that politicians are concerned and that many business groups have welcomed the holding of a national forum. But what is surprising is that the most popular theory for these rising premium costs – that it is due to lawyers advertising for clients – is thus far unsupported by any empirical

showing that liability claims rose from 55,000 in 1998 to 88,000 in 2000. This is a steep rise. However, the figures are for aggregated public *and product* liability claims, and hence are potentially misleading.

Even on these figures, the biggest rise in the number of claims was from the year ending December 1998 to the year ending December 1999. The most recent data available for the period from July 2000 to June 2001 show that claims in this period rose only slightly, that is, by 4,000 claims, compared to the previous year when there was a rise of 13,000 claims.

It follows that to the extent that there is a straightforward link between liability claims, the number of lawsuits and level of public liability premiums, as Mr Hockey suggests, this should have manifested itself most fully around 1999 when there were steep increases in the number of claims. In fact, no such link is evident in the data. By contrast, the year ending June 2001 experienced a fall in claims expenses and premiums collected for this insurance category.

It may be that this rise and then fall masks a complex lagged relationship between increases in liability claims, number of lawsuits and increases in premiums. But Mr Hockey and his supporters have certainly not explained the nature of this relationship or how these purported links are supported by the evidence. In the absence of any such complex mechanism being made out, the APRA statistics seem to suggest that other factors may be at work.

This inference is all the stronger given that it is not difficult to work out what these 'other factors' might be.

First, the collapse last May of HIH, which used to be the biggest public liability insurance provider, and mergers between other major players have decreased competition in the insurance market. Second, the events of September 11, the general economic volatility following that, and lower investment returns to Australian insurers, have forced insurers to reassess their policies. This is reinforced by the fact that past competition took the form of discounting premiums and financing discounts with investments, perhaps to an unsustainable degree. Third, in light of the HIH collapse, APRA has recently required insurers to reserve \$1.09 for every \$1.00 received in public liability premiums compared to the previous 52 cents, thereby increasing costs.

It is difficult to argue with the proposition that the price and cost signals emanating from these three developments might have a lot to do with recent premium increases. Insurers might have simply found it rational to attempt to 'claw back' revenues from already unsustainable bouts of discounting made even more tenuous by recent economic instability.

This does not mean that the linkage between the number of lawsuits and premium rises is entirely implausible. For instance, NSW began to partially deregulate its legal system in 1994. It is possible that this set the scene for increased litigation and consequent increased liability claims and premium expenses. The post-September 11 and HIH effects, although the 'last nail in the coffin', may have added to costs that were higher than what would have occurred under a better-designed legal system.

Nonetheless, it is for the proponents of radical overhaul of the



Photo: Darren Sailer/News Image Archive

The big Rocking Horse of Gumeracha is closed due to the high cost of insurance premiums

evidence. It is also surprising that some fairly radical solutions to this problem have been advocated based on this so far unproven premise.

The Minister for Small Business and Tourism, the Hon Joe Hockey MP, has been prominent in expounding the theory that frivolous lawsuits, contingency fees and 'out of control' courts are to blame for rising public liability premiums. He has also proposed a list of radical measures to solve the problem including abolishing common law rights to sue for tort, establishing a national accident compensation scheme, limiting compensation payouts and/or clamping down on 'no win, no fee' arrangements and legal advertising.

But is there really a problem? And if so, what are its causes and how might they be tackled?

On whether there is a problem, Mr Hockey has quoted figures from the Australian Prudential Regulation Authority (APRA)

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current liability system to prove their ‘story’. Merely claiming that litigation for public liability claims has increased does not do this.

In effect, even if the volume of claims had increased, and that increase had increased premiums, these effects are not *per se* harmful. In this area, as in others, litigation involves benefits as well as costs, and any assessment of societal impacts needs to weigh both of these. There is, in other words, a socially desirable level of litigation, and it would need to be established that current levels exceeded that socially desirable amount.

It may seem counter-intuitive to speak of a socially desirable level of litigation. But this is a well-accepted notion in economics, which considers the relative costs and benefits of alternative institutional mechanisms for dealing with pervasive social issues such as public safety. As the Tasmanian Treasury concluded in a recent review, the compensation regime and insurance system is a market mechanism that acts as a deterrent to negligent behaviour and a financial incentive to minimise risks to the public. Of course, there are other institutional mechanisms to deal with these issues – safety regulations being an obvious example. But the fact that disputes over safety issues arise nonetheless suggests that ‘safety through litigation’ is picking up some of the slack in incentives that these other means have not fully dealt with.

Indeed, it can be argued that until the reforms of recent years, demand for litigation services may well have been inappropriately suppressed by regulatory restrictions and the rarity of ‘no win no fee’ arrangements compared to today. This would undoubtedly have been a loss for some people denied access to legal services as a consequence, especially those with very limited means who had genuine claims to make. The reforms of recent years, even if they increased the volume of claims and associated litigation, would then merely have moved Australia closer to efficient arrangements.

Faced with these arguments, Mr Hockey and his supporters wave the specter of a US-like explosion in litigation. Unless decisive action is taken now, they say, we will march down the US path.

It is indeed true that excessive litigation has overwhelmed the US legal system. But will it happen here? The reality is that the situation in the US differs from that in Australia in crucial ways. These center on the allocation of the costs of litigation.

In the US, each party to litigation generally bears its own costs. In contrast, Australian litigation operates according to the so-called ‘English rule’ in which the losing plaintiff in a case pays the legal costs of the defendant.

There are complexities involved in an economic comparison between this rule and the American system. However, research is fairly conclusive on the point that the ‘English rule’ supports plaintiffs with relatively high probabilities of victory while discouraging those who think they face a low probability of winning. In other words, the ‘English rule’ is more likely to discourage frivolous lawsuits, to the extent that there is some relationship between the ‘frivolity’ of a lawsuit and the expected probability of victory. Indeed, there are grounds for believing that the ‘English rule’ may be overly effective in this respect, suppressing or discouraging some suits that would be socially

worthwhile. It is precisely because it does so discourage claims that adoption of the ‘English rule’ figures prominently in proposals for reform in the US.

It is true that economic research suggests that the English rule, at the same as discouraging more frivolous lawsuits, may actually encourage more serious claims to be pursued rather than settled. This is because the claims which litigants decide to proceed with under the English rule are of course

the ones with an expected higher probability of victory. The expected value of pursuing these claims is therefore higher than under the American system, making settlement somewhat less likely. This means that in aggregate the total costs of litigation in a system that discourages frivolous lawsuits will not necessarily be lower than in other systems.

But is this a bad thing? No, because the resources expended on meritorious claims are, from a social perspective, money well spent to the extent that they create incentives for socially desirable changes in behaviour.

More specifically, the expenditure of resources on litigation may induce the party that can most efficiently avoid risks to safety to do so. This is not to suggest that frivolous lawsuits should be encouraged – far from it. Rather, the point is that there should be no automatic presumption that aiming to reduce the amount of resources expended on litigation is a sensible goal in and of itself.

Additionally, and contrary to the presumption behind one of Mr Hockey’s proposals, contingent fee contracts which base attorney-client agreements on a percentage of the lawsuit award, though common in the US, are not permitted in Australia. As a result, there is no point in legislating against them. If instead what Mr Hockey is proposing is that the more limited ‘no win no fee’ agreements be outlawed, then this is likely to have adverse repercussions for lower income earners because legal aid is not available for personal injury claims. According to some legal experts, abolition of ‘no win no fee’ agreements may also undermine the ability to undertake class action lawsuits which would constitute an additional social loss, because the coordination problems involved when multiple parties are involved (and which class action lawsuits are designed to solve) may frustrate the proper pursuit of meritorious claims.

Where does this leave the range of measures being advocated by Mr Hockey and others concerned with the current legal system? The proposals to suppress legal advertising and ‘no win no fee agreements’ has already been discussed – such proposals presume that there is ‘too much’ litigation, a thus far unproven and even unanalysed proposition, and may well be throwing the baby out with the bathwater.

The proposal to impose caps on compensation payouts seems superficially more appealing, as it does not seem to restrict access to justice in the way that the other proposals would. However, it is far from clear that the proposal makes much economic sense.

The purpose of an award of damages is to put a claimant in the



The Hon Joe Hockey MP

Photo: Robur Kelly/News Image Archive

There is, in other words, a socially desirable level of litigation, and it would need to be established that current levels exceeded that socially desirable amount.

same position he/she would have been in, but for the harm. Thus placing caps on damages awards means that the accident victim effectively subsidises the cost of cutting insurance premiums. However, this is not all – there is also a redistribution of responsibility for payment of *future* costs from insurance users to the public welfare system. This occurs to the extent that a cap on damages means that instead of meeting medical expenses from an award, a claimant may turn to the public health system instead. These undesirable effects can be mitigated somewhat by setting a cap only at the top end of possible awards – but this obviously reduces the extent of cost savings involved, and hence of the likely fall in premiums.

All this is assuming, of course, that any savings in claims costs would indeed be passed on to consumers in the form of reduced premiums. However, if one of the reasons for the current increase in premiums is a lack of competition in the insurance market, then the efficacy of a cap on awards would be severely limited. As a result, capping awards could create the problems discussed above (such as shifting of costs to the public welfare system), while having little or no impact on premiums.

The other proposed ‘solution’ has been to abolish the common law right to sue for compensation for tort and move to a ‘no fault’ national accident compensation scheme similar to the one currently operating in New Zealand. Given the facts set out above, this ‘solution’ seems disproportionate to the problem. Moreover, the New Zealand experience to date suggests that it is far from easy for such a scheme to improve on matters.

The compensation scheme in New Zealand had as of 30 June 2000, an unfunded liability of over NZ\$6bn. Furthermore, many observers of the compensation scheme in New Zealand have noted flaws in its design which are likely to work against efficient incentives as well as imposing disproportionate burdens on particular groups. For instance, women are penalised because they account for fewer accidents from sport, crime and motor vehicles than men, yet pay the same levies. The scheme’s levy rates have also been criticised for not accurately reflecting industry accident records, so that resources are misallocated across industries, as have its experience ratings, with safe employers in an industry effectively subsidising unsafe ones.

It may be that a scheme such as New Zealand’s could do better than these criticisms suggest. But it is also plausible to think that many of these problems stem from the necessarily limited ability of a national compensation scheme to properly reflect all actuarially relevant factors without turning into an administrative nightmare. The price to be paid for all this is then distortion across groups and industries, and arbitrary transfers of income. These pitfalls suggest at least that the regulatory costs of setting up and administering such a scheme may exceed whatever benefits it is meant to provide.

One benefit from the New Zealand scheme which has been touted is its allegedly low administrative costs. However taking this claim on face value, low administration costs tell us nothing about the efficiency of an insurer; rather, they may simply be a sign of insufficient claims investigation and monitoring, and therefore a source of higher overall accident costs. Of course we know that one of the reasons for the low administration costs of the New Zealand scheme is its unfunded liabilities, and another is the actuarial shortcomings already discussed.

Aside from this one disputable benefit, worldwide research is extremely inconclusive on the economic impact of national

compensation schemes imposed in other jurisdictions and in other areas of law. There is, at least to date, no firm evidence that these schemes actually lead to cost savings for the economy without backfiring in other respects such as by reducing efficient incentives to take proper care.

For instance, one 1982 US study by Medoff and Magaddino found that no-fault compensation schemes increased liability loss rates while another by Landes found that states in the US that imposed minor restrictions on tort claims experienced increases of 2-5 percent in fatal accidents while those imposing greater restrictions suffered 10-15 percent more. A 1989 study by McEwin found that add-on no-fault schemes did not increase automobile fatalities but where tort liability was abolished altogether fatalities increased by 16 percent. Other studies, in contrast, have found no relationship between no fault compensation schemes and fatalities schemes.

In short, the case for a radical overhaul of the current liability system is far from having been established. There is little evidence of a problem, much less systematic analysis of its causes. To the extent to which litigation in this area has increased, it is not clear that it has imposed net social losses. And the proposed solutions seem of dubious efficiency. It would be a pity if so poorly informed a public debate were to serve as a foundation for sweeping changes in public policy.

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# Regie National des Usines Renault SA v Zhang

[2002] HCA 10 (14 March 2002)

By Justin Gleeson SC

The plaintiff, Mr Zhang, had entered Australia in 1986. In early 1991 he travelled to New Caledonia with the objective of lodging an application for permanent residency with the Australian Consulate in Noumea. While in New Caledonia he hired a Renault sedan. He suffered serious injuries when he lost control of the car. He spent 14 days in hospital in Noumea and was then transported back to Sydney where he was a patient at the Royal North Shore Spinal Unit for several months. He remains disabled.

Mr Zhang brought an action in the Supreme Court of New South Wales to recover damages from the Renault companies for his injuries. The Renault companies did not conduct business in New South Wales or Australia and could not be served within the jurisdiction. However service was effected on them outside the jurisdiction, using the 'long arm' jurisdiction of a Part 10 Rule 1A(e) of the *Supreme Court Rules*. It was conceded that that rule was applicable: the proceedings were for the recovery of damages in respect of damage suffered within New South Wales caused by a tortious act or omission wherever occurring.

The Renault companies brought an application under Part 10 Rule 6A seeking to set aside service of the originating process on the ground that the New South Wales court was an inappropriate forum for the trial of the proceedings.

The trial judge, Smart J, granted the application. He was heavily influenced by his finding that French law would govern the claim. He regarded this matter as outweighing what were otherwise the

practical advantages in the matter proceeding in New South Wales.

The Court of Appeal allowed the appeal from the decision of Smart J. They held that he was wrong to conclude that French law, as the law of the place where the tort occurred, would govern the claim and therefore his discretion had miscarried. The Court of Appeal re-exercised the discretion and refused the stay application.

In the High Court, the joint judgment of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ held that under Australian choice of law rules, the law of the place of the wrong is the governing law in respect to torts, whether those torts are committed in Australia or overseas. In this respect, the majority extended the previous decision of the Court in *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503 at 521. That case had held that the law of the place of the wrong governed intra-national torts. The result is that the principle in *Phillips v Eyre*, which involved a double actionability test, has now been completely eradicated from Australian law.

The joint judgment did, however, recognise the following:

- a) there may be cases where, as a matter of Australian public policy, an Australian court should not permit a claim based on a foreign tort to be litigated. However these cases should be directly dealt with under the rubric of public policy, rather than through the retention of the double actionability rule;
- b) any party, whether the plaintiff or defendant, which seeks to rely upon the foreign law of the place of the wrong must allege and prove that law;
- c) it follows that where an applicant on a stay motion seeks to rely upon a foreign law as governing the matter, then the applicant is required to lead appropriate evidence as to the foreign law and

the particular features of it which provide an advantage to the applicant;

- d) difficult distinctions may remain between questions of substance which will be governed by the law of the place of the wrong and questions of procedure. For example, the joint judgment reserved for later consideration whether, in the cases of foreign torts, all questions about the kinds of damage, or amount of damages that may be recovered, would be treated as substantive issues governed by the law of the place of the wrong.

Ultimately, however, the Renault companies achieved a pyrrhic victory. The joint judgment held that, although the trial judge had correctly found and taken into account that French law as the law of the place of the wrong would govern the action, he had not directed himself correctly to the ultimate question; namely whether a trial in New South Wales would be productive of injustice because it would be oppressive in the sense of seriously and unfairly burdensome, prejudicial or damaging or vexatious in the sense of productive of serious and unjustified trouble and harassment. In other words, the trial judge set the hurdle for the Renault companies too low on the stay application. The mere fact that the New South Wales Court would need to apply a French law to determine the matter did not render it a clearly inappropriate forum. Further, the Renault companies had led limited evidence respecting the substantive law applicable in New Caledonia. Overall, the practical considerations tended to favour a hearing in Sydney and the Renault companies had not surmounted the hurdle necessary to achieve a stay.

Kirby J agreed with the joint judgment that the rule adopted in *Pfeiffer* should be extended to international torts, subject to the exception where

Under Australian choice of law rules, the law of the place of the wrong is the governing law in respect to torts, whether those torts are committed in Australia or overseas.

enforcement by the forum of the law of the place of the wrong would be contrary to public policy of the forum. However, Kirby J dissented from the joint judgment because he discerned no error in the primary judge's weighing of the factors relevant to the stay. He stated that, having rejected *Phillips v Eyre* as the applicable choice of law rule, the Court should not succumb to a new provincialism in the guise of exercising the discretion to stay proceedings.

Callinan J also dissented. He held that the word 'inappropriate' in the rule should not be burdened with the encrustations of 'oppressiveness' and 'vexatiousness'. He held that suits should not be determined in a jurisdiction which has, with respect to the relevant events, no real connection with the defendant. He held that, on any test, New South Wales was an inappropriate forum. Callinan J did not deal with the application of Pfeiffer to foreign wrongs.

Some lessons for counsel include:

- 1) the evidence necessary to be led on a stay application may extend beyond merely evidence of the

procedures of the relevant foreign Court and the relative advantages and disadvantages generated by such procedures, to evidence of the substantive content of the foreign law applicable to the claim;

- 2) this will probably require the obtaining of affidavits from qualified lawyers in the foreign jurisdiction, deposing to the relevant law;
- 3) to be admissible, the affidavits should depose to the content of the foreign law but not seek to apply it to the facts of the particular case;
- 4) there is room to develop the categories of public policy whereby an Australian court might decline to apply foreign law otherwise mandated by the relevant Australian choice of law rule;
- 5) despite the direction in *Voth v Manildra Flour Mills* 171 CLR 538 at 565 that the stay applications

ought to be able to be determined quickly, often in the privacy of the judge's chambers, this may not be possible where there is a body of evidence led concerning not only the procedures of the foreign court but also the substantive foreign law and factual disputes are thereby generated;

- 6) the burden on the applicant for the stay remains a heavy one because it is necessary to establish that the continuation of the proceedings in the local court would be vexatious or oppressive in the sense defined above;
- 7) in claims like personal injuries claims where the damage travels with the plaintiff, New South Wales courts will often remain a viable forum notwithstanding the accident occurred overseas and foreign law will govern the tort claim.

## Lake Macquarie City Council v McKellar [2002] NSWCA 90

By Justin Gleeson SC

In this appeal, the appellant failed in its attempt to overturn the judgment of Sidis DCJ that the Council was negligent in allowing a nail to remain on a basketball court. The plaintiff had stepped backwards during the course of a basketball game on the courts and his foot became caught by the nail rivet on the concrete surface of the court. The plaintiff fell back heavily injuring himself.

The point of general significance is that senior counsel for the appellant developed oral argument which Ipp AJA described as bearing very little relationship to the written submissions which had been previously filed (prepared by different counsel previously briefed in the matter). Ipp AJA stated:

The Court has a heavy burden of cases and if judgments are to be delivered within a reasonable time it is desirable that judgments in more straightforward cases be delivered at the conclusion of oral argument. Otherwise the period between

argument and the delivery of judgment will grow to an inordinate degree. This process however will be prevented if the oral argument differs in substance from the written submissions.

Ipp AJA also stated:

Where, after written submissions have been filed, new counsel is briefed who wishes to present different arguments, the new counsel is duty bound to ensure that amended written submissions, properly reflecting these new arguments, are filed in good time.

Heydon JA agreed with the observations of Ipp AJA. He stated that in a future case it may be necessary for the Court to take the extreme step of declining to hear oral arguments which are outside the parameters of written argument unless there has been some good explanation for why the disparity exists.

Handley JA agreed with Ipp AJA.

The lessons for counsel are:

- 1) written submissions must be filed on time;
- 2) if new counsel is briefed, amended written submissions must be filed in adequate time prior to the hearing if different arguments are to be presented; and
- 3) if these steps are not followed there is the prospect of not only costs orders against counsel, but the possibility of argument not being allowed on the fresh points which could prompt a negligence claim against counsel.

Any barristers who consider that the suggestions by the Court may be unworkable or overly harsh are invited to write to the Association or this journal with their comments.

# High Court sentencing cases

By Christopher O'Donnell

Although it is difficult to obtain special leave to appeal to the High Court on grounds involving sentencing only, leave is occasionally given. The Court has recently handed down a number of important judgments in this area.

## ***Cameron v The Queen* – [2002] HCA 6 (14 February 2002)**

The appellant was charged with supplying a prohibited drug in Western Australia. He wished to plead guilty, but did not do so until the prosecution, after defence representations, amended the charge to correctly particularize the substance found in his possession. Initially this had been particularised as the chemical name for ecstasy. After analysis showed this to be incorrect the particulars were changed to the chemical name for speed. The appellant then promptly pleaded guilty. When sentenced the appellant only received a discount off his sentence for his plea of 10 per cent. This was less than the 20 per cent to 35 per cent discount usually given in Western Australia for the earliest possible pleas of guilty.

The majority, comprising Gaudron, Gummow & Callinan JJ noted that the discount on sentence for pleas of guilty has traditionally been justified on the basis of the subjective grounds of remorse and acceptance of responsibility and the objective ground that the community has been saved the expense of a trial. However, the majority noted that expressing the objective rationale this way could give rise to the perception that those who assert their right to a trial are discriminated against as compared with those who plead guilty. To avoid this perception, the majority proposed the following solution (at para 14):

Reconciliation of the requirement that a person not be penalised for pleading not guilty with the rule that a plea of guilty may be taken into account in mitigation requires that the rationale for that rule, so far as it depends on factors other than remorse and acceptance of responsibility, *be expressed in terms of willingness to facilitate the course of justice* and not on the basis that the plea has saved the community the expense of a contested hearing. (*emphasis added*)

The majority also held that the appellant had entered his plea at the earliest opportunity because it was not reasonable to expect the appellant to plead to an offence that wrongly particularised the prohibited drug to which the charge related.

## ***Cheung v The Queen* (2001) 185 ALR 111**

This appeal raised a question of sentencing principle and practice concerning the role and responsibilities of a sentencing judge following a conviction at a trial by jury. The appellant, a senior Customs official in Hong Kong, was found guilty of being knowingly concerned in the importation of 50 kilograms of high-grade heroin into Australia. The question on appeal concerning sentencing was whether the sentencing judge was obliged to fix sentence on a view of the evidence most favourable to the appellant.

The charge against the appellant alleged that his knowing concern in the importation occurred between 1 August 1988 and 12 May 1989. The nature and extent of the appellant's involvement, including the period of his participation in the enterprise, his relationship with the other participants, his contribution to the success of the scheme, the financial reward he might have expected, and the reasons for his involvement, were all matters which, if

capable of being ascertained, were of possible relevance to an assessment of his culpability. The jury heard evidence bearing upon some or all of those matters. But the fact that such evidence might or might not have been of significance to some or all of the jurors, in the process by which they reasoned as to the guilt of the appellant did not, according to the majority (comprising Gleeson CJ, Gummow & Hayne JJ), mean that the jury's verdict was 'ambiguous'. The majority, and Callinan J in a separate judgment, affirmed the following principles set out by the New South Wales Court of Criminal Appeal in *Isaacs* (1997) 41 NSWLR 374 concerning the trial judge's fact-finding role on sentence after a verdict of guilty is entered by a jury:

- 1) Where, following a trial by jury, a person has been convicted of a criminal offence, the power and responsibility of determining the punishment to be inflicted upon the offender rest with the judge, and not with the jury ...
- 2) Subject to certain constraints, it is the duty of the judge to determine the facts relevant to sentencing. Some of these facts will have emerged in evidence at the trial; others may only emerge in the course of the sentencing proceedings. ...
- 3) The primary constraint upon the power and duty of decision-making referred to above is that the view of the facts adopted by the judge for purposes of sentencing must be consistent with the verdict of the jury. ...
- 4) A second constraint is that findings of fact made against an offender by a sentencing judge must be arrived at beyond reasonable doubt.
- 5) There is no general requirement that a sentencing judge must sentence an offender upon the basis of the view of the facts, consistent with the verdict, which is most favourable to the offender. ... However, the practical effect of 4 above, in a given case, may be that, because the judge is required to resolve any reasonable doubt in favour of the accused, then the judge will be obliged, for that reason, to sentence upon a view of the facts which is most favourable to the offender.

But the majority held that the correct application of these principles did not prevent the trial judge from assessing the evidence of a witness the evidence of whom is relevant to the degree of culpability of the prisoner, and accepting or rejecting that evidence when finding facts for the purposes of sentence.

The majority further held that provided the facts found by a sentencing judge are not inconsistent with the jury's verdict, a sentencing judge may well make an assessment of an offender's degree of culpability which would not be supported by all, or perhaps any, members of the jury. An example given was a charge of murder against someone who had administered a lethal injection to an elderly ill person causing death. Inheritance of the victim's estate might be one motive. A desire to end the victim's suffering might be another. Both motives could be consistent with guilt but motive would not be an issue for the jury to decide. It could be an issue for the sentencing judge to decide and, in that regard, the sentencing judge's view of the evidence could differ from the jury's.

The majority also rejected the appellant's argument that the

prosecution should have split the charged period in two by charging two separate offences in the indictment to meet arguments over differing interpretations of the facts. It was held that a single charge was warranted in the circumstances.

### ***Wong v The Queen; Leung v The Queen* (2001) 185 ALR 233**

The vexed question of ‘guideline’ judgments for sentencing in future matters was considered by the High Court in this decision, which was handed down on 15 November 2001. The appellants, who were convicted of being knowingly concerned in the importation into Australia of a commercial quantity of heroin, were sentenced to 12 years imprisonment with a non-parole period of seven years. The Commonwealth Director of Public Prosecutions appealed to the New South Wales Court of Criminal Appeal against the sentences on the ground that they were manifestly inadequate. In so doing the Director gave notice to the Court of Criminal Appeal that it would urge the publication by that court of a guideline judgment in relation to sentences applicable to heroin importation. Accordingly, the Court comprised five judges rather than the usual three.

The Court of Criminal Appeal allowed the appeal and substituted sentences of 14 years imprisonment with a non-parole period of nine years. Spigelman CJ, with whom Mason P, Sperling & Barr JJ agreed, also stated a guideline for sentencing those convicted of being knowingly concerned in the importation of narcotics. The guideline was expressed to apply to ‘couriers and persons low in the hierarchy of the importing organisation’. It set out a grid of five categories based upon the quantity of narcotics imported (the total range being between two grams and 10 kilograms) and stated a range of sentences of imprisonment applicable to each category (the total range being between five years and 15 years). Spigelman CJ also stated that this guideline was not relevant to the cases of the appellants.

A majority of the High Court held that the Court of Criminal Appeal was not empowered to issue ‘guideline’ judgments setting out tables of future punishments. In their joint judgment, Gaudron, Gummow & Hayne JJ held that this was because the *Criminal Appeal Act 1912* at the time conferred no such jurisdiction on the Court of Criminal Appeal (at 256):

In the words of sec 5D(1) of the *Criminal Appeal Act*, the Court’s powers were to ‘vary the sentence and impose such sentence’ on the *particular* offenders as was proper. It had jurisdiction in the matter which concerned the sentence passed on those particular offenders. It had no jurisdiction in respect of sentences passed or to be passed on others. The publication of a table of future punishments was neither to vary the sentence that was passed nor to pass a new sentence. It is not within the jurisdiction or the powers of the Court to publish such a table because, to adopt constitutional terms, that is not directed to the quelling of the only dispute which constitutes the matter before the Court. Nothing in sec 12 of the *Criminal Appeal Act* gave the Court any relevant additional jurisdiction or power.

Kirby J held that the Court lacked the power to issue guidelines for these federal offences on the different ground of constitutional inconsistency between the ‘guidelines’ and the federal legislation applicable to the offences. It followed that (at 269):

To the extent, as it must be inferred, that the ‘guidelines’ affected the approach and conclusion, judgment and sentences of the Court of Criminal Appeal, the orders of that Court were erroneous. No statement of sentencing principle, whether called a ‘guideline’ or otherwise, may be inconsistent with federal legislation applicable to the case. This argument of the

appellants must therefore be upheld.

The majority (at 251), with whom Kirby J agreed on this point, further held that the Court of Criminal Appeal erred in attributing chief importance to the weight of the narcotics in fixing sentences for the offence, holding that such an approach amounted to a departure from fundamental principle. The majority also held (at 252) that the ‘two-stage’ approach of arriving at a sentence, in which an ‘objective’ sentence is first determined and then ‘adjusted’ by a mathematical value given to one or more of the subjective features of the case such as a plea of guilty, was also wrong in principle and incorrectly applied to the sentencing of the appellants by the Court of Criminal Appeal.

### **Guideline judgments – Developments since *Wong & Leung***

In December 2001, in response to the High Court’s decision in *Wong v The Queen & Leung v The Queen*, the New South Wales Government enacted amendments to the *Crimes (Sentencing Procedure) Act 1999* in Schedule 5 of the *Criminal Legislation Amendment Act 2001*. The newly inserted sec 37A of the *Crimes (Sentencing Procedure) Act 1999* now permits the Court of Criminal Appeal to ‘give a guideline judgment on its own motion in any proceedings considered appropriate by the Court, and whether or not it is necessary for the purpose of determining the proceedings.’ The newly inserted sec 41 of the *Crimes (Sentencing Procedure) Act 1999* purports to retrospectively validate any guideline judgment given before the passage of sec 37A that would have been valid had sec 37A been enacted before the judgment was given.

The difficulty now inherent in this area was highlighted by a recent case before the Court of Criminal Appeal in which the New South Wales Attorney General had sought guideline judgments for sexual assault without consent and aggravated sexual assault without consent. The matter was adjourned after the Attorney was forced to withdraw the original application and file a fresh application, because the original was filed in September 2001, prior to the amendments to the *Crimes (Sentencing Procedure) Act 1999* coming into operation in late December 2001. At least one member of the bench presiding over the appeal questioned the point of writing a guideline judgment at all given the very wide range of criminal behaviour involved.

### **Judicial Commission of New South Wales**

#### ***Sentencing Manual***

As the above cases demonstrate the area of sentencing is becoming increasingly complex. Practitioners in the area will therefore welcome the publication of the Judicial Commission of New South Wales’ *Sentencing Manual – Law, Principles and Practice in New South Wales* by Ivan Potas (Lawbook Co., 2001). This handy paperback volume is a compilation and analysis of information contained on the JIRS database developed by the Commission as an aid to monitoring sentences imposed by the courts in New South Wales. The book traces legislative and case law developments on sentencing and identifies the principles enunciated by superior courts that govern the exercise of this jurisdiction.

# The counter-terrorism Bills

By Sarah Pritchard

## The Bills: An overview

On 20 March 2002, the Senate Selection of Bills Committee referred the following Bills to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 3 May 2002:

- Security Legislation Amendment (Terrorism) Bill 2002 [No. 2];
- Suppressing of the Financing of Terrorism Bill 2002;
- Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002;
- Border Security Legislation Amendment Bill 2002; and
- Telecommunications Interception Legislation Amendment Bill 2002.

On 21 March 2002, the Senate Selection of Bills Committee referred the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* ('the ASIO Bill') to the Senate Legal and Constitutional Legislation Committee and the Parliamentary Joint Committee on ASIO, ASIS, and DSD for inquiry and report by 3 May 2002.<sup>1</sup>

## The Bills propose to:

- amend the *Criminal Code Act 1995* to introduce new criminal offences of terrorism punishable by life imprisonment and a regime for the attorney-general to proscribe certain organisations, modelled on the recent *UK Terrorism Act 2000*;
- criminalize the financing of terrorism through amendments to the *Criminal Code Act 1995*, the *Financial Transactions Reports Act 1988*, the *Mutual Assistance in Criminal Matters Act 1987* and the *Charter of the United Nations Act 1945*, in order to give effect to Australia's obligations under United Nations Security Council resolution 1373 (2001) and the International Convention for the Suppression of the Financing of Terrorism (1999);
- create offences relating to international terrorist activities using explosive or legal devices in order to give effect to Australia's obligations under Security Council resolution 1373 (2001) and the International Convention for the Suppression of Terrorist Bombing (1998);
- amend the *Customs Act 1901*, the *Customs Administration Act 1985*, the *Fisheries Management Act 1991*, the *Migration Act 1968*, and the *Evidence Act 1995* to increase customs powers; and
- amend the *Telecommunications (Interception) Act 1979* to clarify the application of the Act to telecommunications services involving a delay between the initiation of the communication and its access by the recipient, such as email and short messaging services, include offences constituted by conduct involving acts of terrorism and child pornography related and serious arson offences as offences in relation to which a telecommunications interception warrant may be sought;
- amend the definition of 'politically motivated violence' in sec 4 of the *Australian Security Intelligence Organisation Act 1979*

('the ASIO Act') to include acts that are terrorism offences; and

- insert a new Division 3 at the end of Part II of the ASIO Act dealing with special powers relating to terrorism offences, including in relation to warrants requiring persons to appear for questioning and to be taken into custody and detained for questioning. The most controversial of the proposed powers include those which allow
  - i ASIO to request the incommunicado detention of persons not suspected of any criminal activity for an initial period of up to 48 hours, with the possibility of extension resulting in an unrestricted and indefinite period of continuous detention;
  - ii compulsory questioning without legal representation and under penalty of an offence; and (iii) the use of incriminating answers in subsequent proceedings for terrorist offences.

## Assessment criteria

In assessing the proposals for new security legislation in Australia, it is useful to have regard to the following principles formulated by Lord Lloyd of Berwick for applying the rule of law to the challenge of terrorism:

- Legislation against terrorism should approximate as closely as possible to the ordinary criminal law and procedure.
- Additional statutory offences and powers may be justified, but only if they are necessary to meet the anticipated threat. They must then strike the right balance between the needs of security and the rights and liberties of the individual.
- The need for additional safeguards should be considered alongside any additional powers.
- The law should comply with the UK's obligations in international law.<sup>2</sup>

To these principles, one might add that in striking the right balance between the needs of security and the rights and liberties of the individual, the possibility of other means of combating the perceived security threat should always be considered.<sup>3</sup>

The fourth of the principles identified by Lord Lloyd of Berwick requires compliance between legislation against terrorism and relevant obligations in international law. International instruments concerned with terrorism include the Convention for the Suppression of Terrorist Bombings (1998) and the Convention for the Suppression of the Financing of Terrorism (1999). The principal relevant United Nations Security Council resolution is resolution 1373, adopted 28 September 2001, in which the Security Council decided that all States shall, amongst other things:

2. (e) ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorists act is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.

Further international obligations relevant to an assessment of the proposed legislation are found in international human rights

law and practice. In the wake of the events of 11 September 2001, numerous United Nations human rights bodies have made important statements in relation to proposed anti-terrorist laws.<sup>4</sup>

On 27 February 2002, the High Commissioner for Human Rights confirmed that ensuring that innocent people do not become the victims of counter-terrorism measures should be an important component of anti-terrorism strategies.<sup>5</sup> In order to assist States in complying with international human rights standards in implementing of Security Council resolution 1373, the High Commissioner proposed the following criteria:<sup>6</sup>

...  
2 Human rights law strikes a balance between the enjoyment of freedoms and legitimate concerns for national security. It allows some rights to be limited in specific and defined circumstances.

3 Where this is permitted, the laws authorizing restrictions:

- (a) Should use precise criteria;
- (b) May not confer unfettered discretion on those charged with their execution.

4 For limitations of rights to be lawful they must:

- (a) Be prescribed by law;
- (b) Be necessary for public safety or public order, i.e. the protection of public health or morals and for the protection of the rights and freedoms of others, and serve a legitimate purpose;

- (c) Not impair the essence of the right;
- (d) Be interpreted strictly in favour of the rights at issue;
- (e) Be necessary in a democratic society;
- (f) Conform to the principle of proportionality;
- (g) Be appropriate to achieve their protective function, and be the least intrusive instrument amongst those which might achieve that protective function;
- (h) Be compatible with the objects and purposes of human rights treaties;
- (i) Respect the principle of non-discrimination;
- (j) Not be arbitrarily applied.

### Security Legislation Amendment (Terrorism) Bill 2002 [No.2]

#### The proposed definition of 'terrorist act'

The *Security Legislation Amendment (Terrorism) Bill 2002* proposes the following definition of 'terrorist act' in sec 100.1:

'... *terrorist act* means action or threat of action where:

- (a) the action falls within subsection (2); and
- (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause;

but does not include:

- (c) lawful advocacy, protest or dissent; or
- (d) industrial action.

(2) Action falls within this subsection if it:

- (a) involves serious harm to a person; or

- (b) involves serious damage to property; or
- (c) endangers a person's life, other than the life of the person taking the action; or
- (d) creates a serious risk to the health or safety of the public or a section of the public; or
- (e) seriously interferes with, seriously disrupts, or destroys, an electronic system ...'

The most troubling aspect of this definition is the broad, imprecise and ambiguous formulation of the requisite intention, namely that the action is done or the threat is made 'with the intention of advancing a political, religious or ideological cause'. It is noteworthy that the definition of domestic terrorism in sec 802 of the *United States Code* (as amended by the so-called *Patriot Act* of 2001) does not extend to damage to property, focussing on 'activities that involve acts dangerous to human life'. In addition, the US definition requires an apparent intention 'to intimidate or coerce a civilian population, to influence a policy of a government by intimidation or coercion, or to affect the conduct of government by mass destruction'. The more mildly worded definition in sec 1(1) of the UK *Terrorism Act 2000* contains a requirement that the use or threat of action 'is designed to influence the government or to intimidate the public or a section of the public'. Section 50 of the Northern Territory *Criminal Code* requires an intention to procure the alteration of a matter or thing established by a law of a legally constituted government or other political body, including acts done for the purpose of putting the public or a section of the public in fear. The proposed Commonwealth definition contains no requirement of any similar intention or design, requiring only an intention to advance a political, religious or ideological cause. The effect of such a definition is to remove from the definition of terrorism any element of intentionality to terrorise the government or the public through intimidation, coercion or the evocation of extreme fear.

A related problematic aspect is the inclusion of action involving serious damage to property. Such action could include forms of damage to property caused by advocates of political, religious and ideological causes such as damage to walls and fences of embassies, immigration and other detention centres, military installations, birth control clinics and casinos, as well as to logging trucks, billboards and pavements. The participants in such forms of protest and dissent are frequently youthful, enthusiastic and sometimes zealous, but otherwise peaceful, law abiding and dutiful citizens. Such offences are surely not apt to be characterised as 'terrorist acts' and to be subject to a penalty of life imprisonment. Moreover, any notion of harm to property ought not to be free-standing but must, at the very least, require mass destruction, as well as be linked to a threat to human life or serious physical harm, and contain some element of intentionality to terrorise the government or the public.

The unqualified use of language of 'serious harm to a person' in sec 100.1(2)(a) is also disturbing. As drafted, this could include harm to a person's reputation or economic interests. At the very least, such action should be confined to action causing serious *physical* harm to a person, as well as containing some element of intentionality to terrorise the government or the public. Further, despite the exclusion of 'lawful advocacy, protest or dissent, or industrial action' from the definition of terrorist act, the imprecise and unnecessarily broad nature of the definition is likely to see political activity such as public demonstrations and unplanned industrial activity caught within sec 100.1(1). For example, an

the imprecise and unnecessarily broad nature of the definition is likely to see political activity such as public demonstrations and unplanned industrial activity caught within sec 100.1(1).

urgent action alert issued by a non-governmental organisation such as Amnesty International calling on members and supporters to fax or e-mail a minister in an Australian or a foreign government could fall within sec 100.1(2)(e) as action which ‘seriously interferes with, seriously disrupts, or destroys, an electronic system including: (i) an information system; or (ii) a telecommunications system’. A further example would be a strike by police officers, nurses, fire-persons or other emergency services personnel resulting in a reduction in the provision of relevant services to the public, and hence potentially falling foul of sec 101.1(2)(d) as action which ‘creates a serious risk to the health or safety of the public or a section of the public’.

**Offences connected with terrorist acts:**

**Offences of absolute liability**

Sections 101.2, 101.3, 101.4, 101.5 and 101.6 create offences of providing or receiving training connected with terrorist acts, directing organisations concerned with terrorist acts, possessing things connected with terrorist acts, collecting or making documents likely to facilitate terrorist acts, and other acts done in preparation for or planning terrorist acts. All these offences carry sentences of life imprisonment. An offence against each of these sections is committed even if the terrorist act does not occur.

The offences in secs 101.2, 101.4 and 101.5 are offences of absolute liability. This means that no mens rea is required, so that the offence is committed once it is shown that the accused voluntarily committed the acts which comprise the offence. It is no defence that the accused honestly and reasonably but mistakenly believed in a set of facts which if existed would have rendered his or her conduct innocent.<sup>7</sup> Each of secs 101.2(4), 101.4(4) and 101.5(4) provides for a defence where the person proves that he or she was not reckless in the circumstances. However, reversed onuses are potentially very oppressive. Elsewhere in the criminal law, absolute liability offences have grown out of relatively trivial regulatory offences. There are few, if any, other instances of a substantive offence involving serious criminality and a substantial penalty for which absolute liability exists.

The absence of any requirement of some degree of actual knowledge of circumstances indicating connection with a terrorist act, or of an intention to assist in an act of terrorism is surely a most objectionable aspect of the proposed treatment of terrorist acts. Thus, sec 101.4 would criminalise the possession of things connected with preparation for, the engagement of a person in, or assistance in a terrorist act, such as objects and documents, by persons such as scholars,

researchers and journalists who have no intention of assisting in a terrorist act and whose scholarship, research or journalism may in fact be in opposition to or intended to expose terrorist acts. The defence in sec 101.4(4) would not save such scholars, researchers or journalists because that defence would apply only where such persons could prove on the balance of probabilities that they were not reckless with respect to the thing’s connection with a terrorist act. Such persons would, notwithstanding the absence of any intention to assist in a terrorist act, be guilty of an offence and,

potentially, liable to life imprisonment.

Many of the so-called terrorism offences sought to be elaborated in secs 101.2 to 101.6 are already adequately covered by existing principles of accessory liability. For example, at the Commonwealth level, Part 24 of the *Criminal Code Act 1995* provides for an extension of criminal responsibility in circumstances of attempt, complicity and common purpose, innocent agency, incitement and conspiracy. In each of these cases, the person is taken to have committed an offence and is punishable accordingly. Of particular significance amongst these is conspiracy with another person to commit an offence punishable by imprisonment for more than twelve months, made a general Commonwealth offence in 1995.<sup>8</sup> The doctrine of common purpose is also available to extend joint criminal responsibility to an offence which was not that which was the object of the joint enterprise entered by the accused.<sup>9</sup>

Some may argue that little harm is done by the creation of terrorism offences, as ultimately charges of terrorism are unlikely to be laid in relation to other than the most serious of acts and against other than the most dangerous and threatening of organisations. However, the conferral on the prosecutorial authorities of such sweeping and arbitrary powers in the characterisation of offences and laying of charges is contrary to the prohibition of arbitrary arrest and detention in article 9 (a) of the International Convention of Civil and Political Rights (ICCPR).<sup>10</sup> In 1990, the United Nations Human Rights Committee confirmed in the case of *Van Alphen v The Netherlands* that ‘arbitrariness’ must be interpreted broadly to include elements of inappropriateness, injustice and lack of predictability. This means that deprivation of liberty provided for by law must not be manifestly unproportional, unjust or unpredictable. An unacceptable element of arbitrariness and unpredictability arises in that determining whether or not a person is charged with a terrorist offence, with another offence or with any offence at all (a determination which has profound implications in terms of the onus of proof, available defences, stigma of conviction and penalties), is left to the prosecutorial authorities without any transparency or public scrutiny. The creation of such offences also has considerable implications in terms of the proposed enhanced powers of ASIO under the ASIO Bill 2002.

**Proscribed organisations**

Division 102 of the *Security Legislation Amendment (Terrorism) Bill 2002* proposes to provide the attorney-general with power to make a declaration that an organisation is a proscribed organisation and to create a series of offences in relation to proscribed organisations. In accordance with sec 102.2, the attorney-general may make a declaration that an organisation is a proscribed organisation where the attorney-general is satisfied on reasonable grounds that:

- the organisation has committed, or is committing, an offence against this Part;
- a member of the organisation has committed, or is committing, an offence against this Part on behalf of the organisation;
- the declaration is reasonably appropriate to give effect to a decision of the Security Council of the United Nations that the organisation is an international terrorist organisation; or
- the organisation has endangered, or is likely to endanger, the security or integrity of the Commonwealth or another

The effect of the proposed proscription provisions is to deny affected persons any right to be heard, and to displace altogether long established rules of procedural fairness and natural justice.

country.

In accordance with sec 102.4(1), a person commits an offence if the person:

- (a) directs the activities of a proscribed organisation; or
- (b) directly or indirectly receives funds from, or makes funds available to, a proscribed organisation; or
- (c) is a member of a proscribed organisation; or
- (d) provides training to, or trains with, a proscribed organisation; or
- (e) assists a proscribed organisation.

The penalty for an offence against sec 102.4(1) is imprisonment for 25 years. In accordance with subsection 2, strict liability applies to the element of the offence against subsection 1 that the organisation is a proscribed organisation. Offences of strict liability are offences in relation to which no *mens rea* is required so that the offence is committed once it is shown that the accused voluntarily committed the acts which comprise the offence. It is a defence to an offence of strict liability that the accused honestly and reasonably but mistakenly believed in a set of facts which if existed would have rendered his or her conduct innocent.<sup>11</sup> However, the defence is a positive one in that the accused must be labouring under a mistake of fact, and it does not

arise where the accused does not turn his or her mind to the question.<sup>12</sup> It is a defence to a prosecution of an offence against subsection 1 if the defendant proves that the defendant neither knew, nor was reckless as to (a) whether the organisation, or a member of the organisation had committed, or was committing, an offence against this Part; and (b) there was a relevant decision of the Security Council; and (c) the organisation had endangered, or was likely to endanger, the security or integrity of the Commonwealth or another country. Subsection 4 provides a further defence to a prosecution of an offence against paragraph (1)(c) if the defendant proves that the defendant took all

reasonable steps to cease to be a member of the organisation as soon as practicable after the organisation became a proscribed organisation.

### The proscription provisions, natural justice and the role of the attorney-general

One aspect of the proposed proscription regime which raises particular concern is the power in the attorney-general to make a declaration that an organisation is a proscribed organisation without affected person being afforded any opportunity to be heard.<sup>13</sup> The effect of *Kioa v West* and other decisions<sup>14</sup> is to require that procedural fairness be afforded in relation to decisions of an administrative character which affect the rights, interests and legitimate expectations of an individual, subject only to a clear manifestation of a contrary statutory intention. It is also established that the content of procedural fairness, and the extent of the hearing and participation it requires, will increase in proportion to the seriousness of the consequences involved.<sup>15</sup> The effect of the proposed proscription provisions is to deny affected persons any right to be heard, and to displace altogether long established rules of procedural fairness and natural justice.

The vesting of a far-reaching power to proscribe an organisation solely in a member of the executive, without any safeguards whatsoever, is deeply disturbing. Surely, such sweeping

power should be vested in the judicial branch of government. Instead, it is proposed that executive power resulting in the determination of legal status be exercised entirely shorn of procedural safeguards. A relevant precedent for such safeguards may be found in Part IIA of the *Crimes Act 1914* (Cth) concerning declarations as to unlawful associations which advocate or encourage the overthrow of the Constitution, the established government of the Commonwealth or of a State or any other civilised country, or the destruction or injury of property of the Commonwealth or of property used in trade or commerce with other countries or among the States. An application by the attorney-general to the Federal Court for an order declaring a body of persons to be an unlawful association is made by summons containing averments setting out the facts relied upon in support of the application, and any interested person may apply to the Full Court of the Federal Court of Australia for the setting aside of the order.

By contrast, the proposed proscription regime vests absolute power in the attorney-general to declare an organisation to be a proscribed organisation. There is no requirement that the attorney-general make a case against an organisation before a judge. An organisation can be proscribed without proof of any proscribed conduct and, as noted above, without any opportunity on the part of affected parties to be heard. Whilst the attorney-general can revoke a declaration if he or she is satisfied on reasonable grounds that none of the paragraphs in sec 101.2(1) apply, the offence against sec 102.4(1) that the organisation is a proscribed organisation is an offence of strict liability in relation to which the burden of proof is reversed.

### No right of appeal against a proscription decision

Moreover, the proposed proscription regime provides for no right of appeal against a decision to proscribe an organisation under sec 102.2. Review of the attorney-general's decision under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) would provide an inadequate safeguard because of the narrow grounds of review under that Act. In particular, there would be no scope for review of the merits of the decision. Nor would there be any scope for review on proportionality grounds. Whilst proportionality is well accepted as a basis upon which a purposive conferral of constitutional power, and legislative exercises of power may be impugned<sup>16</sup>, proportionality has not been adopted as a separate ground of review in the context of judicial review of administrative action.<sup>17</sup> That is, it would not be possible to argue on review that the decision was unlawful because it was not 'reasonably appropriate and adapted to give effect to the relevant purpose or object'<sup>18</sup>. Retrospective judicial remedies would not provide an adequate or appropriate means of controlling the exercise of the attorney-general's power under sec 102.2.

### The constitutionality of the proscription provisions

Further, there is real doubt as to the constitutional validity of the provisions of the Bill concerning the proscription of organisations. The *Communist Party Dissolution Act 1950* granted the governor-general an unfettered, and unreviewable, power to declare an organisation to be unlawful or a person to be a communist. That Act was struck down by the High Court in *Australian Communist Party v Commonwealth*<sup>19</sup>, essentially on the ground that the Act granted the governor-general an unreviewable power and that it was beyond the power of the Federal Parliament to suppress an organisation under the defence power on the

An organisation can be proscribed without proof of any proscribed conduct

opinion of the governor-general in a time of relative peace. It is by no means clear that the High Court would consider remedies under the ADJR Act, which provides for neither merits review nor review on proportionality grounds, as supplying a sufficient link between the power and the legal consequences of the attorney-general's opinion. Where, as here, draconian, penalising legislation with the potential to infringe upon individual liberties is involved, the Court is likely to be more astute to review constitutionality.<sup>20</sup>

Moreover, the external affairs power is likely to be a primary basis for anti-terrorism measures in Australia. In relation to both the defence and the external affairs power, it is important to recall the constitutional doctrine of proportionality which has traditionally been regarded as synonymous with the test for purposive characterisation, that is, whether the measure is 'appropriate and adapted' to achieving the valid federal purpose<sup>21</sup>. The High Court has recognised that the external affairs power is available to support a law purportedly enacted to give domestic effect to an international instrument where the means selected are 'reasonably capable of being considered appropriate and adapted to implementing the treaty'<sup>22</sup>. Real doubt must attach to the question of whether the proscription provisions are 'appropriate and adapted' to implementing Security Council resolution 1373.

### Indeterminacy of the proscription provisions

Further concerns arise in relation to the vague and indeterminate concept of 'informal member' in sec 102.1. The equally indeterminate concept of 'assists a proscribed organisation' in sec 102.4(1)(e) would potentially render persons only remotely connected with an organisation liable to a term of imprisonment of up to 25 years. Concerns in relation to the use of the device of a reversed onus to disprove recklessness have been noted above. Moreover, the attorney-general may make a declaration proscribing an organisation that is 'likely to endanger the security or integrity of the Commonwealth or another country' (sec 102.2(1)(d)). In this respect, the concept of 'integrity' has no clearly understood legal or popular meaning. Arguably, use of the term 'integrity' is intended to encompass the concept of 'territorial integrity or political independence of any State', found in article 2(4) of the Charter of the United Nations. Article 2(4) prohibits the threat or use of force by members of the United Nations, in their international relations, against the territorial integrity or political independence of any State. Hence, the power in sec 102.2 could, conceivably, be used to proscribe organisations that campaign for or support pro-democracy and non-violent independence movements in other States.

Examples of organisations potentially susceptible to being proscribed pursuant to this power include organisations supporting independence for East Timor, the overthrow of the military dictatorship and the restoration of democracy in Burma (Myanmar), the end of the Apartheid regime in South Africa, and the removal of the Mugabe Government in Zimbabwe. Offences in relation to such proscribed organisations would be committed by persons directing the activity of the organisation, directly or indirectly receiving funds from or making funds available to the organisation, members of the organisation, providing training to the organisation or assisting the organisation. These might include persons contributing to fundraising drives, providing training in conflict resolution, international law, media skills or use of the internet, disseminating pamphlets and other literature, and otherwise providing material or moral support to the organisation.

### Definition of treason

Proposed amendments to Part 5.1 of the *Criminal Code Act 1995* broaden the existing offence of treason in sec 24. Section 80.1(1)(f) includes as treason conduct 'that assists by any means whatever, with intent to assist' another country or an organisation that is engaged in armed hostilities against the Australian Defence Force. The penalty is imprisonment for life. Such treasonable conduct could include the provision of material and other forms of humanitarian aid such as disaster relief, medical assistance, water and sanitation programmes, agricultural rehabilitation and other means of economic support to enable conflict victims to restore their means of production. The criminalisation of the provision of such forms of assistance to an organisation engaged in armed hostilities against the ADF could, potentially, capture forms of humanitarian aid provided to groups such as the Bougainville Revolutionary Army. The potential for the criminalisation of many such acts of humanitarian assistance is particularly acute given the increased deployment of the ADF in peace keeping, border protection, disaster relief and other forms of non-military action.

### The ASIO Bill

#### Definition of 'politically motivated violence'

The ASIO Bill proposes to amend the definition of 'politically motivated violence' in sec 4 of the ASIO Act to include '(ba) acts that are terrorism offences'. 'Terrorism offence' is defined to mean an offence against Part 5.3 of the Criminal Code. A Note is proposed for insertion at the end of the definition of terrorism offence in sec 4 to provide that a person can commit an offence against Part 5.3 of the Criminal Code even if no terrorist act occurs. Part 5.3 of the Criminal Code is proposed to be inserted in accordance with the *Security Legislation Amendment (Terrorism) Bill 2002* [No.2]. As a result of adopting the inexact and sweeping definition of 'terrorism offence' proposed for the *Security Legislation Amendment (Terrorism) Bill*, the ASIO Bill's anti-terrorism powers are available to enable an unacceptably vast range of persons, themselves not suspected of any criminal activities, to be required to appear for questioning and to be taken into custody and detained for questioning.

#### Prescribed authorities

At the end of Part II a new Division 3 is proposed for insertion dealing with special powers relating to terrorism offences. Pursuant to sec 34B, the minister may appoint as a prescribed authority a Federal Magistrate or a member of the Administrative Appeals Tribunal ('the AAT'). Particular concern arises in relation to the discretion which is proposed to be exercised by the minister

Photo: Michael Jones / News Image Archive



The ASIO building - part of the Russell defence complex

in the selection of those federal magistrates and AAT members considered suitable candidates for appointment as a prescribed authority. There are also cogent reasons for concluding that the powers proposed to be granted to ASIO pursuant to warrants issued by prescribed authorities are so far-reaching, including the power to request detention of persons for 48 hours and longer, that the issuing of warrants should only be capable of being authorised by a Chapter III judge. The common law has long recognised the role of the judiciary in the authorisation of the issuing of warrants. Such a role fits within the established principle of the performance of such function by judges as *personae designatae*.<sup>23</sup>

The separation of judicial power entrenched by the Constitution protects Australian citizens against the usurpation of judicial power in the form of the imposition of involuntary detention of a penal or punitive character by the legislature or executive. In *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* Brennan, Deane and Dawson JJ said that, with limited exception, ‘the citizens of this country enjoy, at least in times of peace, a constitutional immunity from being imprisoned ... except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth’.<sup>24</sup> In the absence of judicial power, the Constitution only permits administrative detention which is connected with a legislative

power, and is reasonably necessary for the purpose of its exercise. In *Chu Kheng Lim*, the mandatory detention of boat people in custody was held to be a valid exercise of the aliens power provided it is not punitive and is ‘limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered.’<sup>25</sup> Such limited authority to detain an alien could be conferred on the Executive without infringement of the exclusive vesting by Chapter III of the Constitution of the judicial power of the Commonwealth in the courts. In *Chu Kheng Lim* Justices Brennan, Deane and Dawson JJ noted that committal to custody pending trial of persons accused of crimes pursuant to executive warrant was not seen by the law as punitive or as appertaining exclusively to judicial power, because even where exercisable by the Executive the power to detain a person in custody pending trial is ordinarily subject to the supervisory jurisdiction of the courts, including the ‘ancient common law’ jurisdiction to order that a person be admitted to bail. The proposed ASIO Bill, by contrast, excludes any such supervisory jurisdiction of the courts.

The possibility that a warrant authorising detention of persons for 48 hours and longer would be capable of being issued other than by a Chapter III judge also raises human rights concerns. UK anti-terrorism legislation<sup>26</sup> providing for detention without authorisation or monitoring by judicial authority gave rise to a successful argument before the European Court of Human Rights concerning a

breach of the European Convention on Human Rights and Fundamental Freedoms<sup>27</sup> in *Brogan v United Kingdom* (‘the European Convention’)<sup>28</sup>.

### Requesting a warrant for questioning and detention

Pursuant to sec 34C, the director-general of ASIO may seek the minister’s consent to request the issue of a warrant for questioning under sec 34D, which consent the minister may provide where the minister is satisfied: (a) that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence; and (b) that relying on other methods of collecting that intelligence would be ineffective; and (c) if the warrant is to authorise the person to be immediately taken into custody and detained, that there are reasonable grounds for believing that if the person is not immediately taken into custody and detained, the person (i) may alert a person involved in a terrorism offence that the offence is being investigated; or (ii) may not appear before the prescribed authority; or (iii) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce. The warrant may specify persons by reference to a class.

The fundamental importance attached by the common law to the right to silence before and during trial requires extraordinary circumspection in circumscribing the circumstances in which a person can be compelled to answer questions.<sup>29</sup> The effect of sec 34C is to allow the director-general of ASIO to request and the minister to consent to the compulsory questioning of persons who are not suspected of the commission of any crime, let alone any terrorism offence, however broadly defined. The proposed test – namely whether or not the minister is satisfied that there are ‘reasonable grounds’ for believing that the issue of the warrant will substantially assist the collection of intelligence – is unacceptably broad.<sup>30</sup>

### Detention of persons

At any time when a person is before the prescribed authority for questioning under a warrant, the authority may give a direction pursuant to sec 34F(1), *inter alia*, to detain the person, for the further detention of the person, permitting the person to contact a specified person or any person, or for the release of the person. The authority is only to give a direction that is consistent with the warrant, or has been approved in writing by the minister: sec 34F(2), and is only to be given where he or she is satisfied that there are reasonable grounds for believing that if the person is not detained, the person (i) may alert a person involved in a terrorism offence that the offence is being investigated; or (ii) may not continue to appear or appear again before the prescribed authority; or (iii) may destroy, damage or alter a record or thing that the person has been may be requested or may be requested, in accordance with the warrant, to produce. A direction under sec 34F(1) must not result in a person being detained for more than 48 hours after the person first appears before the prescribed authority for questioning under the warrant: sec 34F(4). A person who does not appear before the prescribed authority as required by a direction under sec 34F is subject to a penalty of imprisonment for 5 years: sec 34G(1).

The capacity proposed to be conferred by sec 34F(4) to detain, incommunicado, persons not themselves suspected of any criminal offence for a period of 48 hours is surely problematic, and any capacity to seek an extension of the 48 hour period pursuant to sec 34F(7) completely objectionable. The proposed powers of detention and compulsion are inconsistent with the principles of the rule of law applied to terrorism, in particular those requiring

The proposed test – namely whether or not the minister is satisfied that there are ‘reasonable grounds’ for believing that the issue of the warrant will substantially assist the collection of intelligence – is unacceptably broad.

close as possible approximation between ordinary criminal law and procedure and terrorism offences, and justification of additional powers by reference to the necessity to meet actual and anticipated threats. Australian criminal law does not presently permit the detention of persons not suspected themselves of any criminal activity, but only of having intelligence in relation to a criminal offence.

Nor have any material or other circumstances which suggest the existence in Australia of real or anticipated threats justifying the conferral of such extraordinary powers been identified. Under the proposed warrant system, ASIO obtains for the first time coercive interrogation powers, not restricted to situations in which there are a clear and imminent risk of terrorist acts. This represents a significant change in the traditional role of ASIO as an intelligence gathering and analysis agency. The onus is on the Government to demonstrate the insufficiency of existing powers of intelligence and security agencies and police. That onus is a heavy one, given the extent of fundamental liberties which are proposed to be infringed, namely deprivation of liberty without a charge, the denial of the right of a person detained to contact family and to legal counsel, and the abrogation of the right not to incriminate oneself by refusing to answer questions.

In particular, the proposed detention provisions raise concerns in relation to the prohibition of arbitrary detention in article 9 of the ICCPR. In its General Comment on article 9, General Comment No 8 ‘Right to liberty and security of persons’, the United Nations Human Rights Committee has stated:

Paragraph 3 of article 9 requires that in criminal cases any person arrested or detained has to be brought ‘promptly’ before a judge or other officer authorized by law to exercise judicial power. More precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays *must not exceed a few days*.

The important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. ...

Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5).

And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.<sup>31</sup>

The proposed authorisation by a non-judicial authority of a person’s detention for a period of 48 hours, capable of being extended for a further 48 hours on an unlimited number of occasions, and without any access to legal counsel, involves arbitrariness in the protection of the liberty and security of the person.<sup>32</sup> In particular, as stated in the Human Rights Committee’s General Comment on article 9, the requirement of prompt appearance before a judicial officer requires that the period before appearance must not exceed several days. In one case, the Human Rights Committee has found a violation where the person was held

for five days without being brought before a judge.<sup>33</sup> In *Brogan v the United Kingdom*, the European Court of Human Rights found that four days and six hours was too long to satisfy the requirement of promptness.<sup>34</sup> Of utmost concern is that the Bill envisages that second and subsequent warrants each for up to 48 hours may be obtained. There is no restriction whatsoever on the number of such warrants which may be obtained and hence the overall period of continuous detention, except that where warrants will result in a continuous period of more than 96 hours, warrant authority must be sought from the deputy president of the AAT.

**Communications whilst in custody or detention**

In accordance with secs 34F(8) & (9), a person is not permitted to contact and may be prevented from contacting anyone at any time while in custody or detention, other than any person named in the warrant, the inspector-general of intelligence and security and the ombudsman. Thus, a person detained under a warrant for questioning would only be entitled to legal advice where the warrant allowed it. This is a most objectionable aspect of the Bill. Any person compelled to answer questions pursuant to a warrant must be entitled to access to a legal adviser. Without access to independent legal counsel, the guarantee in sec 34J of treatment with humanity and respect for human dignity, and freedom from cruel, inhuman or degrading treatment, is meaningless. Unless information about ill-treatment under questioning or in detention can reach the outside world, there is no practical means to challenge such treatment. The right to communicate with the inspector-general of intelligence and security and the ombudsman, whilst a laudable supplementary safeguard, is inadequate to ensure that detained persons, or persons on behalf of detained persons, are able to bring proceedings challenging the lawfulness of, and treatment under questioning or detention.

The United Nations Human Rights Committee’s General Comment on article 7 concerning the prohibition of torture and cruel inhuman or degrading treatment or punishment provides relevantly<sup>35</sup>:

‘11. ... To guarantee the effective protection of detained persons ... [p]rovisions should ... be made against incommunicado detention. ... The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.’

**Use of information, records or things in criminal proceedings**

Proposed new subsection 34G(9) limits the use which can be made in criminal proceedings of information, records or things obtained as a result of warrant for the purposes of criminal prosecution. The information, records or things provided by a person while before a prescribed authority for questioning under a warrant may only be used in criminal prosecutions for an offence against section 34G or a terrorism offence. Grave concerns arise in relation to the use which can be made of incriminating answers. Ordinarily, persons being questioned have the right to refuse to answer on the basis that an answer might tend to incriminate them. Most bodies with the power to compel answers provide an opportunity for the person to object to answering, with a consequent safeguard that the answer cannot be used against that person in subsequent proceedings. As drafted, the Bill allows incriminating answers to be used against the person in subsequent proceedings for terrorist offences. This represents an unacceptable

Critical aspects of the proposed legislation are inconsistent with fundamental aspects of the rule of law and with core international human rights obligations.

extension of well-established safeguards in relation to use immunity.

Article 14(3) of the ICCPR provides: 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (g) Not to be compelled to testify against himself or to confess guilt.' In its General Comment on article 14, General Comment No 13, 'Equality before the courts and the right to a fair and public hearing by an independent court established by law', the Human Rights Committee has stated<sup>36</sup>:

Subparagraph 3(g) [of article 14] provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.

In *Saunders v United Kingdom*<sup>37</sup>, the European Court of Human Rights held that it was a violation of article 6 of the *European Convention on Human Rights and Fundamental Freedoms* (right to a fair hearing) to admit evidence during a criminal trial which had been obtained at an earlier administrative hearing during which the accused had been compelled by statute to answer questions and adduce evidence of a self-incriminatory nature.<sup>38</sup>

## Conclusions

In the foregoing commentary, it has been sought to demonstrate that critical aspects of the proposed legislation are inconsistent with fundamental aspects of the rule of law and with core international human rights obligations. The following warning given by Justice Kirby on 11 October 2001 against potential excess in the adoption of anti-terrorism laws (referring to the rejection by the Australian people of a proposal by way of referendum on 22 September 1951 to add a new sec 51A to the Constitution to legislate with respect to communists and communism) is, as so often, apposite:

Given the chance to vote on the proposal to change the constitution, the people of Australia, fifty years ago, refused. When the issues were explained, they rejected the enlargement of Federal power. History accepts the wisdom of our response in Australia and the error of the overreaction of the United States. Keeping proportion. Adhering to the ways of democracies. Upholding constitutionalism in the rule of law. Defending, even under assault, the legal rights of suspects. These are the way to maintain the love and confidence of the people over the long haul. We should never forget these lessons...every erosion of liberty must be thoroughly justified. Sometimes it is wise to pause. Always it is wise to keep our sense of proportion and to remember our civic traditions as the High Court Justices did in the Communist Party Case of 1951.<sup>39</sup>

- 1 This commentary draws upon material contributed by the New South Wales Bar Association to the Law Council of Australia's submissions to the two inquiries.
- 2 See also Tony Abbott, President, Law Council of Australia, 'The World since September 11: Can democracy limited by the rule of law combat terrorism effectively?', address to the First Plenary Session of the Australian Academy of Forensic Sciences, 13 February 2002, at p15.
- 3 Lord Lloyd of Berwick was requested in December 1995 by the House of Commons to consider whether there would be a need for specific counter terrorism legislation in the United Kingdom in the event of a lasting peace in Northern Ireland. His report, published in October 1996, was entitled 'Inquiry into legislation against terrorism' Cmd. 3420 (1996).
- 4 'Message by 17 independent experts of the Commission on Human Rights on the occasion of Human Rights Day, 10 December 2001', UN Doc E/CN.4/2002/137, Annex 1.
- 5 UN Doc E/CN.4/2002/18 (27 February 2002), para 2.
- 6 *ibid*, Annex.
- 7 *He Kaw Teh v The Queen* (1985) 157 CLR 523; *Jiminez v The Queen* (1992) 173 CLR 572. 'Absolute liability' is defined in sec 6.2 of the *Criminal Code Act 1995*.
- 8 By the insertion of sec 86(1) into the *Crimes Act 1914*: see *Crimes Amendment Act No. 11 1995*, sec 8. Conspiracy is now dealt with in sec 11.5 of the *Criminal Code Act 1995*.
- 9 *McAuliffe v R* (1995) 183 CLR 108
- 10 Article 9 (a) of the ICCPR provides that: 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'
- 11 *Proudman v Dayman* (1941) 67 CLR 536 at 540; *Hardgrave v R* (1906) 4 CLR 232. 'Strict liability' is defined in sec 6.1 of the *Criminal Code Act 1995*.
- 12 *Proudman v Dayman; State Rail Authority of New South Wales v Hunter Water Board* (1992) 28 NSWLR 721.
- 13 *Kioa v West* (1985) 159 CLR 550, in particular Mason J at 584.
- 14 For example, *attorney-general (NSW) v Quin* (1990) 170 CLR 1 at 57-58; *Annetts v McCann* (1990) 170 CLR 596 at 598.
- 15 2 ed, at p397.
- 16 For example, *Commonwealth v Tasmania* (1983) 158 CLR 1; *Richardson v Forestry Commission* (1988) 164 CLR 261, *Williams v City of Melbourne* (1933) 49 CLR 142.
- 17 *Bruce v Cole* (1998) 45 NSWLR 163 at 185.
- 18 See M Aronson and B Dyer, *Judicial Review of Administrative Action*, 2nd ed 2000, at pp.289-292.
- 19 (1951) 83 CLR 1.
- 20 *R v Hughes* (2000) 202 CLR 535.
- 21 See discussion in J Kirk, 'Proportionality' in T Blackshield, M Coper & G Williams (eds), *The Oxford Companion to the High Court of Australia*, 2001, at pp568-570.
- 22 *Victoria v Commonwealth* (1996) 187 CLR 416 at 487, 488.
- 23 *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer, Commission of the Australian Federal Police* (1995) 184 CLR 348; cf *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1 where the function proposed to be conferred on the judge was to provide policy advice to the Minister.
- 24 (1992) 176 CLR 1 at 28-29, per Brennan, Deane and Dawson JJ
- 25 (1992) 176 CLR 1 at 33. See also *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51
- 26 *Prevention of Terrorism (Temporary Provisions) Act 1989*, sec 14(1)(b)
- 27 Article 5(3) of the European Convention provides that 'Everyone arrested or detained in accordance with the provisions of paragraph 1(c) shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.' Article 5(3) of the European Convention is relevantly identical to article 9 of the ICCPR.
- 28 (1989) 11 EHRR 117. Subsequently, the UK availed itself of the right of derogation conferred by article 15(1) of the European Convention based on the public emergency in Northern Ireland. The derogation was held by the European Court to be effective in *Brannigan & McBride v United Kingdom* (1994) 17 EHRR 539.
- 29 See discussion of the origins of the privilege and its human rights rationale by Mason CJ and Toohy J in *Environmental Protection Authority v Caltex* (1993) 178 CLR 477 at 497-500.
- 30 A more appropriate test would require the Minister to be satisfied that there are compelling grounds to consider that the issue of the warrant is necessary, for example to prevent flight, destruction of or interference with evidence, the commission of further terrorist acts.
- 31 See also views of the Human Rights Committee in *van Alphen v The Netherlands* UN Doc CCPR/C/39/D/305/1988, 15 August 1990, para 5.8; also M Nowak, *UN Covenant on Civil and Political Rights - CCPR Commentary*, Kehl 1993, p172.
- 32 See N Rodley, 'Rights and Responses to Terrorism in Northern Ireland', in D Harris and S Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law*, Clarendon Press Oxford, 1995, p126.
- 33 *Jijon v Ecuador* 277/1988, para 5.3.
- 34 para 61
- 35 Forty-fourth session, 1992
- 36 Twenty-first session, 1984
- 37 (1996) 23 EHRR 313
- 38 See generally S Bronitt and M Ayers, 'Criminal Law and Human Rights' in D Kinley (ed), *Human Rights in Australian Law*, Federation Press 1998, p 120, at pp124-129
- 39 Justice Michael Kirby, 'Australian Law After September 11, 2001', speech to the Law Council of Australia, 32nd Australian Legal Convention, Canberra, 11 October 2001

# Jones v Dunkel in the criminal trial – witnesses other than the accused

By Nick Boyden\*

Recent authorities severely limit the availability of a *Jones v Dunkel* direction against a silent accused in a criminal trial<sup>1</sup>. This article considers authorities on the availability of such directions in criminal trials in relation to a party's failure to call a witness other than the accused. These authorities suggest that such directions will rarely be given, especially against the defence.

## 1. The facts of *Jones v Dunkel*

In *Jones v Dunkel*<sup>2</sup>, a civil negligence case, the High Court held that the jury should have been told that any inference favorable to the plaintiff from the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant, and the evidence provides no sufficient explanation for his absence. Kitto and Menzies JJ also held that the failure to call a particular witness cannot fill an evidentiary gap in the opponent's case.<sup>3</sup>

The facts of *Jones v Dunkel* concerned a motor vehicle accident to which there were no witnesses. The defendant did not call evidence from his employee, the driver of the vehicle.

A number of cases have since clarified and limited the circumstances in which the rule can be applied<sup>4</sup>: These principles are, in summary:

- the unexplained failure by a party to adduce material evidence may, not must, lead to an inference that the evidence would not have assisted that party's case;
- the rule does not permit an inference that the evidence not

tendered would have been damaging to the party who failed to adduce it – it cannot be used to fill gaps in the opponent's case;

- the rule only applies where a party must explain or contradict evidence of 'facts requiring an answer';
- the rule does not apply where the absent witness is the party's solicitor;
- the rule does not operate to require a party to give repetitive evidence;
- the rule cannot be applied to the failure to call a witness by a party unless it would be natural and expected for that party to call the witness; and
- the principles can apply to the failure by a party to ask a witness called by that party particular questions in chief.

Since *Jones v Dunkel*, the courts have held that the mere absence of a witness does not necessarily support an inference that the witness would not have helped the impugned party's case. In *RPS* the majority of the High Court expressed caution about the principle, noting that:

it is essential to note its limits. It relates to the drawing of inferences or conclusions from other facts ... the mode of reasoning which is described proceeds from the premise that the person who has not given evidence not only *could* shed light on the subject but also *would* ordinarily be expected to do so.<sup>5</sup>

*Jones v Dunkel* was a circumstantial case and its application should, in the opinion of the author, be limited to such cases. Judges should avoid directions that encourage juries to speculate on what that evidence must have been and thus to infer (impermissibly) that the evidence would have been unfavourable.<sup>6</sup>

## 2. Application of *Jones v Dunkel* in the criminal trial

The principles in *Jones v Dunkel* apply to criminal as well as civil trials.

However, courts have emphasised the need for caution in criminal cases:

in many cases the absence of a witness either for the Crown or the accused might well be explicable upon grounds not readily capable of proof. If it is suspected that there may be some valid reason for a witness not being called, then, in a criminal trial in particular, a careful appraisal is requisite before commenting on the absence of that witness<sup>7</sup>.

Since *Jones v Dunkel*, this principle has been strictly applied, both in favour of the defence and the Crown.<sup>8</sup>

It is now well established that where, in a criminal circumstantial case, the accused does not give evidence, an inference might be drawn about his or her failure to give evidence if there were facts which explained or contradicted the evidence against the accused, they were facts which were within the knowledge only of the accused, and could not be the subject of evidence from any other person or source.<sup>9</sup> However the High Court's recent decisions in *RPS* and *Azzopardi & Davis* show that such cases will be very rare<sup>10</sup>.

## 3. *Jones v Dunkel* directions against the Crown

The prosecution duty to present its case fairly includes the calling of all relevant witnesses.<sup>11</sup> Where the prosecution fails to call a witness whom it might have been expected to call, the High Court has recently noted that:

the issue is not whether the jury may properly reach conclusions about issues of fact but whether, in the circumstances, the jury should entertain a reasonable doubt about the guilt of the accused.<sup>12</sup>

This statement appears to be stronger than the Court's previous observations in *Apostilides*.<sup>13</sup>

### 3.1 Has the proposed witness made a statement?

In assessing whether or not the Crown

Judges should avoid directions that encourage juries to speculate on what that evidence must have been and thus to infer (impermissibly) that the evidence would have been unfavourable

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should call a witness, a significant factor will be whether or not the witness has actually made and adopted a statement.

It could hardly be suggested that the prosecution should call a witness where the witness has not made a statement of some sort.<sup>14</sup> However, where the witness' account was 'fresh in his or her memory', evidence from investigating police who obtained a verbal statement could be led, assuming that the witness was to be or had been called.<sup>15</sup> Where appropriate, the witness might be declared 'unfavourable' (refer below). The question is what circumstances constitute a 'sufficient explanation' for failing to call a particular witness. In some cases this may merely be indolence or incompetence on the part of the police and/or the Crown – in other cases there may be something more sinister (especially where the evidence would have been expected to exculpate the accused), and practitioners should be alert to whether a 'sufficient explanation' exists.

There will be situations where a witness has made a statement containing material against an accused yet there is no sufficient explanation for the witness' absence. To direct a jury that they may more confidently draw an inference favourable to the accused because of the witness' absence would be misleading assuming there is no suggestion that the statement was improperly obtained or fabricated. There may be difficulties however where other witnesses have mentioned the absent witness in the course of giving evidence so that it might be expected that the absent witness would have been in a position to give evidence about a material issue; in such cases the jury should be directed that they should not speculate about what evidence the absent witness may have given.

### 3.2 Alibi witnesses

Of particular significance is the situation where the accused has served notice of alibi on the Crown.<sup>16</sup> Depending on the level of detail provided in the notice, it may well become incumbent upon the Crown to properly investigate the alibi. Where the Crown do not call persons named by the accused in the notice, it might be inferred that the proposed witness' evidence would not have assisted the Crown case in refuting the claims of alibi. A 'sufficient explanation' for not calling the proposed

witness might include evidence of unsuccessful attempts to locate them.

Significantly, however, s48 does not seem to place a statutory obligation on the Crown to investigate or call alibi witnesses notified by the defence – it simply prevents the defence adducing alibi evidence unless notice has been given or leave granted. Accordingly, where the Crown investigate an alibi witness and this witness supports the accused's case, s48 merely permits the accused to call the witness in his or her defence without the need to obtain leave. While there is no statutory obligation on the Crown to call the witness as part of their case, there is ample common law authority and professional and ethical rules<sup>17</sup> to suggest that the witness should be called by the Crown, if only to be made available for cross-examination.

In a recent CCA case<sup>18</sup> the accused raised alibi in his recorded interview with the police yet no formal notice of alibi was served. Notwithstanding this, police obtained a statement from one of the alibi witnesses which tended to assist the accused. This witness was not called by either party, yet the accused was cross-examined on the absence of that witness. The CCA held that the cross examination was inappropriate, absent a proper basis for seeking to establish *false* alibi. In noting that no request had been made by the defence that the Crown call the witness, the CCA observed that the Crown would have had to overcome s18 of the *Evidence Act 1995 (NSW)* given that the proposed witness was the accused's wife.<sup>19</sup>

### 3.3 Unreliable witnesses

It is well established that there should be 'identifiable factors clearly establishing unreliability' before a decision not to call a material witness on the ground of unreliability can be justified.<sup>20</sup> There is a lack of authority as to what actually constitutes 'unreliability' although 'mere inconsistency of the testimony of a witness with the Crown case is not grounds for refusing to call the witness'.<sup>21</sup> The prosecution cannot decline to call that witness merely on the basis that the absent testimony suggests that they are 'in the camp of the accused' or 'some case theory that does not accord with all the otherwise reliable evidence'.<sup>22</sup> Moreover, 'the advisability, if not necessity' that a prosecutor should actually conference the witness prior to

concluding that he or she is unreliable should be considered.<sup>23</sup>

In many cases where a witness might possibly be considered 'unreliable', application might be made by the prosecutor to cross-examine an unwilling witness under s38 of the *Evidence Act 1995 (NSW)* (assuming the requisite pre-conditions can be satisfied). Significantly, a prosecutor can now call a witness known to be unfavourable for the purpose of adducing a prior inconsistent statement (the contents of which become evidence of the truth of what was said) if the evidence is relevant for another purpose (i.e. for a purpose other than proof of the truth of what was said in them).<sup>xxiv</sup> In such cases a *Jones v Dunkel* direction against the Crown for failing to call such a witness may well be justified.<sup>25</sup>

### 3.4 Is the proposed witness compellable to give evidence for the Crown?

Where the witness is the spouse, *de facto* spouse, parent or child of the accused, he or she may object to giving evidence on behalf of the prosecution.<sup>26</sup> This should not form the basis for a decision not to call the witness given that the balancing test in s18(6) is a matter for the trial judge to determine – if the 'test' is satisfied then the witness must not be required to give evidence. If the witness is not required to give evidence, this would undoubtedly constitute a 'sufficient explanation' for their absence justifying a *Jones v Dunkel* direction not being given against the Crown for that particular witness or witnesses. In the case of Kirby noted above, while the CCA noted the difficulties the Crown may have faced in relation to s18, there was no attempt by the Crown to have the accused's wife give evidence at trial. In such circumstances, it is surprising that the CCA was not critical of the Crown's failing to call the wife (albeit that the defence did not request that she be called), especially after noting that her evidence 'tended to assist the accused'.

### 3.5 Would or should the Crown have been aware of an absent witness?

In many cases the prosecution will have no notice that an absent witness exists until the defence case unfolds.<sup>27</sup> In such cases it could not be expected that an inference adverse to the prosecution could be drawn unless it can be shown

that the prosecution was or should have been aware of the witness within a reasonable time prior to trial. For example, the absent witness may have been in the accused's presence at the time of the offence or the accused may have mentioned the absent witness in an interview with the police.<sup>28</sup> In such cases the prosecution is clearly on notice that there may be a witness or witnesses who could provide relevant evidence (irrespective of whether the evidence either inculpates or exculpates the accused).

### 3.6 Corroborative witnesses

As noted above, the rule does not operate to require a party to give merely repetitive evidence. This is of particular significance where police officers merely corroborate each other's evidence. In many cases however there will be tactical reasons for the defence asking that what are ostensibly 'merely corroborative' witnesses be called or made available for cross-examination.

### 3.7 Is the absent witness open to suspicion on the Crown case or on the accused's version of events?

In some cases the proposed witness might reasonably be supposed to be criminally concerned or in fact an accomplice/associated defendant.<sup>29</sup> While generally an associated defendant is not compellable to give evidence on behalf of the prosecution, he or she is compellable if tried separately from the accused<sup>30</sup> or has already been dealt with. An accomplice warning would invariably be given.<sup>31</sup>

In theory it could be argued that associated defendants tried separately from the accused should be called by the prosecution to avoid the possibility of a *Jones v Dunkel* direction unless there is a 'sufficient explanation' for not calling them. Indeed such a witness would invariably be protected by the privilege against self-incrimination and granted a certificate under s128 of the *Evidence Act 1995* (unless of course he or she has been dealt with to finality). In practice, however, many proposed witnesses that might reasonably be supposed to be criminally concerned or in fact an accomplice/associated defendant would be unwilling to co-operate with prosecuting authorities for a number of reasons such as fear of retribution.

In *Newland*<sup>32</sup> Gleeson CJ outlined factors relevant to a decision by the Crown not to call an accomplice:

- on the Crown case, Collins was an accomplice of the appellant and a warning under sec 165 of the *Evidence Act* would have been required;
- he was compellable and if called by the Crown it was possible that he could have been questioned under sec 38 of the *Evidence Act*; and
- if the Crown was unwilling to call Collins because he was regarded as unreliable then that would have been a proper reason for not calling him.<sup>33</sup>

In concluding that this was not a case where a *Jones v Dunkel* direction was required, but rather an instruction to the jury to refrain from speculation as to why Collins and Paul Newman were not called, Gleeson CJ stated:

In some cases the question of who might reasonably be expected to call a witness might be answered simply as a matter of common-sense. In other cases, of which the present is an example, it might be a question the answer to which is far from simple. Cases of that kind require a deal of caution before *Jones v Dunkel* is involved.<sup>34</sup>

Such a direction might more readily be given where the proposed witness has not been charged and is therefore not an 'associated defendant'.

### 4. *Jones v Dunkel* directions against the defence for witnesses other than the accused

As noted above, although the principles in *Jones v Dunkel* apply to criminal, as well as, civil trials, courts have emphasised the need for caution in such cases, as the witness' absence might well be explicable upon grounds not readily capable of proof:

it can be very difficult in a criminal case to know, or to explain, in a way which does not cause embarrassment or prejudice to an accused, why a particular witness is not being called.<sup>35</sup>

Moreover, it will be harder to justify a *Jones v Dunkel* direction against the defence in a criminal trial primarily because the accused has a presumption of innocence, the prosecution bears the onus of proof and has a responsibility to ensure that the prosecution case is presented with fairness to the accused.<sup>36</sup> Indeed it was

recently noted that such an expectation that the defence call a particular witness might well involve 'an inversion of the onus of proof'.<sup>37</sup>

### 4.1 Cross-examination of the accused about the absent witness

In many cases there will be a sufficient explanation for the witness' absence justifying a *Jones v Dunkel* direction not being given. Where the accused has given sworn evidence it would be very unfair to give such a direction if the accused was not cross-examined and given a chance to provide an explanation for the witness' absence, assuming this to be within the knowledge of the accused.<sup>38</sup> Potential prejudice and questions of relevance may make it desirable for such cross-examination to occur on the *voir dire*.

In *R v Donnelly*<sup>39</sup>, the CCA(NSW) held that cross-examination of the accused about persons with whom he had been drinking on the evening of the offence was 'of no particular significance' and best left alone. A *Jones v Dunkel* direction was not given by the trial judge and the CCA held that in the circumstances there was no unfairness to the accused.<sup>40</sup>

### 4.2 Alibi witnesses

As noted above, sec 48 of the *Criminal Procedure Act 1986 (NSW)* states that an accused may not, without the leave of the court, adduce evidence in support of an alibi unless formal notice of alibi has been served on the Crown. Where an accused attempts to call an alibi witness but has not given notice and leave is refused to call the witness, this would somewhat paradoxically seem to constitute a 'sufficient explanation' for the witness' absence. On the other hand, where notice has been given and a statement obtained that does not assist the accused, it would be expected that the Crown would call the witness as part of the Crown case without the need to rely on a *Jones v Dunkel* inference being drawn against the accused.

### 4.3 Circumstantial cases

There appears to be only one case in NSW where a *Jones v Dunkel* direction given against the accused regarding a missing witness (other than the accused) was undisturbed on appeal. In *R v Champaign*<sup>41</sup> the accused was convicted of five offences of defrauding the

Commonwealth. The offences occurred over seven years while the accused was an employee of the Department of Social Security. Notably, the Crown case was entirely circumstantial<sup>42</sup> heavily relying on the close correspondence between the accused's movements and the time and location of withdrawals made from accounts set up to receive the funds.

In one particular instance the accused gave evidence that she could not have been responsible for a withdrawal in Sydney as she was in Maitland at a funeral. In evidence she nominated her father (since deceased) and his solicitor as being with her at the funeral but could not call anyone who remembered her being at the funeral and her name did not appear in the condolence register at the funeral. Moreover, her notice of alibi did not identify the solicitor as a person who could support her alibi. A *Jones v Dunkel* direction was given in respect of the father's solicitor.

#### 4.4 Co-accused

Sub-section 20(4) of the *Evidence Act 1995 (NSW)* seems to allow a co-defendant to suggest that the defendant's spouse etc did not give evidence because the defendant is guilty of the offence charged and the spouse etc believes that the defendant is guilty. Surprisingly, the sub-section does not provide for situations where there is 'sufficient explanation' for the absence of the spouse etc. It is suggested that the making of such comment should, in practice at least, be extremely rare for the following reasons:

- the usual dangers of running a 'cut-throat' defence;
- the rules applying to the application of *Jones v Dunkel* in a criminal trial, especially against an accused; and
- the highly and unfairly prejudicial nature of such a comment and the difficulty if not impossibility of the judge neutralising such prejudice by 'commenting on such a comment' (sec 20(5)).

#### 4.5 Where the witness is open to suspicion on the Crown case or on the accused's version of events

The NSW CCA recently noted that it will rarely be appropriate for *Jones v Dunkel* direction to be given against an accused where the absent witnesses are themselves open to suspicion on the Crown case or on the accused's account of

events.<sup>43</sup> If such a direction is to be given the jury's attention should be drawn to the following matters:

- the witness would have been entitled to claim privilege against self-incrimination. The question of a certificate<sup>44</sup> would then have arisen with uncertain outcome;
- the witness may have chosen to lie rather than either to tell the truth or claim privilege in order to distract suspicion from him or herself; and that this would or might have occurred may have been known to the accused;
- there may have been threats if the accused sought to call the witness or fear of retaliation if he or she did. If that was the case the accused may have thought it unwise to disclose the explanation for not calling the witness; and
- there may be an explanation that has not been disclosed because the accused has reasons for not disclosing it, especially where the absent witnesses are members of the accused's family – 'one cannot know what under-currents might have come to bear on such a decision'.

Given the numerous qualifications that would need to be given with such a direction, the potential for confusion of the jury to the extent that they are distracted from the real issues to the prejudice of the accused is manifest. In many cases it would be desirable to direct the jury to refrain from speculating at all about the reasons for absent witnesses not giving evidence.<sup>45</sup>

#### 4.6 Cases where the accused bears the onus of proof

Despite the numerous authorities dealing with *Jones v Dunkel* in a criminal trial, there do not appear to be any authorities dealing with the situation where, in a criminal trial, the accused bears the onus of proof. A common example is a case of supply prohibited drug where the prosecution relies upon the deeming provision. Once the prosecution proves beyond a reasonable doubt that the accused had in his or her possession not less than the trafficable quantity of the particular drug, the accused must then prove on the balance of probabilities that he or she had the drugs in their possession

'otherwise than for the purposes of supply'.<sup>46</sup> In this regard the accused might then be considered to bear an onus similar to that of a plaintiff in civil proceedings.

Nevertheless, even where the accused bears the onus, the prosecution still has an overriding duty to conduct its case with fairness to the accused and there remains the presumption of innocence and the right to silence:

an accused person has a privileged position compared to litigants in civil proceedings. In particular the latter do not have the benefit of the presumption of innocence or the right to silence.<sup>47</sup>

It might be argued that because the accused bears the onus of proof, the rules relating to the application of *Jones v Dunkel* against an accused should be relaxed. In this regard it could be said that where the onus is reversed, there is a presumption of guilt rather than innocence. Additionally, most cases where the onus is reversed are circumstantial ie the tribunal of fact is being asked to infer guilt from the circumstance that the accused had in his or her possession a specified quantity of drugs or in a goods in custody case, an item of property reasonably suspected of being stolen or otherwise unlawfully obtained. However, because it is a criminal trial, the stakes are substantially higher than that of the litigant in a civil trial:

The peril of liberty and the risk to reputation have imposed on criminal trials over the centuries a rigorous discipline so that procedural requirements are strictly complied with ... Rules of practical commonsense and flexibility, which have become increasingly acceptable in civil trials, must be viewed with reservation and care in the context of criminal trials<sup>48</sup>.

Moreover, where the absent witness(es) 'are themselves open to suspicion on the Crown case or on the accused's account of events' the principles in *Zrieka* (above) apply.

Accordingly it is submitted that the mere reversal of the onus does not lessen the strict rule relating to the giving of a *Jones v Dunkel* direction against the accused. Where there is a chance of a *Jones v Dunkel* direction being given against the accused, it would be desirable that the Crown call the witness if only to make him or her available for cross-examination by the accused.

## 5. Conclusions

It is arguable whether the rule in *Jones v Dunkel* is applicable in any case other than a circumstantial case, be it civil or criminal, given that the decision concerned the drawing of inferences from facts proved by direct evidence as opposed to the mere absence of a possible witness without sufficient explanation. In relation to criminal cases, this argument has considerable support given that the only case in NSW where a *Jones v Dunkel* direction against the accused was undisturbed on appeal arose from a circumstantial case.<sup>49</sup> However, in view of the numerous authorities relating to the duties of the prosecution to call material witnesses, it is very doubtful whether the application of *Jones v Dunkel* against the Crown should be limited to circumstantial cases. Given the presumption of innocence, the fact that the prosecution nearly always bears the onus of proof and has a responsibility to ensure that the prosecution case is presented with fairness to the accused, it is submitted that the Crown bears a very heavy burden in seeking to deflect, at the very least, a *Jones v Dunkel* direction in respect of an absent witness without sufficient explanation.

1 *RPS v R* (2000) 168 ALR 729, *Azzopardi v R; Davis v R* (2001) 179 ALR 349  
 2 (1958-1959) 101 CLR 298  
 3 id at 308, 312. See also *Dilosa v Latec Finance Pty Ltd* (1966) 84 WN(Pt 1)(NSW) 557 at 582  
 4 Heydon, J, *Cross on Evidence* (6th ed), Butterworths, Sydney, 2000 at paragraph 1215  
 5 *RPS v R* (supra) at 737  
 6 *Brandt v Mingot* (1976) 12 ALR 551  
 7 *R v Buckland* [1977] 2 NSWLR 452 at 459 per Street CJ  
 8 *R v Champain*, (Unreported, Court of Criminal Appeal; 5 December 1997); *Taufua* [1999] NSWCCA 205; *R v Zreika* [2001] NSWCCA 57; *R v Newland* (1997-1998) 98 A Crim R 455; *Scott* [2000] NSWCCA 187. In all these cases (apart from *Champain*), the convictions were quashed and a new trial ordered  
 9 *Weissensteiner v The Queen* (1993) 178 CLR 217  
 10 *RPS* (supra); *Azzopardi*; *Davis* (supra).  
 11 *Kneebone* [1999] NSWCCA 279; *Richardson v The Queen* (1974) 131 CLR 116 at 119; *R v Apostilides* (1984) 154 CLR 563; DPP(NSW) *Prosecution Policy 15 – Witnesses*; New South Wales Barristers' Rules 62, 66B  
 12 *RPS v The Queen*; op. cit. at para 29 per Gaudron ACJ, Gummow, Kirby and Hayne JJ. Callinan J held (at para 111) that there is 'no doubt' that that a *Jones v Dunkel* direction may given against the Crown and that the need for such a direction will be heightened by the Crown's responsibility to present its case with fairness.  
 13 *Apostilides* (1984) 154 CLR 563 at 575  
 14 In *Fabre v Arenales* (1992) 27 NSWLR 437 at 450 the Court noted that 'a party is not, under pain of detrimental inference, required to call a witness 'blind'.  
 15 Section 66 *Evidence Act 1995 (NSW)*; *Lee v The Queen* [1998] HCA 60  
 16 Section 48 *Criminal Procedure Act 1986 (NSW)*  
 17 See for example '3.3 – Unreliable witnesses'.

Moreover, where an accused has a reasonably solid alibi the Crown should be considering 'No billing' the matter or where a bill has been found, discontinuing the proceedings.

18 *R v Kirby* [2000] NSWCCA 330  
 19 Refer also '3.4 – Is the proposed witness compellable to give evidence for the Crown?'  
 20 *Kneebone*; op. cit. at para 49  
*Apostilides* (1984) 154 CLR 563 at 576  
 21 ibid; *Whitehorn v The Queen* (1983) 152 CLR 657. DPP(NSW) *Prosecution Policy 15 – Witnesses*  
 22 *Kneebone* op. cit. cf New South Wales Barristers' Rule 66B(h) and Law Soc.of NSW 'Revised Professional Conduct and Practice Rules', A.66B(h)  
 23 *Kneebone*; op. cit. at paragraph 51, 52  
 24 *R v Adam* [2001] HCA 57  
 25 Note that in respect of civil cases, it has been held that a *Jones v Dunkel* inference may not arise if a witness has a reason for not telling the truth or refusing to assist the party who calls them – *Fabre v Arenales* (1992) 27 NSWLR 437; the authority of this decision would seem to be in doubt given *Adam* and the fact that sec38 applies to both criminal and civil trials.  
 26 Section 18 *Evidence Act 1995 (NSW)*  
 27 See for example *R v Champain*, (Unreported, Court of Criminal Appeal; 5 December 1997); 5.12.97; *R v Zreika* [2001] NSWCCA 57; *R v Donnelly* [2001] NSWCCA 394  
 28 See above 3.2 *Alibi witnesses* esp. *R v Kirby* [2000] NSWCCA 330 where the accused named his wife as a possible alibi and police obtained a statement yet she was not called to give evidence.  
 29 *The Evidence Act 1995 (NSW)* refers to 'associated defendants' as defined in Part 1 of the Dictionary to the Act.  
 30 Section 17(3) *Evidence Act 1995(NSW)* (subject to secs18,19 *Evidence Act 1995(NSW)*).  
 31 Section 165(1)(d) *Evidence Act 1995(NSW)*.  
 32 (1997-1998) 98 A Crim R 455  
 33 It might also be noted that if Collins' or Paul Newlands' evidence merely corroborated Floyd's evidence this would also appear to constitute a sufficient explanation for their not being called – Heydon, J D *Cross on Evidence* (6th ed) Butterworths, Sydney, 2000 at para 1215.  
 34 *Newland*; op. cit. at 462  
 35 *Champain*; op. cit. at 8 per Gleeson CJ  
 36 *RPS v R* (supra) at para738, 756; *Weissensteiner v The Queen* (1993) 178 CLR 217; *Taufua* [1999] NSWCCA 205  
 37 *Taufua* id. per Carruthers J at para 49  
 38 *Browne v Dunn* (1894) 6 R 67 (HL)  
 39 [2001] NSWCCA 394  
 40 Refer also to *R v Kirby* [2000] NSWCCA 330 discussed above – 3.2 *Alibi witnesses*.  
 41 CCA(NSW), unrep; 5.12.97  
 42 In this regard it should be noted that the only case in which a *Jones v Dunkel* direction in respect of an accused's failure to give evidence has been undisturbed by the High Court was also entirely circumstantial – *Weissensteiner* (1993) 178 CLR 217.  
 43 *R v Zreika* [2001] NSWCCA 57 at paragraph22  
 44 Section 128 *Evidence Act 1995(NSW)*.  
 45 *R v Newland* (1997-1998) 98 A Crim R 455  
 46 Sections 25, 29 *Drug Misuse and Trafficking Act 1985 (NSW)*. Although *Zreika* was a case of 'deemed' supply, the issue of the absent witnesses arose in relation to the question of possession and as such the prosecution bore the onus of proof.  
 47 *Taufua* at para 53. Indeed an accused may discharge the onus relying exclusively on the evidence of the Crown case – *Fong*; (Unrepted, NSW Court of Criminal Appeal, 29 November 1996)  
 48 *R v Birlut* (1995) 39 NSWLR 1 at 5 per Kirby P  
 49 *R v Champain*, (Unreported, Court of Criminal Appeal; 5 December 1997)

# Section 106 of the Industrial Relations Act 1996

## A source of jurisdictional conflict

By Malcolm Holmes QC and Andrew Bell

### Introduction

Recent issues of the *New South Wales Law Reports* have contained a number of important decisions in relation to the operation of sec 106 of the *Industrial Relations Act 1996*<sup>1</sup> (‘the 1996 Act’) (formerly sec 275 of the *Industrial Relations Act 1991*, ‘the 1991 Act’, and ‘the modern equivalent of the old 88F of the *Industrial Arbitration Act 1940*’<sup>2</sup>, ‘the 1940 Act’).

Section 106 and its predecessors have been recognised as powerful tools available to be deployed by a claimant in the Industrial Relations Commission sitting in court session (‘the Commission’).<sup>3</sup> Sitting in court session, the Commission enjoys ‘equivalent status’ to that of the Supreme Court of New South Wales<sup>4</sup>. The High Court and the Court of Appeal ‘have repeatedly stressed the very wide discretion conferred... [by sec 106 upon the

Commission, and that once the section] attaches, the remedies which are then at the disposal of the Commission ... are also extremely wide’<sup>5</sup>.

It has been said of the section that it ‘acts with drastic and pervasive effect. It certainly plays havoc with the classical principles relating to contracts.’

may become so over time or by reference to parties’ conduct, and as such come within the Commission’s reach.<sup>8</sup> The interpretation of the word ‘industry’ is notoriously broad.<sup>9</sup>

Because of the expansive interpretation afforded by the Commission to the meaning of ‘industry’, and to the scope of its powers generally, recourse to the Commission in what might be styled ‘common garden-variety’ commercial disputes has increased. A recent example illustrates the point. In *Metrocall*, proceedings under sec 106 were commenced by a company, Electronic Tracking Systems Pty Limited, with regard to a licensing agreement between it and Metrocall in connection with the installation, marketing, leasing, operation and maintenance of a particular tracking system. The license agreement was contained in a contract with provided for arbitration in Texas with Texan law nominated as the governing law. Notwithstanding these provisions and the entirely commercial nature of the arrangement, the Commission not only treated the dispute in relation to this contract as involving work ‘in an industry’ within the meaning of sec 106 but held that the dispute was one which was ‘incapable of settlement by arbitration’ within the meaning of sec 7 of the *International Arbitration Act 1974* (Cth).

The potential impact of the jurisdiction is seen in the recent acknowledgement by the Commission that ‘outcomes in proceedings under sec 106 in favour of applicants are now in some cases being measured in millions rather than thousands of dollars.’<sup>10</sup>

### Jurisdictional conflict

The existence of the ‘unfair contract’ jurisdiction and its wide-ranging potential attendant remedies has long been a source of jurisdictional conflict. The main reason

for the jurisdictional conflict is that the jurisdiction of the Commission under sec 106 is *exclusively* vested in it. It is a statutory jurisdiction which is not invested in the Supreme Court. Conversely, being a creature of statute, the Commission has no general jurisdiction to entertain disputes to enforce contracts or to award damages for breach of contract or specific performance in addition to or in lieu of damages. The legislature has ignored suggestions by the Commission that when dealing with any contract, condition or arrangement under sec 106 it should be ‘empowered to consider *any other claim* arising out of the same contract, condition or arrangement and be empowered to grant relief accordingly’.<sup>11</sup>

Initially the conflict was seen to arise where parties to proceedings in the Commission were engaged in litigation elsewhere. Sometimes, in answer to, or in anticipation of, proceedings in the Supreme or Federal Courts, proceedings are commenced in the Commission seeking to have the very contract the subject of the Supreme or Federal Court proceedings (or anticipated proceedings) quashed or varied. Sometimes, the order of commencement is reversed and anticipatory Supreme or Federal Court proceedings are commenced by putative defendants in the Commission. This strategy has frequently generated and will continue to generate an undesirable situation for litigants in the sense that competing jurisdictions may be seized of essentially the same subject matter. Where this occurs, and there are concurrent proceedings in the Supreme or District courts of New South Wales or the Federal Court of Australia, on the one hand, and the Commission, on the other, a significant procedural impasse arises.

### Staying or restraining

#### Supreme Court proceedings

The Supreme Court has an inherent power to make orders to ensure that the pursuit of its ordinary procedure by litigants does not lead to injustice and for this purpose to grant a stay of proceedings whether permanent or temporary upon such terms and conditions as may seem appropriate<sup>12</sup>. This power extends to staying proceedings within the Court for the purposes of the prosecution of proceedings in another court, if injustice would be occasioned in the absence of such an order. However, the power is

exercised sparingly and a stay not lightly granted. The general considerations to be taken into account where a court is faced with concurrent proceedings were described by Lockhart J in *Sterling Pharmaceuticals Pty Limited v The Boots Company (Australia) Pty Limited*<sup>13</sup> as including:

- i Which proceedings was commenced first.
- ii Whether the termination of one proceeding is likely to have a material effect on the other.
- iii The public interest.
- iv The undesirability of two courts competing to see which of them determines common facts first.
- v The circumstances relating to witnesses.
- vi Whether work done on pleadings, particulars, discovery, interrogatories and preparation might be wasted.
- vii The undesirability of substantial waste of time and effort if it becomes a common practice to bring actions in two courts involving substantially the same issues.
- viii How far advanced the proceedings are in each court.
- ix That the law should strive against permitting multiplicity of proceedings in relation to similar issues.
- x A general balancing of the advantages and disadvantages of each party.

Accordingly, the Supreme Court has stayed its proceedings where the ‘demands of justice dictate’<sup>14</sup> that the party should have an opportunity of having its claim brought before and determined by the Commission. The Federal Court has also acted to stay its proceedings to allow the Commission to first determine its proceedings.<sup>15</sup>

The existence and availability of relief in the Commission not otherwise available in the Supreme Court is sometimes relied a significant factor in granting a stay of Supreme Court proceedings.<sup>16</sup> The existence of proceedings in the Commission is not sufficient to obtain a stay of a judgment regularly obtained in the Supreme Court.<sup>17</sup> It is ultimately a delicate matter of considering the interests and conduct of the parties in deciding

whether or not to grant a stay and whether or not there is a concurrent consideration of the same facts in a different legal guise.<sup>18</sup> The fact that the Supreme Court (or District Court for that matter) accedes to a stay application<sup>19</sup> pending the hearing of the Commission proceedings does not entitle a party, if otherwise not lawfully entitled, to an injunction to maintain the status quo pending the conclusion of the Commission proceedings.<sup>20</sup>

In a case in 1979 the Supreme Court acted to support the Commission’s jurisdiction when it granted an interlocutory injunction restraining a party from exercising its legal rights ‘on the footing of protecting the [applicant’s] rights to have his application determined by the Industrial Commission in the circumstances as they presently exist rather than in completely altered circumstances which may well operate in a practical sense to deprive [the applicant] of the proper measure of relief which might otherwise be...[available in the Commission]’<sup>21</sup>. This supportive attitude did not last and six months later the Supreme Court held that ‘the principles of equity provide no justification to restrain acts which neither infringe some legal, equitable or statutory rights...nor are otherwise unlawful’.<sup>22</sup> Nor, as observed above, could the plaintiff call in aid an interlocutory injunction to protect a right to final relief in the Commission. This view correctly recognises that the applicant for relief under s.106, no matter how meritorious, is not possessed of a right to an order. Section 106 ‘does not of itself confer any rights or obligations on anyone...[an applicant] has the right to apply for an order, nothing more.’<sup>23</sup>

### Restraining Commission proceedings

Another procedural tool that has been deployed in cases where proceedings have been on foot in both the Supreme Court at the Commission is the anti-suit injunction. In *Tszyu v Fightvision*<sup>24</sup>, the Court of Appeal upheld a decision of Hunter J<sup>25</sup> restraining Tszyu from proceeding in the Commission in circumstances where the relief sought in the Commission in terms sought to unwind an earlier decision of the New South Wales Court of Appeal<sup>26</sup> in relation to a contract dispute between the same parties and when Tszyu had eschewed the opportunity (for perceived tactical reasons) to pursue his Commission action prior to the three week trial in the

Supreme Court. The facts of this case were somewhat unusual and it is suggested that the use of anti-suit injunctions to break the jurisdictional impasse that may be presented by concurrent Supreme Court and Commission proceedings will be rare.

It should be noted that the principles that apply to the grant of a stay of proceedings in circumstances of concurrent or overlapping issues (which may entail matters of case management) are not the same as for the grant of anti-suit injunctions<sup>27</sup> and, in order to obtain the latter form of relief, it is necessary to establish that the ‘foreign proceedings are vexatious or oppressive’, as that phrase has been explained in the cases.<sup>28</sup>

### Cross-vesting

Before turning to consider legislative solutions to the dilemma of factually overlapping, but not legally concurrent, jurisdiction, a further scenario touched on above needs to be considered in more detail, namely a circumstance where there are proceedings pending in the Federal Court or the Supreme Court of another State, whether additionally or alternatively to proceedings in the Supreme Court of New South Wales, and which overlap factually with proceedings in the Commission.

A body of case law has emerged<sup>29</sup> whereby the mechanism of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* has been deployed to have Commission proceedings transferred to the Supreme Court of New South Wales either for them to be determined by the Supreme Court or for them to be then cross-vested to the Supreme Court of another State or the Federal Court (although this last possibility, namely transfer to the Federal Court, is not available after *Re Wakim ex parte McNally*<sup>30</sup>). This body of case law entails the ultimate consequence that the Supreme Court of another State may be invested with jurisdiction, via sec 8 of the *Jurisdiction of Courts (Cross-Vesting) Act* to hear proceedings under the *Industrial Relations Act 1996* in circumstances where the Supreme Court of New South Wales has been given no such jurisdiction directly.

There are certainly cases, pre-*Wakim*, where Commission proceedings have been cross-vested to the Federal Court. In *Adamson v NSW Rugby League Ltd*<sup>31</sup>, orders under sec 8 of the cross-vesting legislation were obtained by consent from

the Supreme Court removing the proceedings to the Supreme Court and then orders were made under sec 5 removing those ‘Supreme Court’ proceedings to the Federal Court. Interestingly notice was given to the State and Commonwealth attorneys-general pursuant to sec 78B of the *Judiciary Act 1903* of an anticipated argument that, were the Federal Court to exercise the powers of the Commission, this would be an exercise of a non-judicial power (by virtue of the nature of the then sec 88F jurisdiction) and the cross vesting legislation did not operate validly to vest non-judicial power in the Federal Court. Ultimately no such argument was advanced and the Federal Court proceeded to determine the case under sec 88F of the 1940 Act<sup>32</sup>.

In an early (unsuccessful) application to achieve this result, *Wood v Boral Resources (NSW) Pty Ltd*<sup>33</sup>, which has since not been followed in other (necessarily) first instance decisions (necessarily because there is no right of appeal from a cross-vesting decision save, perhaps, a constitutionally entrenched right to seek special leave to appeal to the High Court), McLelland J observed:

the jurisdiction under sec 275 is, by the Industrial Relations Act, conferred solely on a specialist Court, namely the Industrial Court, established primarily to deal with matters relating to industrial relations. The importance of the specialised nature of the Court is emphasised by the

use of such a wide criterion as ‘against the public interest’ in para(c) of subs (1), reinforced by the inclusion in the content of that expression of the matters described in subs (2), and also by the additional powers in proceedings under sec 275 conferred on the Industrial Court by sec 276. It is apparent that the legislature considered it appropriate that the wide discretionary powers arising under sec 275 should, at least primarily, be exercised by a Court whose members had specialised knowledge and experience in the area of industrial relations. It is significant that the powers of the Industrial Court under sec

275 cannot be exercised by any other New South Wales court including the Supreme Court. It would therefore be somewhat anomalous if the mechanism of the Cross-Vesting Act were to be used to transfer proceedings properly pending in the Industrial Court to which its specialised nature is highly relevant, to another court of relevantly un-specialised jurisdiction or composition, whose eligibility to receive such a transfer depends upon the fact that it is not a New South Wales court.

This question whether and, if so, by what criteria Commission proceedings may be removed into the Supreme Court of New South Wales for the purposes of transfer to the Supreme Court of another State has recently been referred to the Court of Appeal by Einstein J.<sup>34</sup> The process of referral to the Court of Appeal had been earlier followed in *James Hardie v Brear*<sup>35</sup> where the Court had to consider whether or not proceedings in the Dust Diseases Tribunal could and should be transferred to the Supreme Court of Queensland. The Court, whilst holding that they could be so transferred, held that the procedural advantages afforded by the *Dust Diseases Tribunal Act 1989*, not available in Queensland, made it inappropriate to transfer proceedings.

If it be correct, as Austin J held in *Heath v Hanning*<sup>36</sup>, that Commission proceedings may be transferred to the Supreme Court in anticipation of related Federal Court proceedings also being transferred to that Court, then it is a curious feature of this jurisdiction that the Court of Appeal (as well as appellate courts in States where matters have been cross-vested) will have, on that scenario, appellate jurisdiction to consider the result of any determination of the Supreme Court of an application under sec 106 which has been removed to it and yet may no longer have even supervisory jurisdiction over any such decision by the Commission.

There is no scope, either in the *Supreme Court Act 1970* or in the 1996 Act, for a direct transfer of proceedings from one court to the other. Similarly there is no scope for a Supreme Court matter and a Commission matter converging through a common appellate tribunal. Even the Court of Appeal’s supervisory jurisdiction, which was regularly invoked under the 1940 Act and the 1991 Act, now seems questionable. The privative provisions of the 1940 Act and the 1991

Act were held, as a matter of their construction,<sup>37</sup> not to be a bar to the Court of Appeal’s supervisory jurisdiction or to its power to issue orders of prohibition or certiorari in appropriate cases. The Court emphasised that the then privative provision, sec 301, only applied to a ‘lawful decision’<sup>38</sup> and did not apply if there was no jurisdiction for the Commission’s decision or where the Commission’s decision exceeded its jurisdiction.

On one construction, the current privative provision would oust the supervisory jurisdiction of the Court of Appeal completely. The new privative provision, sec 179, applies additionally to ‘purported’ decisions and the prohibition now extends to calling in question the purported decision whether ‘on an issue of fact, law, jurisdiction or otherwise’. Further, in the second reading speech which led to the 1996 Act, it was said that sec 179 of the 1996 Act which deals ‘with the finality of decisions is a *bolstered version* of the privative clause [previously] contained in the 1991 Act. The Government [being] of the view that where a specialist court or tribunal is established to deal with a particular area of the law then that is the forum where the particular body of law ordinarily should be determined’<sup>39</sup>.

The Court of Appeal whilst recognising that such an argument exists, has not yet found it necessary to decide this vexed question of jurisdiction and has dismissed all challenges to decisions under the 1996 Act on other grounds.<sup>40</sup> It may safely be said that the circumstances (if any) in which application may be made to the Court of Appeal in respect of a decision under sec 106 of the 1996 Act are extremely limited.

The decision in *Resarta*, if adopting the ‘cross-vesting’ technique, will only go some limited distance (and then by a somewhat artificial and indirect route) to answering the problems presented by the exclusivity of the sec 106 jurisdiction. If the Court of Appeal holds that the cross-vesting technique is not available, the only technique practically available to parties is grant of a stay (either of Supreme Court or Commission) of proceedings.

**Solutions**

A number of possibilities arise. First, one legislative solution would be the concurrent investment of jurisdiction

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under sec 106 in the Supreme Court of New South Wales. That would at least mean that there would be one Court which could hear all aspects of a dispute involving sec 106 unfair contract issues as well as related attempts to enforce the unamended contract. Alternatively, a pendent jurisdiction, similar to the Federal Court's accrued or associated jurisdiction, could be conferred on the Commission.<sup>41</sup>

Secondly, express transfer provisions (of the kind that currently exist between the District Court and the Supreme Court and of the kind that existed prior to the Supreme Court Act in relation to common law matters and equity suits<sup>42</sup>) could be inserted into the legislation. No doubt, the test to be applied on such a transfer would draw upon the same considerations as have emerged in cross-vesting jurisprudence.

Thirdly, the current jurisdiction of the Commission under sec 106 could be removed from it entirely and invested in the Supreme Court. A variation on this solution would be to create an Industrial Division of the Supreme Court which could exercise the Commission's present jurisdiction under sec 106.

A fourth, and perhaps the most radical, potential solution would be either to eliminate or constrain the Commission's jurisdiction under sec 106. There can be no doubt that that section, as it has been interpreted over time by the Commission and its predecessors, is extraordinarily broad in its reach. In *Stevenson v Barham*<sup>43</sup>, Barwick CJ expressed doubt that it was 'within the contemplating of the legislature that agreements for business ventures ... freely entered into by parties in equal bargaining positions should be so far placed within the discretion of the Industrial Commission as to be liable to be declared void'. His Honour held, however, that the language of (then) sec 88F of the 1940 Act was intractable and was to be given effect according to its width and generality. It may be observed that Barwick CJ's surprise 25 years ago would be even greater in light of recent decisions by the Commission as to the breadth of its jurisdiction, as referred to earlier in this article.

Elimination of the 'unfair contracts' jurisdiction is most unlikely. It has long been a feature of New South Wales law and its aspiration is a commendable one. Constraining or limiting the Commission's jurisdiction, on the other hand, would reduce, if not eliminate, some of the

jurisdictional problems that have been discussed in this paper. In this context, at the time of going to press, a Bill, styled the Industrial Relations Amendment (Unfair Contracts) Bill 2002 was due to be presented to Parliament. It is designed to prevent orders under sec 106 being made in respect of 'contracts of employment' if the annual remuneration package paid or receivable under the contract exceeds \$200,000. This amendment, if passed, would affect high profile 'employee' cases such as the heavily publicised Macquarie Bank v Bell and Berg litigation. On the other hand, depending upon the manner in which the key term 'contract of employment' is interpreted by the Commission, the amendments will not eliminate resort to the Commission in commercial cases such as Metrocall in which a 'contract of employment' is not involved. In this context at least, the scope for the jurisdictional difficulties canvassed above will remain.

1 *Stone Microsystems (Australia) Pty Limited v Kuong* (1997) 42 NSWLR 160 ('Stone Microsystems'); *Kinsella v Trustees of the Camperdown Cemetery Trust* (1998) 43 NSWLR 376; *Woolworths Ltd v Hawke* (1998) 45 NSWLR 13; *Behan v Bush Boake Allen Australia Limited* (1999) 47 NSWLR 648; *Reich v Client Server Professionals of Australia Pty Limited* (2000) 49 NSWLR 551 ('Reich') and *Metrocall Inc v Electronic Tracking Systems Pty Limited* (2000) 52 NSWLR 1 ('Metrocall')

2 Per Meagher at [3] in *Fisher v Madden* [2002] NSWCA 28

3 See generally Holmes 'An historical analysis of the jurisdiction conferred on the Industrial Court' (1995) 69 ALJ 49

4 see sec152(2) of the 1996 Act

5 *Walker v Industrial Court* (1994) 53 IR 121 per Kirby P at 135

6 *Davies v General Transport Development Pty Ltd* [1967] AR (NSW) 371 at 373 per Sheldon J

7 *Stone Microsystems, and Hoffman v Industrial Commission* (1990) 30 IR 139 per Handley JA at 141-143

8 *Reich*; and see sec 106(2) which embodied in the statute the approach taken by the Court of Appeal in *Walker v Industrial Court* (1994) 53 IR 121 at 133-134 per Kirby P.

9 See Holmes, op.cit. at 56-61.

10 Emphasis added, per Wright P at [55] in *Westfield Holdings v Adams* [2001] NSWIR Comm 293 and see e.g. *Avis v Australian Mutual Provident Society* [1997] NSW IRComm 182

11 per Marks J, in *Pullen v. R & C Products Pty Ltd* (1994) 60 IR 183 at 208, emphasis added

12 see *Tringali v Stewardson Stubbs v Collett Limited* (1966) 66 SR (NSW) 335 at 344, *Williams v Williams* (1979) 1 NSWLR 376 at 386 and *BP Australia Limited v Bennett*, No.4263 of 1983 McLelland J, 17 August 1983 unreported at p5

13 (1992) 34 FCR 287

14 per Rogers J in *Alpine Finance Limited v Clarke* No.14275 of 1987, 12333 of 1983, 14 December 1983 unreported at p7 and O'Keefe J in *National Mutual Life Association of Australia v Jones*, No 50371/93, 16 August 1994, unreported and Rogers J in *AMP v Noy*, No 11416 of 1992, 6 October 1992, Butterworths, unreported judgments BC 9201569

15 *Bell v Macquarie Bank*, NG 1042 o 1997, (Unreported, Lehane J, 15 May 1997)

16 *AMP v Noy*, Rogers J, No.11416 of 1992, 6 October 1992, Butterworths Unreported Judgments.

17 *Majik Markets Pty Ltd v S & M Motor Repairs Pty Ltd*, No. 3793 of 1987, Young J, 13 October 1987, Butterworths Unreported Judgments BC8701067, see also *Richardson & Wrench Ltd v Harfield Pty Ltd*, No. 3588 of 1991, Young J, 15 July 1991, Butterworths Unreported Judgments, BC9101796.

18 Cases where a stay of proceedings in the Supreme Court has been refused include *Star League v Pay*, No 2430 of 1995, Santow J 9 June 1995 *Woodruff v De Marchi & Ors*, No. 10541 of 1995, Hidden J, 26 June 1996, *Cole v Coca Cola Amatil*, No 2305 of 1998, Master Macready 16 September 1998 and *ECC Lighting v McGurk*, No 3851 of 1993, 15 June 1995 Santow J which proceedings ultimately led to an 'estoppel' which led to the Commission proceedings being dismissed, see (1996) 82 IR 102

19 As occurred in *Beard v Caltex Oil (Australia) Pty Ltd*; (Unreported, Kearney J, 29 June 1979)

20 *Bringmann v Lend Lease Investments Pty Ltd* (Unreported, McLelland J, 4 December 1979)

21 Kearney J, 29 June 1979 *Beard v Caltex Oil (Aust) Pty Ltd* Unreported at p.3, subsequent proceedings reported in *Beard v Caltex* [1979] AR 601

22 McLelland J in *Bringmann v Lend Lease Investments Pty Limited* 4 December 1979 unreported at p.4, which was followed by *Henderson v The Taree City Bowling Club Co-Operative Ltd* 10/6/1983 unreported, No.4182 of 1983, Needham J, and *Wood v Boral Resources (NSW) Pty Ltd* 2 October 1992, No.41980 of 1992, Butterworths Unreported Judgments BC9201576, Hodgson J.

23 Meagher JA in *Fisher v Madden* [2002] NSWCA 28 at [12], and Sheller JA at [44], see also *Majik Markets Pty Ltd v Brake & Service Centre Drummoyne Pty Ltd* (1991) 28 NSWLR 443 at 461 per Mahony JA and at 467 Handley JA

24 [2001] NSWCA 103

25 [2000] NSWSC 899

26 (1999) 47 NSWLR 473

27 See *CSR Ltd v Cigna Insurance Australia Ltd* (1977) 189 CLR 345 at 397-398.

28 cf. *Pegasus Leasing v Cadrol Pty Ltd* (1996) 59 FCR 192; see also Bell and Gleeson 'The Anti-Suit Injunction' (1997) 71 ALJ 955.

29 *Winron Pty Ltd v Shell Co of Australia Ltd* (1996) 66 IR 64; *Bruning v Kingmill (Australia) Pty Ltd* (1998) 44 NSWLR 180; *Heath Group Australasia Pty Ltd v Hanning* [1999] NSWSC 719; *Macquarie Bank Ltd v Bell* [1999] NSWSC 957; *Premier Sports Australia Pty Ltd v Dodds* [2001] NSWSC 707.

30 (1999) 198 CLR 511.

31 (1991) 27 FCR 535 at 541, a similar procedure was followed in *Gallagher v Pioneer Concrete (NSW) Pty Ltd* (1993) 113 ALR 159 at 194-196 and 213

32 see p.551-553 and p.568; see also *Gallagher*, supra at 194-196 and 213.

33 No 4980/92, 28 October 1993, unreported, McLelland J and followed by Santow J in *ECC Lighting v McGurk* 15/6/95, BC 9504958

34 see *Resarta Pty Ltd v Finemore* [2002] NSWSC 75 (One of the co-authors is briefed in that matter)

35 (2000) 50 NSWLR 388

36 [1999] NSWSC 719

37 *Walker v Industrial Commission* (1994) 53 IR 121 per Kirby P at 136-138 when construing sec 84 of the 1940 Act and sec 301 of the 1991 Act.

38 *Walker*, supra., per Kirby P at 137, and not to a 'decision made without authority or beyond authority' per Sheller JA at 149

39 emphasis added, second reading speech, Hansard, 23 November 1995 at p 3852 The second reading speech of the 1995 Bill was adopted into the second reading speech of the 1996 Bill which resulted in the 1996 Act except where there had been amendments; Hansard, 17 April 1996 Legislative Council p81 at p82, see also Cahill V-P in *Rennard v. Fortran Auto Treatments Pty Ltd* NSWIR Comm 68.

40 See *Woolworths Limited v Hawke & Ors.* (1998) 45 NSWLR 13 and *Carey v Industrial Relations Commission in Court Session*, [1999] NSWCA 189, Registrar Jupp, and (2000) 109 IR 376 per Spiegelman CJ at 377.

41 See also observations of Marks J cited at fn.11 above.

42 see section 98 of the *Supreme Court Procedures Act 1957* and section 8A of the *Equity Act 1901*

43 (1977) 136 CLR 190 at 192

# Is (international commercial) arbitration ADR?

By Luke Nottage\*

In the last issue of this journal, Sylvia Emmett examined the Bar's role in Alternative Dispute Resolution, noting *New South Wales Barristers' Rule 17A* (in effect since January 2000) which requires barristers to advise on 'alternatives to fully-contested adjudication', and remarking that ADR 'has become the general term for processes by which disputes are resolved outside the court system'.<sup>1</sup> Consistently with this expansive definition of ADR, she helpfully reviewed developments such as

- compulsory court-annexed mediation under sec 110K *Supreme Court Act 1970* (NSW), in effect since August 2000;<sup>2</sup>
- sec 27 of the *Commercial Arbitration Act 1984* (NSW), whereby parties may allow an arbitrator to act as mediator, while observing the rules of natural justice (and therefore not meeting independently with parties to help promote a mediated settlement, should that person wish to revert to the role of arbitrator);<sup>3</sup>
- multi-tiered dispute resolution agreements;<sup>4</sup>
- dispute resolution by 'regulatory bodies', such as mediation or arbitration regarding use of chemicals in compounds, conducted by the National Registration Authority; and 'electronic ADR'.<sup>5</sup>

By contrast, at a recent conference in Japan, an Australian lawyer who is currently President of LEADR (Lawyers Expert in ADR), argued that ADR is restricted to 'interest-based resolution of disputes by agreement without any element of third party determination ... of legal rights', thus excluding arbitration processes.<sup>6</sup> This led to surprise and consternation among other speakers and commentators from the Asia-Pacific region, as we had explicitly or impliedly adopted the more expansive view and discussed developments in arbitration law and practice. On further reflection, the latter view appears to be more appropriate.

A useful starting point is to return to Sylvia Emmett's article, where she gives as another example of dispute resolution conducted outside the courts, by 'regulatory bodies', the procedures developed by the World Intellectual Property Organisation (WIPO). She observes that WIPO 'manages disputes arising from the regulation and registration of internet domain names by way of binding arbitrations that are often conducted on the papers only and thereby are significantly more cost effective'.<sup>7</sup> In fact, the procedures of WIPO's Arbitration and Mediation Center developed to further the Uniform Domain Name Dispute Resolution Policy (UDRP) have much less binding force than most international commercial arbitration procedures. First, a party complaining about another's illegitimate and bad faith registration of certain types of domain names ('cyber-squatting') is not bound to bring the case before WIPO; that party may instead bring the case directly to a Court having jurisdiction. Only the other party (the cyber-squatter) is bound to go through the WIPO procedure, under its contract (incorporating the UDRP) with the registrar

company which granted it the domain name. The WIPO procedure provides more limited remedies (transfer or cancellation of the domain name at issue) than most courts (which would normally also be able to award and enforce damages against the cyber-squatter). Secondly, the order rendered by the panel which WIPO appoints to decide whether there has been illegitimate registration can be 'appealed' to an appropriate court by either party, but only within 30 days.

For these two reasons, one WIPO Center official calls the procedures 'administrative'.<sup>8</sup> Yet they can still be characterised as 'arbitration'. The High Court of Australia, for example, had no difficulty in finding that an 'arbitration agreement' extended to 'an agreement whereby the parties are obliged, if an election is made, particular event occurs, step is taken or condition is satisfied (whether by either or both parties), to have their disputes referred to arbitration'.<sup>9</sup> Secondly, particularly in the Anglo-Commonwealth law tradition, arbitration has traditionally been subjected to considerable supervision by courts, even allowing reviews of arbitrator's decisions on the ground of an error in substantive law. This has not made it any less 'arbitration'; nor has the more recent tendency to restrict the grounds for court interference in an arbitral award made it any more so.<sup>10</sup> The key is that there be *some* element of binding force in the decision rendered by the 'arbitrator' for the parties.<sup>11</sup> That does occur under the WIPO procedures, albeit to a limited extent, because the WIPO order will prevail if neither party brings the complaint anew before the appropriate court in a timely fashion.

Developing this perspective, international commercial arbitration in its more conventional manifestations, following its re-emergence from the 1950s and 1960s – initially to resolve large infrastructure development disputes involving multinational companies and newly-independent states, in particular; later in disputes involving commercial parties<sup>xii</sup> – should also be seen as an important form of ADR. It has important affinities with more consensual forms (such as mediation), rather than being conceptually distinct, as suggested recently by the President of LEADR. First, the success of the UNCITRAL Model Law on International Commercial Arbitration, promulgated by the United Nations in 1985 as a template for domestic legislation, has reinforced the tendency to restrict the powers of courts to overturn arbitral awards, a trend initiated by the 1958 New York Convention on Recognition and Enforcement of Arbitral Awards. In the many jurisdictions which have adopted the Model Law in updating their international arbitration regimes (like Australia in 1990), as in many of those which have drawn more loosely on it (like England in 1996), and in jurisdictions which are expected to follow the Model Law soon (like Japan, next year), the award cannot be challenged for error of substantive law.<sup>13</sup> Even where the curial law of the arbitration proceedings allows for this sort of challenge, the realities of international commercial arbitration have created considerable scope for arbitrators to not strictly apply legal rules to resolve the dispute between the parties. International arbitrators will often sit in neutral countries and have to apply

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substantive law which they are not qualified in or are less familiar with. They also have considerable leeway in selecting the applicable law, under conflict of laws rules or the like.<sup>14</sup> Taken to an extreme, the arbitrators may choose to apply the ‘new *lex mercatoria*’. A recent empirical study demonstrates that this practice is pervasive, albeit usually to supplement international instruments or domestic law rather than to supplant those rules,<sup>15</sup> and despite the ‘new, new *lex mercatoria*’ – in the guise, for example, of quite precise UNIDROIT Principles of International Commercial Contracts – arguably representing a partial formalisation of the still evolving norms of trans-border contracting.<sup>16</sup> Finally, even more so than in domestic arbitration, international arbitrators will be aware that the parties have deliberately opted out of the national court system, where there are broader public interests in deciding cases strictly in accordance with a clear corpus of legal norms.<sup>17</sup>

If international arbitrators, in law or in practice, have a very broad margin of discretion as to whether or not to apply strict rules of law to resolve a dispute, the central issue becomes whether they do so nonetheless, and for what reasons. No doubt it depends firstly on the circumstances of the case, and in particular the type of dispute, as they try to envisage what sort of approach the particular parties (or even most parties in such circumstances) would generally want. Parties may be content with quicker, yet sometimes more ‘rough justice’ when the stakes are low,<sup>18</sup> or the business environment is growing rapidly (as in the People’s Republic of China over the last decade). Other parties may well prefer certainty and predictability, arguably better promoted by stricter application of bright-line rules,<sup>19</sup> when they are well-advised, experienced and large companies dealing in certain types of transactions, such as charterparties. Even here, however, there may be differences in local markets and legal worlds.<sup>20</sup> Arbitrators – more than judges, whose reputations (and certainly remuneration) are not so dependent on meeting the expectations of particular parties and their communities – need to be careful not to be dogmatic, but rather draw for example on a growing body of empirical work comparing practices and expectations in contractual relationships.<sup>21</sup> A second consideration may be the general reputation a particular arbitrator wants to

develop or maintain: as someone who prefers a stricter application of narrow legal rules, or someone willing to adopt a more expansive approach. This factor also seems to be important in the debate world-wide as to whether or not, and to what degree or under which safeguards, an arbitrator should actively encourage settlement.<sup>22</sup>

Thus, in low-value cross-border disputes involving transactions where bright-line rules are not readily applied, in expanding markets where developing long-term relationships is important, we might expect parties to select arbitrators known to take a less strict approach to determining and applying legal rules, and to prefer a pro-active role in encouraging early settlement.<sup>23</sup> Further, if the curial law of the arbitration provides limited grounds for having an award reviewed by the courts, attempts by the arbitrators to encourage a mediated settlement may have even more persuasive force than those by judges, since a recalcitrant

party can ignore similar attempts by judges if an appeal can be brought against adverse judgments.<sup>24</sup> Thus, some arbitration processes and resulting awards may become very much like ‘interest-based resolution of disputes by agreement’, with little or any ‘element of third party determination ... of legal rights’, which the President of LEADR suggests distinguish ADR.<sup>25</sup> In other words, at least certain types of international commercial arbitration may become so informal as to merge with some mediation processes, especially the more ‘evaluative’ processes, rather than the more ‘facilitative’ ones (where the third party tends to just paraphrase what each side says, more to defuse emotions and ensure surface understanding of issues and perceptions).

Taking this more expansive view of arbitration, as a variable and sometime overlapping part of a broad spectrum of ADR processes, then allows us to map how certain types of arbitration processes are evolving, to examine how these may influence the overall ‘world’ of arbitration, and even to note parallels or contrasts with developments in other parts of the spectrum (such as mediation). For example, empirical studies added to more anecdotal evidence of a gradual formalisation of international commercial arbitration over the 1970s and 1980s, partly due to the growing involvement of international law firms.<sup>26</sup> Yet the 1990s have seen significant counter-reactions, including revisions of arbitration laws and (more importantly) institutional rules to expedite proceedings, arguably underpinned by the emergence of many novel forms of arbitration in its broader sense, such as domain name dispute resolution procedures, cyber-arbitration, arbitration in financial transactions,<sup>27</sup> sports arbitration,<sup>28</sup> and resolution of disputes about dormant bank accounts in Switzerland.<sup>29</sup> Somewhat ironically, moreover, there has been a significant and ongoing ‘professionalisation’ of mediation, for example through the expansion of organisations such as LEADR and recent attempts to standardise certification,<sup>30</sup> which could result in significant formalisation of these originally very informal processes. In addition, there has been an upsurge in the use of court-annexed mediation in the Asia-Pacific region, which aims of course at consensual resolution by parties, but occurs – to greater or lesser degrees – in the shadow of formal judicial court adjudication.

These are issues examined in new courses at the University of Sydney Law Faculty, and to be explored further in its Continuing Legal Education seminar on ‘Arbitration and ADR in Australasia’ on 12 June. They are also related to the theme of the inaugural Clayton Utz International Arbitration Lecture co-hosted by the Faculty, to be delivered by Lord Mustill on 11 June in the Banco Court.<sup>31</sup> To set the stage for such broader debates, and better to ensure that barristers in New South Wales are able to fulfill their new duty under Rule 17A, arbitration should be (re-)situated as an important part of ADR, although not necessarily its centerpiece.

1 Sylvia Emmett ‘The Bar in mediation and ADR’ *Bar News* [Summer 2001/2002] 25 at 25

2 See also David Spencer ‘Mandatory mediation in New South Wales: Further observations’ [August 2001] *Australasian Dispute Resolution Journal* 141; *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 427

3 See Michael Redfern ‘The mediation provisions of section 27 of the Commercial Arbitration Acts’ [August 2001] *Australasian Dispute Resolution Journal* 195.

4 See also Michael Pryles ‘Multi-tiered dispute resolution clauses’ 18(2) *Journal of International Arbitration* (2001) 159; *Computershare Ltd v Perpetual Registrars Ltd (No 2)* (*Computershare*) [2000] VSC 233

5 See also Roger Alford ‘The virtual world and the arbitration world’ 18(4) *Journal of International Arbitration* (2001) 449

6 Gerald Raftesath ‘Alternative dispute resolution in Australia’, paper presented at

Taking this more expansive view of arbitration, as a variable and sometime overlapping part of a broad spectrum of ADR processes...

- the international symposium on civil and commercial law: ADR in Asian and Pacific countries – Now and in the future, hosted by the International Civil and Commercial Law Foundation and Japan's Ministry of Justice, Osaka, 15 February 2002, at 3
- 7 Above note 1 at 25-26. It resolves disputes under generic Top Level Domains ('gTLDs' such as .com, .net, and the new ones like .info), and under country-code TLDs ('ccTLDs' such as .tv for Tuvalu, and several other states in the Pacific) when nominated by that country. See <<http://arbitrator.wipo.int/center/index.html>>
- 8 Tsutomu Takahashi 'The WIPO Internet domain name online dispute resolution experience', paper presented to the Ministry of Justice Legal Research and Training Institute course, Osaka, 20 February 2002
- 9 *PMT Partners Pty Ltd v Australian National Parks & Wildlife Service* (1995) 184 CLR 301 at 323 (Toohey and Gummow JJ)
- 10 Cf Justice Keith Mason 'Changing Attitudes in the common law's response to international commercial arbitration' 18/2 *The Arbitrator* (1999) 73
- 11 Gabrielle Kaufmann-Kohler & Henry Peter 'Formula 1 racing and arbitration: The FIA tailor-made system for fast track dispute resolution' 17(2) *Arbitration International* (2001) 173.
- 12 Luke Nottage 'The vicissitudes of transnational commercial arbitration and the *lex mercatoria*: A view from the periphery' 16 *Arbitration International* (2000) 53 at 59.
- 13 Respectively, compare art 34 of Schedule 2 of the *International Arbitration Act 1974* (Cth) and the list of 34 other model law jurisdictions at <<http://www.uncitral.org/english/status/status-e.htm>>; see 69 of the English *Arbitration Act 1996*; and 'Arbitration Law Reform Underway' [February 2002] 13 *JCA Newsletter* 7.
- 14 Pierre Mayer 'Reflections on the international arbitrator's duty to apply the law (The 2000 Freshfields Lecture)' 17(3) *Arbitration International* (2001) 235 at 240-1.
- 15 Klaus Peter Berger (ed) *The Practice of Transnational Law* (Kluwer Law International, The Hague et al, 2001); reviewed by Luke Nottage in 19 *Journal of International Arbitration* (forthcoming, 2002).
- 16 Nottage, above note 12 at 60. Compare Yves Fortier 'New trends in governing law: The new, new *lex mercatoria*, or, back to the future' 16 *ICSID Review* (2001) 10
- 17 Mayer, above note 14 at 237.
- 18 Compare eg Alford, above note 5.
- 19 Mayer, above note 14 at 243.
- 20 Compare eg *Star Steamship Society v Beogradska Plovidra* [1988] 2 Lloyd's LR 583 (*The Junior K*) and *Great Circle Lines v Matheson* (1982) 681 F 2d 121 (2d Cir).
- 21 See eg Luke Nottage, 'Planning and renegotiating long-term contracts in New Zealand and Japan: An interim report on an empirical research project' [1997] *New Zealand Law Review* 482
- 22 So, for instance, if parties want a Japanese arbitrator who actively encourages settlement, they could select Emeritus Professor and ICC Court Vice-President Toshio Sawada, who has signalled a preference in this regard (see for example 'ADR to wa – 'Chusai' to 'Chotei' no Kisochishiki [What is ADR? Basic Knowledge about 'Arbitration' and 'Mediation']' <<http://www.adr.jp/columns/index.html>>). If they want someone who is cautious about this role, they could select Professor Yasuhei Taniguchi, now a Judge on the Appellate Body of the WTO ('Settlement in International Commercial Arbitration' [1999] 4 *JCA Newsletter* <<http://www.jcaa.or.jp/e/arbitration-e/syuppan-e/newslet/newslist.html>>).
- 23 In other situations, stricter approaches may be expected and provided. Compare eg Stephanie Keer & Richard Naimark 'Arbitrators do not 'split the baby': Empirical evidence from International Business Arbitrations' 18(5) *Journal of International Arbitration* (2001) 573
- 24 This point struck the author when advising a New Zealand defendant in a case recently before a Japanese court. Following the German law tradition, Japanese judges have long encouraged settlement in civil proceedings. Yet despite the proceedings unfolding in a manner unfavourable to the Japanese side in this case, the plaintiff expressed no inclination to engage in either negotiation or mediation, and has appealed the case despite the first-instance court only awarding one percent of the amount claimed. If the matter had been subjected to arbitration and proceedings had developed in a like manner, with no possibility of appeal for error of law (which is the situation even under current arbitration legislation in Japan), the plaintiff might have adopted a more conciliatory stance.
- 25 Above note 6.
- 26 Nottage, above note 12 at 62-4.
- 27 Christopher Style & Stuart Dutton, 'Arbitration, international commerce, and international finance: Safety first' 1(1) *International Trade and Business Law Bulletin* (2000) 55-57
- 28 Robert Glasson 'Appeals from the Court of Arbitration for Sport: *Angela Raguz v Rebecca Sullivan & Ors* [2000] NSWCA 240' [Summer 2000/2001] *Bar News* 20-21; Kaufmann-Kohler & Peter, above note 11
- 29 Thomas Buergethal, 'Arbitrating entitlements to dormant bank accounts' 15/2 *ICSID Review* (2000) 301
- 30 See for example National Alternative Dispute Resolution Advisory Council (NASDAC), *The Development of standards for ADR: Discussion paper* (Canberra ACT, 2000)
- 31 For further details see the author's website at <<http://www.law.usyd.edu.au/~luken/arbitration.htm>>

# SEMINAR

## ARBITRATION AND ADR IN AUSTRALASIA

Seminar  
Wednesday 12 June 2002  
4.30 pm – 6.30 pm  
at Faculty of Law,  
173 Phillip Street



Faculty of Law  
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# The courts and public opinion

*The following address was delivered by the Hon Sir Anthony Mason AC KBE, at the National Institute of Government and Law's inaugural public lecture on 'The Courts and Public Opinion'. The lecture was held at Parliament House, Canberra, on 20 March 2002.*

## Introduction

There are two sides to this topic. The first is what account, if at all, do the courts take of public opinion? The second is what opinion does the public have of the courts? My remarks are directed to the first rather than the second aspect of this interaction. It is not possible, however, to segregate the two aspects because, as will appear, the public's perception of the courts and what the courts do are matters which are, in some respects, not entirely unrelated to the making of judicial decisions

and the factors which judges consider in making their decisions. Because the courts are concerned with maintaining public confidence in the administration of justice, judges cannot dismiss public opinion as having no relevance at all to the work of the courts.

### Judicial attitudes to public opinion

As with other aspects of the law, the relationship between the courts and public opinion is undefined. Because it is undefined, it is not well understood, not only by lay people but also by lawyers and politicians.

#### a. The law is the law is the law

The traditional judicial view of the relationship between the law and public opinion was summed up in the line 'The law is the law is the law'. This line expresses the notion that the law is an autonomous set of rules to be applied according to their terms irrespective of community views and opinion. In other words, the law must be applied

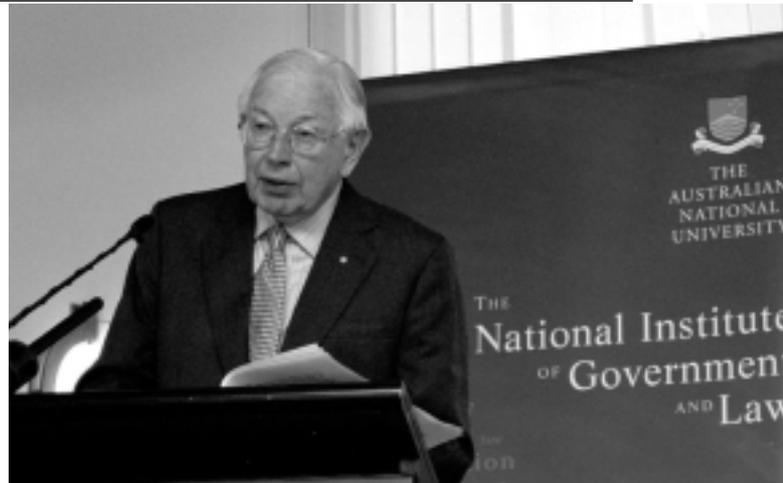
even if it is contrary to public opinion.

So to take an example: If we were to assume that a majority of people in NSW thought that smoking cannabis should be legalised, the judges would say, quite rightly, that the community view would not justify them in refusing to enforce a law which prohibits the smoking of cannabis.

Only four years ago in the famous Massachusetts homicide trial of Louise Woodward, the British child-minder, Judge Zobel re-stated this view of the judge's duty when he said:

The law, John Adams told a Massachusetts jury while defending British citizens on trial for murder, is inflexible, inexorable, and deaf: inflexible to the cries of the defendant; 'deaf as an adder to the clamours of the populace'. His words would ring true 227 years later. ...

Judges must follow their oaths and do their duty, heedless of editorials, letters, telegrams, picketers, threats, panelists and talk shows. In this country we do not administer justice by plebiscite.



A judge, in short, is a public servant who must follow his conscience, whether or not he counters the manifest wishes of those he serves; whether or not his decision seems a surrender to the prevalent demands.<sup>1</sup>

That statement is, as we shall see, not the entire story.

#### b. Judges recognise that the rule of law rests on the existence of public confidence in the courts

It is not the entire story because the courts act at their peril if, by their actions and decisions, they set at risk public confidence in the courts. Judges accept that the rule of law in our community depends upon the maintenance of public confidence in the administration of justice and that means maintenance of public confidence in the courts. Absence of public confidence in the administration of justice would bring unwanted and untold consequences in its train. It would result in non-compliance with the court orders and greater difficulty in enforcing them. It would lead us down a path away from the peaceful settlement of legal disputes into a world in which people would be inclined to take the law into their own hands. It would take us back to an earlier stage in the development of civilised society when disputes were resolved by brute force.

The rule of law in our community is underpinned by the apparatus and infrastructure of the State. The orders of a court are executed and enforced by the agents and officers of the State. But that underpinning in turn rests on the public acceptance of the courts and the public sentiment that the courts are so deserving of support that their decisions should be enforced. Without that public acceptance and sentiment, the State might not provide the apparatus and infrastructure which reinforces the authority of the courts. Indeed, the State might itself decide not to respect decisions which were adverse to its interests.

Of course, prevailing public sentiment reflects a general approval of our system of administering justice rather than an approval of particular decisions delivered by the system. Rarely does the public know enough about, or take a sufficient interest in, a particular decision to form a worthwhile judgment about its correctness or desirability. Naturally, that does not preclude the uninformed from expressing their opinions about a particular case.

There may be court decisions of which the public disapproves without our being aware of the reasons for that disapproval. It may be that people disapprove of the legal rule that the court applies in the particular case, whether it be based in statute law or common law, or that, alternatively, while agreeing with the legal rule, they may think that the court was wrong about the facts so that the rule should not have been applied to the case.

Judges accept that the rule of law in our community depends upon the maintenance of public confidence in the administration of justice

The point is that the public, even if it thinks that the courts do get it wrong from time to time – as may well be the case – nevertheless supports the court system generally. I emphasise the word ‘generally’ because the public may have strong criticisms to make of aspects of the system – delay and expense, to mention two of the principal subjects of recent complaint. Even if public support is less than enthusiastic and is qualified, the public recognises at least that the system should be supported because it is better than any other alternative which has been offered.

Judges associate public confidence in the administration of justice with the independence of the judiciary and impartial enforcement of the law.<sup>2</sup> That may well be right, though, in the absence of proof, it necessarily rests on an assumption. Whether the public appreciates the concept of judicial independence and values it highly may be questionable.

Judicial independence is the feature of the system which is most prized by the judges themselves. They see it as the cornerstone of the rule of law. And, if the importance of judicial independence be conceded, as it must be, it can serve as a justification for other principles and conventions which shore up judicial independence and impartiality.

### Protecting independence, impartiality and confidence in the courts

Thus, the common law of contempt of court was formulated by the judges in order to deter criticisms which would impair public confidence in the courts and judicial independence. The judges frowned upon any attempt to influence judicial deliberations, whether by politicians or the media. Judges naturally prefer to decide a case on the arguments presented in court on behalf of the parties, without being exposed to the pressure that comes from political and media discussion. That discussion, particularly distorted media discussion, as we know all too well, often emphasises the sensational and, by so doing, threatens objective consideration of the factual and legal issues which arise for decision.

In earlier times, insistence on absence of comment on pending litigation led to the making of broad judicial statements asserting that comment on a pending case was punishable as contempt of

court. Thus, it was said:

A publication referring to pending litigation is a technical contempt if it is one having a *tendency* to influence the result – this gives the court jurisdiction to interfere; the court will not exercise its summary power of interference at the instance of a party unless, besides the tendency, the publication is *likely* to influence the result<sup>3</sup>

That statement went a very long way. A persuasive, well-reasoned article on a pending case would have a tendency to, and might well, influence the result. Although it is not to be supposed that, these days, the publication of such an article would be held to constitute a contempt, the statement indicates how far the courts were prepared to go to discourage comment on court cases. The courts were, of course, more lenient with comments which might affect judicial deliberations than with comments on evidence or issues which would affect jury deliberations. Judges have a capacity to resist the influence that such comments might have; a jury would be more susceptible to influence.

Judges are also conscious of the authority of the courts, the need to protect that authority and the spirit of obedience to the law. It is on that footing that the courts have punished for contempt of court publications which unfairly criticised a court so as to undermine public confidence in the administration of justice.<sup>4</sup> The exercise of the contempt power in that class of case has been squarely based on the necessity for maintaining public confidence in the administration of the law. Yet it has been recognised that the courts must be open to free criticism and that protection of public confidence in the court system can come at too high a price.<sup>5</sup> So a reconciliation between these two principles is involved.

This reconciliation has resulted in some adjustment since the world acknowledged that freedom of expression is a fundamental freedom and that freedom to criticise public institutions is a fundamental element of modern democratic government. Recognising the strong public interest in free discussion of a matter of public importance, the courts have been increasingly reluctant to use the contempt power simply to protect judges from criticism. Statements criticising judges for their decisions do not attract an exercise of the contempt power, at least when the criticism is fair and honest.

### The courts are vulnerable to criticism

The inutility, if not the unavailability, of the contempt power has left the courts vulnerable and exposed to criticism, not all of it being of a responsible kind. The decline of the contempt power has naturally been accompanied by an erosion of the convention that comment will not be made on matters which are *sub judice*, because the convention rested on the possibility that the contempt power would be exercised and on the possibility that proceedings for defamation might be brought.

These days, another factor is the unwillingness of the Federal Attorney-General to defend the courts against criticism. This is not the occasion to rehearse my disagreement with the



The media pack waiting for the arrival of Ivan Milat as he returns to court for the verdict, 26 July 1996.

Photo: Michael Amundia / News Image Archive



The Hon Daryl Williams AM QC MP  
13 March 2002.

Attorney-General on this point. All I need to say is that there comes a time when political and media criticism of the courts or a court decision reaches a point when it threatens to undermine public confidence in the courts and at that point the Attorney-General should assert himself to protect the courts from irresponsible criticism.

I think that the Attorney now recognises that this is so. So our disagreement may have descended to the point where our disagreement is about when such a threat exists. Our disagreement about the Attorney's failure to defend the High Court in the *Wik Case* illustrates the point.

I do not suggest that the Attorney-General should defend the courts on all occasions. Far from it. Indeed, I agree with the Attorney that there is a case for the judges, through appropriate channels, speaking for themselves. But that is not a substitute for a defence of the courts by the Attorney-General who, as the responsible minister representing the Government, will secure more media coverage and attention than a judge. In any event, as the *Mabo (No. 2)* and *Wik* cases demonstrate, it is difficult, it not impossible, for the relevant judges to speak without running the risk of seeming to favour one side or the other in a controversy over a court decision which becomes a party political controversy. I do not accept that an Attorney-General is unable to defend the courts or a judge simply because he is a politician. Attorneys-General have succeeded in doing so in the past.

The point here is that the courts are at considerable risk if politicians or the media venture on a campaign of criticism of judges for political or other expedient advantage. In other words, it is a matter of great importance that the courts as a fundamental national institution should not be made a target of irresponsible criticism. Public confidence, which is vital to the well-being of the administration of justice, once lost or damaged, is not easily restored. This fact should be recognised by other institutions of government, particularly by participants in the political process who, whether operating under parliamentary privilege or not, have a capacity to do very considerable harm to the public standing of the courts.

I had not intended to speak about the very recent controversy relating to Justice Kirby. But I wish to mention aspects of that controversy which undermine the Attorney-General's conception of his role. First, the controversy rapidly developed into a party political controversy with the result that the Judge could only defend himself in the public debate by running the risk of participating in a party political dispute. Secondly, when Chief Justice Nicholson of the Family Court sought to defend the Judge

in a public speech, he was rebuked by the Prime Minister for speaking out of turn. So, in the playing out of this controversy, we saw how the Williams' theory of the sufficiency of judicial self-defence fell apart. It simply resulted in a rebuke for the Judge who sought to rally to Justice Kirby's defence.

Otherwise, I would simply draw attention to two articles in this morning's newspapers which you may have read. One in the *Sydney Morning Herald* by Mr Gordon Samuels; the other in *The Australian* by Professor George Williams. The authors make some interesting and important points which bear on this aspect of my talk.

### The judge as the voice of the community

The other side of the coin is the notion – which is quite misleading – that the judge is the representative of the community. Initially, the judge was the agent or delegate of the King in administering justice. At that time, the jury, rather than the judge, was the voice of the community. In deciding a case, the jury brought to bear its knowledge of the community. It was in a position to interpret community views and identify and apply community standards, practices and expectations. This was one of the attractions of trial by jury. Over time, however, the judge came to inherit the role of the jury in civil cases as pressure to reduce the time taken in, and the expense of, civil cases resulted in the judge supplanting the jury as the tribunal of fact.

Today, the judge, in civil cases, has largely assumed the role of the jury in deciding issues of fact. In this respect, the modern judge represents the professionalisation of the decision-making process, professional decision-making displacing what in much earlier times was popular decision-making, when the jury's verdict might have been thought to represent the community view of the case.

At no stage was the judge regarded as representing the views of the community in exercising his judicial duties and deciding cases. And as the law became more sophisticated, the judge came to be seen as an independent and impartial adjudicator who acted only on the evidence presented in court and was free from outside influences.

It is important to underline this point. The court must arrive at its own decision on the facts as well as the law. And that proposition applies to the modern jury as well as to the judge. The jury must arrive at its own decision on the facts and should dismiss from its mind the opinions of others on the issue before them. Justice, as we see it today, is best achieved by the decision-maker deciding the case for itself by having regard only to matters established in evidence and advanced in argument in open court, instead of drawing on knowledge and information which is not part of the public record. Openness, transparency and accountability have played a part in defining the decision-making function in this respect.

To the extent that the judge has inherited the role of the jury, the judge is called upon from time to time to apply community standards and expectations. In so doing, the judge must identify and interpret those standards and expectations. In that restricted sense, the judge is the voice of the community but otherwise the judge is not the voice of the community in any meaningful sense.

The judge does not personify the people in the way that the jury does. The judge does not have the same pedigree. He or she is a professional legal specialist without the knowledge of the community that we attribute, rightly or wrongly, to the jurors. Yet, subject to those handicaps, the judge performs the jury's old

I do not accept that an Attorney-General is unable to defend the courts or a judge simply because he is a politician. Attorneys-General have succeeded in doing so in the past.

function and applies community standards and expectations, though the judge will not reflect the community's view, if it has one, about the outcome of the case. It would be improper for the judge to do so. It would be a dereliction of judicial duty.

### The judge and the world outside the court-room

It follows that the judge does not turn a blind eye to the world outside the courtroom. The judge is part of that world; the litigants and the witnesses are part of that world and in the transactions and events to which the court case relates were part of that world. So, the judge in evaluating the truth and the reliability of the witnesses and, in deciding the case, draws on knowledge of the outside world. In assessing the explanations given by a witness for what he did or said on a particular occasion, the judge will bring to bear his knowledge of people, how they behave, how they respond or are likely to respond to particular situations. The judge's knowledge of the world, perhaps more than anything else, perhaps more than any impression formed from the witness's appearance in the witness box, assists the judge in deciding whether the events which the witness claimed to happen are likely to have happened.

The judge draws not only on personal experience but on knowledge gained from other cases. In this respect, the judge has a unique window on the world. If you read the transcript of a trial or an appeal book you will begin to understand just how valuable that window is. It gives you a perspective on how people behave, seen through their eyes and the eyes of bystanders. Once you compare the transcript of a trial or an appeal book with a departmental file with its absence of detailed information about individuals, you will appreciate that the judge is better informed about people and the way they behave in particular circumstances than the administrator and even perhaps the politician.

### The judge and community standards

I have referred to the judge's role in applying community standards. The standard of what is 'reasonable' is a common feature of our law. The obligation to take reasonable care to avoid damage or injury to others is the central element in the law of negligence. What is 'reasonable' is a standard to be assessed by reference to community practices and expectations. As the High Court has said:

What is considered to be reasonable in the circumstances of the case must be influenced by current community standards. In so far as legislative requirements touching industrial safety have become more demanding upon employers. This must have its impact on community expectations of the reasonably prudent employer.<sup>6</sup>

In most, but not all, cases, community standards will be proved by evidence.

The standard of what is reasonable applies in many branches of the law, not least of them criminal law e.g. 'reasonable belief', 'reasonable excuse', 'reasonably foreseeable'. In these various contexts, the relevant standard is ascertained against a background of community practices and expectations.

There are four points to be made in relation to judicial ascertainment of community standards. First, the diffidence of judges in discussing how community standards are ascertained



South Sydney fan announces the Supreme Court decision to the media, 8 July 2001.

and determining what are community standards; secondly, the difficulty of taking judicial notice of matters that are controversial (as community standards generally are); thirdly, the difficulty of determining community standards in the absence of evidence; and, finally, the magnitude of the undertaking if evidence were to be required.

The way in which the courts apply the law necessarily takes account of the community's standards of behaviour and expectation. But this does not mean that the courts automatically give effect to community behaviour or expectations or, for that matter, the community's moral values or attitudes.

### The judge and enduring moral values

On those exceptional occasions when the courts adopt a moral value or principle as the basis of a legal concept or principle, the courts look to an enduring moral value or principle rather than one which is merely current or transient.

Perhaps the most notable example of this proposition is the most famous of the tort cases, *Donoghue v Stevenson*.<sup>7</sup> The case concerned the snail in the bottle of ginger beer where the plaintiff consumer recovered damages from the manufacturer for the manufacturer's negligence. That case articulated the 'neighbour' principle as the criterion for recognising the existence of a common law duty of care owed by one person to another.

According to that principle, a person comes under a duty of care to another when it can reasonably be foreseen that one's acts or omissions are likely to injure that other person, that person being one who is so closely and directly affected by the act or omission that he ought reasonably to be in contemplation when the act or omission takes place. The principle is both a legal and a moral principle; in other words, the legal principle takes as its foundation a moral value. It is an instance of the formulation by the courts of a legal principle by reference to an enduring moral value.

The reasoning in the judgment of Brennan J in *Mabo v Queensland (No. 2)*<sup>8</sup> is another example, though it is not such a striking example. There his Honour rejected the fiction by which the rights and interests in land of the indigenous inhabitants were disregarded. He did so for various reasons, one of which was that the doctrine was inconsistent with 'the contemporary values of the

The judge is better informed about people and the way they behave in particular circumstances than the administrator and even perhaps the politician.

Australian people'. The expression 'contemporary values of the Australian people' is to be understood as referring to contemporary values of an enduring kind.

*Donoghue v Stevenson* and *Mabo (No. 2)* demonstrate that when the judges make use of moral principles or values to shape or inform legal principles, they do not tie themselves to the current opinions, views and attitudes of society. Those opinions, views and attitudes may be fleeting or transient; they may be ill-informed or motivated by shallow self-interest. The judges look to a higher principle, one which can be regarded through the ages as expressing an acceptable approach to human action.

A particular instance of resort to values in the formulation of legal principle is the use of consequentialist reasoning by judges. Judges use consequentialist reasoning when they take into account the impact on community conduct of introducing a particular principle. In one case the question arose whether a former employer who gives to an intending employer a reference relating to an employee is under a duty of care to the employee in relation to the giving of the reference.<sup>9</sup> The answer given was that the reference giver was under a duty of care.

One factor taken into account was the possibility that, if such a duty was imposed, persons would be deterred from giving references or from giving accurate references. On this question, judicial opinion was divided.<sup>10</sup> There was, of course, no evidence of what the likely consequence would be. Here we see an instance of judges predicting how the community will react to the introduction of a particular legal rule.

#### Interpretation of statutes

Statutes cannot be interpreted in a vacuum. In interpreting statutes and giving them an operation, judges will, where appropriate, take into account community standards and values. Examples are statutory provisions, Federal and State, which confer jurisdiction on courts to grant relief in relation to contracts the operation of which is unconscionable, harsh, oppressive or unfair or which have been procured by conduct of that description. Although judges are called upon in

various ways to identify community standards, expectations, practices and values, they do not represent or speak on behalf of the community or, for that matter, give effect to community views about the particular case.

#### Public confidence in the administration of justice as a factor in judicial decision-making

On the other hand, judges now have regard to public confidence in the administration of justice as a factor which may be relevant in some cases. Modern courts are more concerned to take account of public confidence in the administration of justice as an element in judicial decision-making than courts were in the past. This change in attitude has come about as the judges have come to appreciate that the public no longer uncritically accepts judicial decisions. Deference to authority has given way to a disposition to question, indeed to criticise, the decisions of authoritative institutions such as the courts. In the face of this new attitude, the judges regard public confidence in the court system as a relevant consideration in some aspects of judicial decision-making.

In a number of cases, the High Court has used the factor of

maintaining public confidence in the administration of justice as an element in articulating legal principle and in interpreting and applying the provisions of the Constitution.<sup>11</sup> In these cases, the High Court has been concerned with adverse impressions of the courts, especially courts exercising federal jurisdiction, that the public might form from the way cases are dealt with by the courts and from administrative functions that judges might be called upon to perform. In particular, the Court has been concerned that the independence of the judges and the integrity of the judicial process might be seen to be compromised. Whether the High Court is right in attributing to the public these adverse or possibly adverse impressions of the courts in such situations is beside the point. What is important is that the Court has arrived at decisions after taking into account the public confidence factor. I hasten to say these are not cases in which the Court has said 'We come to this decision because the public would have no confidence in us if we decided the case the other way.' So there is no inconsistency between these High Court cases and the remarks of Judge Zobel in the *Woodward Case* which I quoted at the beginning of this Lecture, before making the comment that Judge Zobel's remarks were not the entire story.

#### Sentencing and public opinion

That statement brings me to the relationship between the judge's function in imposing a sentence on a convicted person and public opinion. The media is quick to seize upon lenient punishment of offenders and use it as a basis of criticism of the judges. Politicians do not lag far behind if a 'law and order' political campaign offers prospect of electoral advantage. In a community that is anxious about any perceived upsurge in the incidence of violent crime, lenient punishment is naturally regarded as an indication that the judiciary is 'soft' on crime. In England, as well as Australia, the judiciary has been criticised from time to time on this score. So sentencing, like judicial review of migration decisions, is an area in which there is a potentiality for conflict between the courts on the one hand and political, media and public opinion on the other hand, with possible consequences for public confidence in the courts.

People feel very strongly about violent crime. They also have a belief, not generally supported by expert opinion, that heavy punishment is a strong and effective deterrent. And because sentencing seems to be less complex than many other judicial decisions, people feel that *they* understand the issue and are confident in the view they form, even if they are unaware of all the relevant circumstances. Another factor is that these days the media gives prominence to interviews with the victims or relatives of the victims of crime when they express their dissatisfaction with lenient punishment. Consequently, controversy about sentencing decisions, even a particular sentencing decision, has a greater potential to erode public confidence in the administration of justice than other cases. Controversy about the alleged leniency of sentences in high profile cases has led to a political response which results in pressure on a Director of Public Prosecutions to appeal and to seek a longer sentence.

So, critical to the sentencing process is the question whether the judge is either bound or permitted to have regard to public opinion and, if so, by what means does the judge ascertain what that public opinion is. As sometimes proves to be the case, the answer to this critical legal question is not as clear as it might be.

Although the common law has developed a body of principles governing the ascertainment of an appropriate sentence, these

Judges have  
come to  
appreciate that  
the public no  
longer uncritically  
accepts judicial  
decisions.



Photo: Kylie Block/News Image Archive

Protest over mandatory sentencing outside Darwin's Magistrates Court.

principles do not refer to public opinion. They are consistent with the proposition implicitly stated by Judge Zobel that the judge must do his or her judicial duty in accordance with principle without giving way to popular urgings or public opinion polls. That is not to say, however, that the judge cannot take account of community views on sentencing generally as distinct from community views on the sentence which should be imposed in the particular case.

There are powerful reasons why it is not helpful for the judge to have regard to public opinion about the sentence to be imposed in the particular case. For one thing, how does one ascertain what that opinion is? For another thing, how could the judge be satisfied that the opinion was an informed opinion, based on relevant sentencing principles and reflecting knowledge of all relevant circumstances of the case? And thirdly, there is the risk that opinion about the particular case may represent an emotional reaction to one or more aspects of the crime.

### The English view

On the other hand, the cardinal principle of sentencing law that the punishment must be proportionate to the gravity of the circumstances of the offence<sup>12</sup> allows the judge to take into consideration the public perception of the gravity of the kind of offence which was committed. The second is that there is ground for thinking that the judge is entitled to take account of general considerations relevant to 'public confidence in the criminal justice system'.<sup>13</sup> On this view, the judge can take account of the public concern that crimes of violence should be severely punished. Indeed, there is ground for thinking that the judge *should*, in assessing the gravity of the offence, at least *consider* the relevance of the public view of offences of that kind. Indeed, it is very likely that the judge is *required* to take account of that view, so long as it is identified in an acceptable form, a matter which I shall address a little later.

What I have just said reflects, subject to some qualifications,

the discussion by the House of Lords judges, in particular Lord Steyn, in the case involving the sentencing of the English child murderers of James Bulger, a boy aged two.<sup>14</sup> I shall not go into the facts of that case because the English statutory régime governing sentencing in murder cases has no Australian counterpart. In the case of the two children, that régime required the imposition of a mandatory sentence – detention at Her Majesty's pleasure. But the statutory régime left with the Minister (the Home Secretary) the determination of the period which the children should serve in custody. In setting the tariff period in the *Bulger Case*, the Minister had been influenced by a public opinion poll in *The Sun* newspaper, relying upon 21,281 coupons which had been filled in by readers. The Minister's approach was found to be flawed by a majority of the English judges. And when the case was taken to the European Court of Human Rights, the statutory régime was found to contravene article 5(4) of the European Convention for the Protection of Fundamental Rights and Freedoms because the minimum period of detention was set by the Executive, not by a court.

The *Bulger Case* and its aftermath make a fascinating story. But time does not permit us to explore it on this occasion.

### The Australian view

In New South Wales, in 1998, the Court of Criminal Appeal introduced a régime of sentencing guidelines along the same lines as the régime which existed and exists in England. The object of the régime was, according to the judgment of Chief Justice Spigelman, in *Jurisc*,<sup>15</sup> 'to reinforce public confidence in the integrity of the process of sentencing'. The Chief Justice continued: 'Guideline judgments ... may assist in diverting unjustifiable criticism of the sentences imposed in particular cases.'<sup>16</sup>

The idea was that an appropriate balance should exist between the broad discretion that must be retained to ensure that justice is done in each individual case, on the one hand, and the desirability of consistency of sentencing and the maintenance of public confidence in sentences actually imposed and the judiciary as a whole, on the other.<sup>17</sup>

Spigelman CJ expressed his agreement with a statement by Lord Bingham LCJ to the effect that when differences of opinion arise on issues of sentencing between judges and 'an identifiable body of public opinion', the judges are bound to consider who is right. This is because a significant disparity between public opinion and judicial sentencing conduct will eventually lead to a reduction in the perceived legitimacy of the legal system.

The critical question here is what is meant by the expression 'an identifiable body of public opinion'. The body of public opinion that Spigelman CJ identified in *Jurisc* related to the offence of occasioning death or serious injury by dangerous driving. He did so largely, if not wholly, by reference to the legislative prescription of sentences for that offence and statements made by the Attorney-General as to the seriousness of the offence, when introducing the legislation. This, along with a history of successful prosecution appeals against lenient sentences, enabled the Court of Criminal Appeal to conclude that the judges had 'not reflected in their sentences the seriousness with which society regards the offence'.<sup>18</sup>

In November 2001, however, the High Court of Australia criticised the New South Wales guidelines on the ground that their effect is to constrain the sentencing discretion conferred by statute on the sentencing judge.<sup>19</sup> In that decision, the High Court was dealing with a case relating to sentences imposed for being knowingly concerned in heroin importation. The High Court did not discuss the rationale advanced by the Court of Criminal Appeal for

the introduction of guideline sentencing.

### Future directions

What can we take from this increased judicial emphasis on the importance of maintaining public confidence in the administration of justice and its linkage with the relevance of public opinion in sentencing offenders? In an area of the law which is undergoing rapid development, one can only look to apparent trends. Not without some diffidence, I make the following comments.

First, although the distinction between public clamour about the particular case and more generalised public opinion about the severity or lack of severity of sentences applicable to particular classes of offence is not easy to make, it offers a way forward. Secondly, for reasons already discussed, it is unthinkable that the courts will simply impose sentences by reference to public opinion of what is the appropriate outcome in a particular case. Thirdly, it is more likely that the courts will regard more generalised and ‘identifiable’ public opinion as a tangential factor to be taken into account.

This brings me to several more fundamental questions. One is how does the judge ascertain relevant public opinion? Although there are difficulties in saying that a judge can take judicial notice of public opinion, to require proof by evidence scarcely seems sensible. No doubt the judge can have regard to any relevant pattern of legislative history and statements made by the responsible minister. The judge may also be entitled to have regard to responsible expressions of opinion in the Parliament so long as it appears that they reflect a broad consensus of opinion.

Can the judge go further and look also to informed writings and to the elements of public and political debate and distil from them what are matters of public concern? This is an approach which seems to involve a substantial degree of subjective evaluation. To that extent, it may be thought to be questionable, though in some instances it may be possible to identify matters of public concern with some confidence.

Another fundamental question is whether there is a place in this scheme of things for a dialogue between the judges and the executive government. We know that the Premier of New South Wales has communicated views to the Chief Justice of New South Wales who had at an earlier time received representations from the Opposition as to aspects of law and order. We do not have a record of the discussions and we do not know what the precise terms of the Chief Justice’s response was. No doubt

the discussions were in general terms and did not relate to any particular case that was pending in the Supreme Court.

The prospect of a dialogue, particularly a continuing dialogue, between the judiciary and the executive government about sentencing would represent a new development and, like all new developments, it would involve some imponderables. There is a risk of a perception that the judges would be seen as compromising judicial independence and exposing themselves to political influence. That risk might have consequences for public confidence in the administration of justice. On the other hand, potential avenues for better informing the judges in relation to aspects of their work should be explored. If any such dialogue is to take place, it should be properly structured and recorded. Publication of an appropriate summary record would help to lessen potential

misunderstandings.

The final question is: what are the consequences for taking into account public opinion in other areas of the law? One area of the law that springs to mind is judicial review of administrative decisions, especially in migration and deportation cases. This is an area of the law where there is considerable scope for disputation and controversy. Without venturing into details, I mention the criticism made several years ago by Mr Ruddock, as Minister for Immigration, of certain Federal Court immigration decisions, one of which was *Eshetu*, a decision which was subsequently overruled by the High Court.<sup>20</sup>

Going back even further there was Government criticism of court decisions in migration and deportation cases. Although judicial decisions on these matters may lend themselves to controversy because people have strong views on such topics, the legal issues at stake are quite different from the legal issues which arise in sentencing decisions. The legal issues in migration cases are generally discrete and there is no scope for taking account of generalised public opinion on the legal issues which do arise.

So, in conclusion, the approach of the courts in sentencing cases is unlikely to migrate to other areas of the law, except in so far as the courts may find it necessary in relation to some particular issues to look to community perceptions. But there is no basis on which the courts can take account of and give effect to public sentiment of what is the appropriate outcome in a particular case.

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1 *Commonwealth v Louise Woodward*, Memorandum and Order, 19 November 1997; see S. Shute, ‘The place of public opinion in sentencing law’ [1998] Crim LR 465.

2 See, for example, Sir Gerard Brennan, ‘Courts for the people – not people’s courts’ (1995) 2 *Deakin Law Review* 1 at 6-7

3 *Bell v Stewart* (1920) 28 CLR 419 at 432 per Isaacs and Rich JJ

4 *The King v Dunbabin* (1935) 53 CLR 434 at 447 per Dixon J

5 *ibid* at 448.

6 *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 309 per Mason, Wilson and Dawson JJ

7 (1932) AC 562

8 (1992) 175 CLR 1

9 *Spring v Guardian Assurance* [1995] 2 AC 296

10 Lord Goff of Chieveley thought that the duty would have little impact; Lord Slynn thought it would have no impact. Lord Woolf thought that some referees would be more timid but that there was little likelihood of no reference being given.

11 *Jago v District Court (NSW)* (1989) 168 CLR 23; *Wilson v Minister for Aboriginal Affairs and Torres Strait Islanders* (1996) 189 CLR 1; *Kable v DPP (NSW)* (1996) 189 CLR 51

12 *Chester v The Queen* (1988) 165 CLR 611 at 618

13 *R v Secretary of State for the Home Department ex parte Venables* [1997] 3 All ER

14 *ibid*.

15 [1998] 101 A Crim R 259 at 266

16 *ibid*.

17 *ibid*.

18 *ibid* at 269-270

19 *Wong v The Queen* [2001] HCA 64 (15 November 2001)

20 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611

# The compleat judge: Justice Peter Young

*Interview by Rene Sofroniou*

I was nervous about this interview. My image of Justice Young has always been of a lightning-sharp, impossibly-learned-in-the-law judge who brooks no nonsense (alas) and really keeps you on your mettle. I wasn't sure whether my mettle were up to our meeting. It amazes me that he expressed some uncertainty as to why *Bar News* would want to interview him. In fact it is no light thing to get to probe the mind of the Chief Judge of the Equity Division and in my view a proper oral history project should be conducted, if it has not already. More to the point, I was really tickled (and touched) by some of the judge's responses to my questions. I came away from the interview thinking that, for all of his impressive erudition and acuity, I had met a top-rate human being. I was sorry to say goodbye.

**Rena Sofroniou:** Thank you for agreeing to the interview. You are a man of many parts: judge, Chief Judge of the Equity Division (which also means administrator now, I gather), writer, teacher, Christian, family man. I note that in addition to this you have been Patron of the Motor Neurone Disease Association?

**Justice Young:** I am now Vice Patron, because the Governor is the Patron.

**Rena Sofroniou:** I've even heard a scandalous rumour that you are a Sydney commuter, too?

**Justice Young:** Yes and I am also Patron of the Bus and Truck Museum.

**Rena Sofroniou:** I suppose the commuter role could well be the most time-consuming of all of them, given the current state of transport in Sydney. It's a busy life, I gather?

**Justice Young:** Yes.

**Rena Sofroniou:** And you are renowned for the relish with which you leap in to the judicial seat on the Bench to dispose of cases efficiently and quickly and with which you rush to take on additional cases when your own workload is exhausted. The obvious question has got to be – how do you relax, Judge?

**Justice Young:** I suppose one answer is I

don't. But the other answer is I travel now every three or four years and I am very interested in transport history.

**Rena Sofroniou:** Where does that take you?

**Justice Young:** The transport history is purely local and involves observations of what is happening at the present time and trying to remember what happened twenty, thirty, forty years ago. But when I go overseas every three or four years I spend a bit of time in London and sometimes a bit of time in Berlin and other places working out how their systems click.

**Rena Sofroniou:** I suppose it would have been fascinating to see post-Wall transport changes in Berlin?

**Justice Young:** Yes, their bus system is now much easier – and there is no Check Point Charlie.

**Rena Sofroniou:** What is your attitude to the use of life's time? Are you driven to obtain full value out of each day or is the busyness just the result of the jobs and interests?

**Justice Young:** These days it just happens.

**Rena Sofroniou:** Well if the child is father to the man, may I ask you about your background? Am I correct in thinking that you represent the fourth generation of the Young family in the law?

**Justice Young:** Yes that's right.

**Rena Sofroniou:** So we're going back how far?

**Justice Young:** 1873, when Richard Alexander Young became a solicitor and later mayor of Maitland. He married a Miss Wolstenholme who was also a mayor of Maitland and that's how I get the Wolstenholme in my name. Their son, James Young, was admitted to the Bar in 1903. My father was admitted as a solicitor in 1933. I was admitted in 1963 too as a barrister and my son Marcus was admitted to the Bar in 1993.

**Rena Sofroniou:** There's something



spookily inevitable about the year 2023.

**Justice Young:** No, we can stop now because I haven't got any grandchildren yet and I think I would have needed one by now to get admitted then.

**Rena Sofroniou:** You have twenty-one years to see if one can be admitted as a lawyer by then. That's an admirable family heritage.

**Justice Young:** Yes.

**Rena Sofroniou:** In light of it, do you feel that you had any real choice as to your career?

**Justice Young:** I never really thought of doing anything else but whether that was because of family background or was in the blood, I don't know.

**Rena Sofroniou:** Were you encouraged in the decision to become a lawyer?

**Justice Young:** I suppose so. I can't remember any direct encouragement but certainly I expressed the desire to go to the Bar fairly early on and I went in for debating at school to prepare.

**Rena Sofroniou:** So you thought that it was a job that was particularly suited to your preferences in any event?

**Justice Young:** Yes, and I was particularly awkward with my hands, so it was either the law or teaching.

**Rena Sofroniou:** How closely does Brian Butterworth, the protagonist of your book *Civil litigation* resemble you as barrister?

**Justice Young:** Oh in many ways but not completely.

**Rena Sofroniou:** What are the points of departure?

**Justice Young:** I think Brian's basic philosophy is mine and the way he would go about cases as told to his pupil in that book are pure me but a lot of the padding is not. I used to teach legal history to

SAB/BAB students and found that the only way you really got the message across was by a bit of sin, sex and sadism and so Butterworth is sort of loaded with a bit of that.

**Rena Sofroniou:** Oh, is that right? I mustn't have read it closely enough, I came away with lots of legal research points.

**Justice Young:** Then you have missed key points.

**Rena Sofroniou:** I must have been too naive in reading it. One thing that I recall was a throw-away phrase at the end he takes silk and he's taken out for a drink which he accepts with alacrity, since, as you put it, he normally led 'an austere life'. Is that an inevitable quality of life at the Bar?

**Justice Young:** Well, it probably was for me but there were quite a number of busy juniors in my day who went out of their way to court solicitors and invite them to Christmas parties and things of that nature.

**Rena Sofroniou:** And generally party?

**Justice Young:** That wasn't my way.

**Rena Sofroniou:** Would you agree with the often-stated view that says prior to the 1980s there was more formality and also more eccentricity at the Bar than afterward?

**Justice Young:** Certainly more eccentricity but I think because the law has become more a business now, there's less room for that.

**Rena Sofroniou:** Who were either the leading lights or famous eccentrics in your circle prior to your appointment to the Bench?

**Justice Young:** I don't really call it my circle but people like Kerrigan QC: it's a shame that someone didn't recall all his anecdotes because if you

were in court either as his junior or opponent you'd be regaled with all those.

**Rena Sofroniou:** His name crops up so often in peoples' reminiscences. Is that because he was a particularly good raconteur?

**Justice Young:** Well he always had something interesting to say. He would tell

you stories of the past – I can remember being in the Banco Court on one occasion – the old St James Road courts now – and he would tell how one of the Windeyers used to annoy Sir Philip Street by always coming into the court via the judge's door. We don't have people who do that these days. I'm told someone did give Kerrigan a dictaphone once and he gave it back.

**Rena Sofroniou:** What a shame – maybe he needed company around him to do the storytelling. My next area of curiosity – your exotic practice at the Bar. Why were you admitted in Papua New Guinea and as a silk in Fiji?

**Justice Young:** Well, I was admitted in Papua New Guinea because John Kearney said to me 'Peter there's a nice Family Provision Act application up in Papua New Guinea and I'm being admitted to deal with it for the estate. The plaintiff also wants a good Sydney equity junior, it would be fun.'

And so I said I'd be willing to take the brief for the plaintiff and did. It was involving a gentleman who was domiciled in Papua New Guinea but had property all over Australia and it was decided that the best thing to do was to have all the Family Provision Act claims heard in the one place, and because he was domiciled in Papua New Guinea, that's where we went.

It was a bit of a mistake in some respects because we got up there and John Kearney, who was a great fellow and who always wanted to do the right thing, asked me: 'How are we going to get admitted up there? We better go over and get Laurence Street to give us a certificate saying that we're good guys.' So we went over to Laurence Street and he wrote a nice rosy certificate to say that we were good guys and we took that up with us. Tom Reynolds, Guy Reynolds father, was also getting admitted and he was out at Lae I think also the same day that we were in Moresby. Anyhow, we found out when we got there that all we required was a certificate from the PNG under-secretary for justice to say that we were needed. It didn't matter whether we were good guys or not. So we went over and my solicitor took me into a room and we waited for about a quarter of an hour and at about quarter to nine a Melanesian gentleman appeared and my solicitor said to him: 'Sign here Boss'. So this gentleman signed the piece of paper that my solicitor put in front of him and that, I subsequently found, was the under-secretary for justice certifying



that we were needed.

We were duly admitted by a single judge. Tom Reynolds, on the other hand, was admitted by three judges and he was crowing about this for a while until we found out that they only used three judges when there was some doubt about the fellow. So John Kearney and I were quite happy to have been admitted by one judge.

And that's how I got admitted in Papua New Guinea. After I got admitted there I did a few more cases, mainly in administrative law. The principal one was against Frank McAlary when I was acting for the secretary of air who had dismissed the chief executive officer of Air New Guinea, immediately after that gentleman had flown on annual holidays, in a special *Government Gazette*. Unfortunately without good communications this gentleman got to Singapore to find that he'd been dismissed, so he flew back.

I can remember we were arguing natural justice and all those points and in New Guinea they have three stages of Acts – constitutional law, special laws and ordinary laws. The constitutional law trumps the special law and a special law trumps an ordinary law. You know when a law is a special law when the outside of the Act of Parliament has 'This is a special law' printed on it. Anyhow we got to a stage in the argument when my copy of the law had 'This is a special law' and McAlary's hadn't. The judge just said: 'Oh it happens to us all the time.' But that was also the first time that I met a problem that may now be a little more common, when, on my arrival to argue a case before a five-judge appeal court, my solicitor said: 'The presiding judge is sleeping with junior counsel for the other side, do you think we

On my arrival to argue a case before a five-judge appeal court, my solicitor said: 'The presiding judge is sleeping with junior counsel for the other side, do you think we should do anything about it?'

should do anything about it?

**Rena Sofroniou:** Your response?

**Justice Young:** Well one out of five I didn't think would make much difference.

**Rena Sofroniou:** You thought your side could accommodate that.

**Justice Young:** Especially having been to school with another of them.

**Rena Sofroniou:** You will excuse me if I decline to make the obvious rejoinder in respect of that remark, Judge.

**Justice Young:** That was New Guinea. In Fiji, I think it was Steve Stanton who asked me to lead him in a case. There the Rules used to be that you were admitted *ad hoc* for your first four cases, after which if you'd been a good boy four times you could get permanent admission. So I got *ad hoc* admission to do a couple of cases over there.

**Rena Sofroniou:** You were appointed to the Bench in March 1985 at a young age for the job – I think in your early forties?

**Justice Young:** Yes, 44.

**Rena Sofroniou:** What were your expectations of that office at the time you were appointed?

**Justice Young:** I'm not too sure what you mean by that question.

**Rena Sofroniou:** Did you see it, for example, as a new way of practising law? Did you have a strong sense of thereby obtaining the opportunity of providing service to the community?

**Justice Young:** Well, I'd probably just select the high ground and nominate the latter. I had been vice-president of the Bar Association, which had involved me being in a lot of committees with judges.

I believe I got too close to them and I was getting to the stage where it was very awkward in the Supreme Court not to treat these guys as 'buddies', and that's not healthy.

**Rena Sofroniou:** I suppose it helps to shake off some reticence that might otherwise be there.

**Justice Young:** I began to feel a bit uncomfortable. I always did want to go to the Bench. I was probably appearing more frequently in the Court of Appeal, Full Federal Court and in the High Court at this stage. The view taken by the attorney general of New South Wales at the time

was that if they appointed a person in their mid-forties, they would get more work out of them before their pension at seventy. It hasn't worked out that way because guys burn out but that's what the theory was, so a few of us were appointed in our forties.

**Rena Sofroniou:** Turning to your judicial work, I think I can identify an underlying educational component in the methodology of some of your judgments, so that apart from the merits of the case you are deciding there's an element of more generalised instruction or explanation in them. I could be totally deluded of course – is that your conscious objective in writing your judgments?

**Justice Young:** Some judgments, yes. I mean whenever you are writing a judgment you should (though you don't always do this) work out why you're writing it.

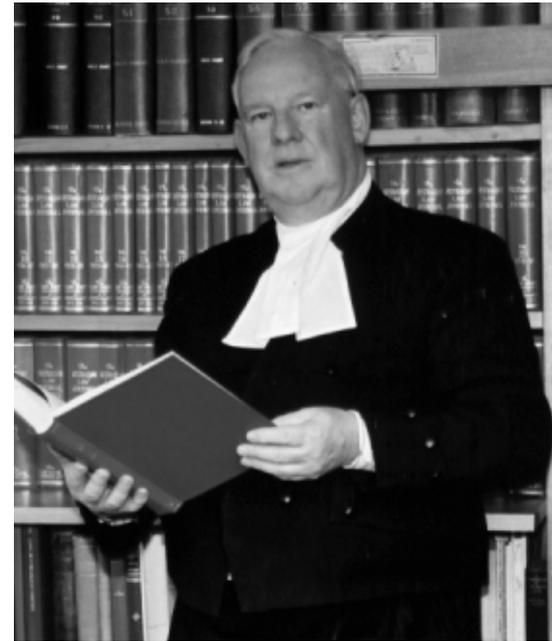
**Rena Sofroniou:** Well then at the risk of putting a provocative question – there seems to be a tendency – and I single out no court or judgment when I say this – whereby thanks to current technology each pleading, affidavit and submission is faithfully recorded in some dozens of pages of 'background' leading up to very few paragraphs of decision with undisclosed reasoning, at the end. It is difficult to plough through. Can you identify such a phenomenon?

**Justice Young:** Yes, with some people. I don't know whether it's common but, to save repeating myself, you can read what we said at that session on how to write judgments out at Sydney University.

(i) I said there that you've got to remember that the Court of Appeal will be tempted to say, at the instigation of new counsel for the loser, 'the judge didn't think of this, that and the other point'. So you've got to watch your back a bit in writing judgments. You have got to remember why you are writing a judgment. In many cases it's just resolving the dispute on hand but our judgments are read quite extensively in Singapore, Malaysia, New Zealand and even England. So if you do find an appropriate vehicle, and it's been well argued, it's usually a good idea to record what has happened.

**Rena Sofroniou:** With one eye on the wider reading audience?

**Justice Young:** Yes, and I always say to the academics: 'I've given this *dicta*, now



you build on it.' They rarely do these days unfortunately.

**Rena Sofroniou:** Why is that?

**Justice Young:** I don't know. I think it may be because academics are now becoming more part-time and they're putting out a quantity of work to keep their positions at the university rather than producing quality articles. Certainly as editor of the *Australian Law Journal* I notice that.

**Rena Sofroniou:** You are Chief Judge in Equity at an interesting time where what might be identified as pure equity doctrine (to the extent it is not tautologous to use such a phrase) is becoming hybridised with more general commercial law principles, which latter may not have a pure equity pedigree.

**Justice Young:** Well I think you've got to go back in history a bit. Up until 1972 we have the common law pleading system and the English Rules of Hilary Term 1834 which meant that the only development in commercial law in New South Wales could take place in equity. Charles McLelland (or Jerry, as he was always known), really developed commercial law in the equity side. Laurence Street carried that on, so that New South Wales commercial law has always had a very great equity flavour as opposed to English commercial law, which has developed completely independently. Occasionally we get great clashes, such as the way in which the English think of time clauses as opposed to the way we think of time clauses. That's probably why commercial law is more suited in New South Wales to be heard in the Equity Division rather than Common Law

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**Rena Sofroniou:** What do you say about the role of equity in public law now?

**Justice Young:** I don't think it's as much as it used to be, because they've now reformed the procedures so we don't have to budge. In the old days, when you had *mandamus*, which was relatively limited, and *certiorari*, which was relatively limited, in order to do justice in public law you had to make declarations of right and go through all sorts of funny procedural gambits. Now when you've got in the federal sphere the *Administrative Decisions (Judicial Review) Act 1977* and when in the State sphere each judge can give a declaration, injunction, *certiorari* or whatever he or she wants to do, you don't have to worry so much about whether it's an equitable remedy or not.

**Rena Sofroniou:** Provided, in your first example, that you fall within the terms of the federal statute?

**Justice Young:** Well, you can usually find something that can invoke our jurisdiction. To illustrate, one of our problems is: a little girl has just left home, her father goes to the Police station, the Police say: 'Oh the magistrate has committed your child to a welfare institution'. The father asks: 'Why.'

'I can't tell you' the Police say and he can't get

any information anywhere.

So he comes up here to us. Now because the little girl is the child of a marriage, we've got very limited powers under sec 8 of the *Family Law Act 1975*. But we've still got *certiorari* powers, so if people come up to the Equity Court because it is the 'odd job' court, we can find some remedy or at least exercise power sufficient to find out what happened. There are not many cases of that nature but of about the dozen I have dealt with over the last six or seven years I think that in about half of them once the order for *certiorari* was made the crown solicitor said: 'Oh, that shouldn't have happened' and seems to rectify the situation.

**Rena Sofroniou:** So the Equity Division can stabilise the situation?

**Justice Young:** Yes.

**Rena Sofroniou:** Now what about the relatively current developments in equity in the High Court. Do you consider the judgments are affording us adequate

direction and guidance to enable barristers and solicitors to accurately advise their clients as to their particular position? I'm thinking, to take one example, of the current law concerning the exercise of remedial discretion when equity finds a right to relief?

**Justice Young:** No! Next question?

**Rena Sofroniou:** More, please.

**Justice Young:** Well, we used to go through cycles but they're becoming shorter and shorter. You go through a period where the principle is up for grabs and there are a lot of uncertain judicial decisions for about thirty years, and then for seventy years everyone follows before the next cycle starts. We're in a period at the moment where everything's up for grabs and historically that will always be followed by a period where the principles are slowly brought out of a new mess and those principles are then applied for the next X years until we go through another sphere of change.

**Rena Sofroniou:** And in the interim what's a judge to do? Actually, what's a barrister to do?

**Justice Young:** Well he or she should still have to hand the basic principles and you just apply them by analogy, always remembering that you're governed by exactly what the majority of the High Court says – if you can identify what that is.

**Rena Sofroniou:** Lawyers in this State and probably further afield rely upon you to teach us property law, conveyancing, mortgages, recent developments in the ALJ and difficult legal points upon which you have written the only *dicta*. Has legal writing always been a major component of your legal career?

**Justice Young:** No.

**Rena Sofroniou:** So how did it come about?

**Justice Young:** Butterworths had a book writing competition going and I entered it. I got halfway through a book on company law, but I wasn't happy with it. I still use that half-written book every so often to write a judgment because I found the results of my research useful but that's as far as it went. I can't remember exactly why I wrote *Declaratory orders*.

**Rena Sofroniou:** Yes, I forgot that. We also need you to teach us about declarations.

**Justice Young:** It was 1975. What had happened in about 1965 was that Laurence Street was very keen to ensure that his cases were reported properly, and in his

inimitable style he persuaded Butterworths that all of his cases should be reported by me in the *New South Wales Reports*. I started an association with Butterworths then and there were so many Street declaratory orders that I gradually collated them, together with those that came from the English book, *The declaratory judgment*, by Zamir, and some other sources to make this book. Butterworths were so pleased that someone had actually finished a book they gave me a couple of other projects.

**Rena Sofroniou:** I knew the Brian Butterworth name was sus!

**Justice Young:** Yes – they didn't like it at first. They thought someone was parodying their great name. They also had great problems with it because none of their sub-editors had any experience with the narrative style. Writing a book has become a lot easier with current computer technology. In those days if you deleted seven words in the proofreading process you had to be sure to find another seven to insert back in.

**Rena Sofroniou:** Speaking of computer technology, I recall Brian Butterworth manfully dragging his pupil to look up the *American law reports* and the like. Fifteen years since the publication of *Civil litigation* we live in a brave new world of computerized legal research, ie millions of references with no abstracts to give context. How do you handle that?

**Justice Young:** One gets so much now, you must ignore a great amount of it! I'm a fairly old-fashioned researcher and of course we have a legal researcher for the Division who is well-skilled in computer research. Their input together with traditional research methods fairly much covers the field.

**Rena Sofroniou:** Could you share your method with us?

**Justice Young:** A typical case before me would typically require some sort of statutory construction. My traditional research method therefore requires me to consult legal word books: *Stroud's judicial dictionary* Butterworths *Words and phrases*, *Australian legal words and phrases*, the words and phrases sections the *Australian digest* and *Australian current law* and of course the 90 volume *American Words and phrases, permanent edition* – I then have my own noting up system whereby I have every case noted up, even those cases which relate to areas of law I do not commonly encounter. A red notation means that the case has been overruled in

You're governed  
by exactly what  
the majority of the  
High Court says –  
if you can identify  
what that is.

a subsequent decision; blue means it has been thoroughly discussed; green means it has been followed and black means it has merely been referred to.

When the list of authorities comes in at 8:30 that morning (as it ought to) my tipstaff is instructed to take particular note of any red notations to the authorities being cited. I think I am now notorious for asking counsel, 'so what is your best case' and, on being informed, telling them: 'Really? I note that decision has been distinguished'.

**Rena Sofroniou:** Thanks, Judge. From which reports does the noting up come?

**Justice Young:** Australian, English and New Zealand reports. It costs me about \$40,000 per year from my own funds to maintain the subscriptions.

**Rena Sofroniou:** I think that is appalling.

**Justice Young:** Yes. Fortunately my ALJ honorarium helps.

**Rena Sofroniou:** So you avoid some of the ghastly legal site search engines?

**Justice Young:** In this job there is too much to do in too little time. I frequently need to decide cases on the Bench and there is insufficient time to do all the research I would like to. You mostly know that counsel has thoroughly researched the area. Sometimes you know they haven't.

**Rena Sofroniou:** Again in *Civil litigation*, you reproduced a list of common advocacy errors originally promulgated by Justice Kirby, with which you could relate as, then, a new judge. Most of these really reduced to a failure to state the central facts and legal issues of the case in an adequately direct and timely manner. Are judges adequately assisted by advocates?

**Justice Young:** A lot of people stress their own good points and totally ignore their opponent's. They get carried away with their own thoughts.

**Rena Sofroniou:** An over-identification with their client or the case?

**Justice Young:** Perhaps. They choose to

run it their own way and prefer to skip over the differences between their case and their opponent's. Of course their opponent is frequently doing the same. A good advocate rides with the blows, and it is difficult to do this when you have to lodge written submissions beforehand.

Some of the great advocates, in their early days, would meander and meander around until the judge made some comment. They

would then seize upon the point made by the judge and build on it, giving the impression that it was the judge who had seized upon this brilliant idea, which counsel then humbly adopted.

**Rena Sofroniou:** Were the judges so amenable to manipulation?

**Justice Young:** Yes, but it's much harder today with written submissions.

**Rena Sofroniou:** Isn't there a risk that the production of very detailed written submissions simply results in dueling parallel essays which do not address each other's points?

**Justice Young:** Yes. Chief Justice Mason in the *Sydney Law Review* said that a great advantage of written submissions is to give a picture of the argument and show where it is heading.<sup>2</sup> This is especially useful when the matter is before a quick, anticipating judge. There were some judges in earlier days, who made it necessary for counsel to drive preconceived ideas *out* of the judge's head, before it was free to put any new submission in. As George Bernard Shaw wrote in his introduction to *The little black girl in search of God*, 'If you want to put clean water into a bowl first of all empty the dirty water out'. Advocates dealing with such a judge would either have to build on what the judge had said or get the old idea out. Before one such judge I remember I had my junior and solicitor running to find the books during the running of the trial to be able to prove to the judge the ideas he was floating during the case were wrong and get those ideas out of his head quickly before they could grow.

Some judges we called 'logs'. They



would sit and reveal absolutely nothing as to what they were thinking. This is not fair and in any event you are often wrong and it is surely better to find that out before you have delivered judgment than after! I believe a judge should always give counsel an indication of their view, without of course having prejudged the matter.

**Rena Sofroniou:** How do I find the more obscure but apt references that from time to time appear as icing on the judicial cake? I have a vision of a secret society of Pakistani, South African and Tanzanian judges all swapping unreported judgments with you.

**Justice Young:** Not quite. When I appeared in Papua New Guinea, citing decisions of the High Court earned you two points, but citing *East African Law Reports* earned you three. So I got into the habit of consulting them. Indeed, I would discover that some Privy Council cases, in fact binding upon Australian courts, had not been reported anywhere else but the *East African Law Reports*.

**Rena Sofroniou:** What about regional Reports – Indian, Hong Kong, Pakistani cases?

**Justice Young:** India has very good law on joint tenancies and tenancies in common because it is a factor in the Hindu way of life and they have the same partition law that we have. Whenever you have a sec 66G application you must go for the Indian authorities: *Mitra's Co-ownership and partnership*, 7th edition, Eastern Law House (Calcutta, 1994) is an excellent resource.

**Rena Sofroniou:** Sales will go through the roof, you watch. Turning now to your

I remember I had my junior and solicitor running to find the books during the running of the trial to be able to prove to the judge the ideas he was floating during the case were wrong and get those ideas out of his head quickly before they could grow.

Church role, you are Chancellor to the Anglican Diocese of Bathurst – is that correctly put?

**Justice Young:** That's right.

**Rena Sofroniou:** What does a chancellor do?

**Justice Young:** The local Anglican Church once thought it had the same powers as the Established Church of England. It was disabused of that in about 1868. In England, the chancellor is the bishop's confidential legal advisor, who also presides over the Consistory courts. We do not have consistory courts here, but the chancellor generally gives legal advice, sits next to the bishop at Church Synod. In the country, apart from a few local solicitors sometimes, the chancellor is the only lawyer experienced in ecclesiastical law and in drafting in that area and preparing legislation.

**Rena Sofroniou:** And you are also head of the Lawyers' Christian Fellowship?

**Justice Young:** I am the President – it is mainly an honorary role so that there is a judge as President. The work is really done by Graham Ellis but I have been on the Executive since Norman Jenkyn was president in the early 1970's.

**Rena Sofroniou:** Is it a rewarding affiliation?

**Justice Young:** Yes. I think it is remarkable that the percentage of Christians in the profession is greater than in the community as a whole. There are fourteen judges in the judges' bible study group and I believe there is a waiting list.

**Rena Sofroniou:** While we are speaking of less mundane matters, what do you consider to be your best virtue, Judge?

**Justice Young:** I don't know whether I have one. I suppose the Bar think I'm a

bit mad, a bit of a loose cannon, so people approach a trial before me as if it's going to be an unpredictable event. I don't know whether that helps settlement or not.

**Rena Sofroniou:** Aw, Judge – that seems a bit harsh. Anyway, is this an image you foster?

**Justice Young:** No.

**Rena Sofroniou:** Well then is it one you relate to?

**Justice Young:** No, I don't think I'm mad, really.

**Rena Sofroniou:** That's quite a poignant response! Well, sadly, you have seemed a little too sane to me, if I may say so. The only 'mad' thing I've ever observed is you informing me in one matter before you that my cross-examination had really gone on long enough and that that was quite sufficient for your purposes.

**Justice Young:** Well the standard of cross-examination in equity is quite sad.

**Rena Sofroniou:** Umm... thanks for your candour, Judge(!)

**Justice Young:** The fault is not necessarily with counsel. In fact it seems as though few barristers are briefed with sufficient material on which to cross-examine. The number of times counsel is triumphantly grilling a witness because their affidavit said 'were' and the oral evidence said 'are'. Really!

**Rena Sofroniou:** Exploring that a bit, do you consider objections to affidavits on the ground of 'improper form' to be well taken?

**Justice Young:** Yes, within limits. The classic example is 'She swore at me'. Sometimes it makes a difference as to what was said. Where the words set out give only a vague indication of the words said, I will uphold the objection 95 per cent of the time. But it seems to me that you have not been before me lately, Rena.

**Rena Sofroniou:** I keep getting someone else.

**Justice Young:** My current practice is that if the case is listed for, say, 1 May, there has to be an exchange of objections by 18 April. A week before hearing I rule on the objections. Then the case starts, the affidavits are read, I provide the rulings and basically go so fast that counsel can't follow them. No-one asks me to repeat them. Then I get on with hearing the case.

**Rena Sofroniou:** Ingenious! They'll never know! But vagueness aside, it is when the exact words of the conversation are given, but in a tense that denotes indirect speech that bugs me. Especially when the witness can put it that way in response to a question in cross-examination and the erstwhile objector is as meek as a lamb.

**Justice Young:** Well in ruling I am fairly liberal with respect to form objections. If, when I have read all of the affidavits I see that the other side has given a version of the same conversation I tend to point that out to

objecting counsel.

**Rena Sofroniou:** What in your view is your worst habit?

**Justice Young:** Probably getting overtired and making comments better left unsaid. One should remember that counsel often know when they've got a crook case, and it is hard on them to make that appear too early.

**Rena Sofroniou:** What is your view of the relatively small number of women at the Bar?

**Justice Young:** Very disappointing! When I was vice president of the Bar Association I used to say, in response to media questions for example: 'Give it fifteen years and see how the numbers leap up' and it hasn't happened. That is a great shame for the Bar.

**Rena Sofroniou:** My next spookily revealing stock standard Rorschach blot of a question – what non-essential object you would like to have with you if stranded upon a desert island?

**Justice Young:** It brings to mind that joke I read in a magazine once: a man is stranded on a desert island with a twelve volume encyclopedia lying around him and he says: 'Perhaps I should have saved that blonde instead'. The point being, of course, that however useful they might be, if you choose objects over people, you will soon be fairly bored.

**Rena Sofroniou:** Any imminent plans? Are you interested in teaching overseas for example?

**Justice Young:** I went to Queen's University, in Kingston, Ontario for a month while I was researching *Fisher & Lightwood*. It was a quiet place to do some research and a little lecturing. But the staff were never in their rooms – they had to act as advocates to supplement their work and they would complain at how badly they were treated by the full-time advocates. I enjoyed it but I have had the experience now and don't really want to keep doing it.

**Rena Sofroniou:** Content with things as they are?

**Justice Young:** Yes – my annual August overseas holiday when I was at the Bar has now become an 11- week trip every three or four years and that is sufficient for me.

**Rena Sofroniou:** Thanks for a very enjoyable afternoon.

I suppose the Bar think I'm a bit mad, a bit of a loose cannon, so people approach a trial before me as if it's going to be an unpredictable event. I don't know whether that helps settlement or not.

1 *Australian Bar Review* 9(2) August 1992, pp.130-145

2 (1984) 10 *Syd Law Rev* 253, 258

# The notification provisions of the Legal Profession Act

By Carol Webster\*

It is little over twelve months since several amendments to the *Legal Profession Regulation 1994* were gazetted – largely in response to the *Sydney Morning Herald* articles in February 2001 regarding bankruptcy and barristers. The purpose of this article, written at the request of the editors of *Bar News*, is to provide some historical background and to collect together the relevant statutory provisions – beginning with the changes introduced in March 2001, which were followed by more substantial changes made in July 2001.<sup>1</sup>

The *Legal Profession Amendment (Notification) Regulation 2001* was gazetted on 9 March 2001 ('the Notification Regulation'). It applied to both barristers and solicitors. The changes made by the Notification Regulation required legal practitioners to report to the relevant Council certain bankruptcy events and offences. The president sent a circular to all members of the Association on 9 March 2001 drawing attention to the amendment and to the disclosure obligations imposed by the new regulation<sup>2</sup>.

In *Bar Brief* No.82, March 2001, the president outlined the background to the introduction of the Regulation. The media publicity alleged that there were barristers who had taken advantage of the bankruptcy laws effectively to avoid paying their creditors, and that the Commissioner of Taxation had been owed large amounts in unpaid taxes by those barristers.

Some four months later, the *Legal Profession Act 1987* (LPA) was amended, by the *Legal Profession Amendment (Disciplinary Provisions) Act 2001*. At the same time, there was further amendment to the Regulation by the *Legal Profession Amendment (Disciplinary Provisions) Regulation 2001*. The amendments commenced on 27 July 2001. The extent of the obligation to notify was extended in some respects, and the Councils were given further, 'special', powers to cancel or suspend practising certificates. In *Bar Brief* No.85, July 2002, the president outlined the changes that had been made.

For events occurring after 27 July 2001 (bankruptcies and findings of guilt), the obligation to notify is set out in sec 38FB of the LPA<sup>3</sup>. The Regulation, as amended, sets out when a notification should be made, and what the disclosure statement should address<sup>4</sup>.

Two decisions of the Court of Appeal and two first instance decisions in the Supreme Court have referred to and considered, to varying degrees, the effect of the notification provisions: *NSW Bar Association v Cummins* [2001] NSWCA 284<sup>5</sup>; *NSW Bar Association v Somosi* [2001] NSWCA 285<sup>6</sup>; *Murphy v The Bar Association of New South Wales* [2001] NSWSC 1191 (McClellan J, 21 December 2001)<sup>7</sup> and, most recently, *Cameron v Bar Association of NSW* [2002] NSWSC 191 (Simpson J, 20 March 2002).

The decisions of the Court of Appeal in *Cummins and Somosi* will be considered below. The two cases might be viewed as being at the extreme end of the spectrum, but the remarks made in the

course of the judgments could be expected to inform consideration, whether by a Council or the Court, of a barrister's fitness arising out of conduct not directly relating to professional practice.

As has been recorded in *Bar Brief*<sup>8</sup> and on the Bar Association's web site, Bar Council has considered a number of matters under the notification provisions, and made decisions with respect to some barristers' practising certificates. Appeals to the Supreme Court in respect of a number of those decisions await hearing. There are strict prohibitions in any event on disclosure of professional conduct matters, but as a number of matters are yet to be heard by the Court, no reference will be made in this article to any particular matter or to the work of the professional conduct committee that investigated matters under the notification provisions and reported to the Bar Council. The *Annual Report* of the Association contains a report on the work of all professional conduct committees.

Although it will undoubtedly make this article longer than many may think desirable, as there is no convenient reprint this article will refer in some detail both to the changes made by the Notification Regulation and the further changes made in July 2001.

## Obligation to notify under the Notification Regulation Offences

Clause 69D(1) of the *Legal Profession Regulation 1994*<sup>9</sup> imposed a *duty* on a barrister or solicitor<sup>10</sup> found guilty of an offence to notify the relevant Council of the finding and nature of the offence (in writing) and furnish other information required relating to the finding or commission of the offence. Clause 69D(2)(b) made it clear that a finding of guilt must be notified whether or not the court proceeded to a conviction for the offence. That is, whether or not the court applied the former sec 556A *Crimes Act 1900* (NSW), the present sec 10 *Crimes (Sentencing Procedure) Act 1999* (NSW) or sec 19B *Crimes Act 1914* (Cth).

Clause 69D(2)(e) extended the notification obligation to any indictable offence whenever committed, including before commencement of the clause. Sub clause (2)(f) extended the notification obligation in respect of offences which were not indictable offences, to those committed within the period of ten years before commencement of the clause.

## Bankruptcy

Clause 69E(2) of the *Legal Profession Regulation 1994*<sup>11</sup> imposed a *duty* on a barrister in respect of 'notifiable incidents'. Clause 69E(1) defines 'notifiable incidents':

- becoming bankrupt or presentation of a creditor's petition to the Court;
- presentation of a debtor's presentation of a declaration to the Official Receiver under sec 54A *Bankruptcy Act 1966* of intention to present a debtor's petition, or presentation of a debtor's petition under sec 55 *Bankruptcy Act*; or

- applying to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounding with creditors or making an assignment of remuneration for the benefit of creditors.

The significance of the definition of ‘notifiable incidents’ including compounding with creditors is that a person who compounds under secs 73 or 74 *Bankruptcy Act 1966* and obtains the agreement of creditors to an annulment of his or her bankruptcy still must notify, because the ‘annulment’ does not matter for the purposes of Regulation.

The barrister was required to provide with the notification a statement as to why the barrister considered that, despite the notifiable incident, the barrister was a fit and proper person to hold a practising certificate. There was the same obligation as under cl 69D to provide any further information required by the Council relating to the cause of or circumstances surrounding the incident.

### Applying for practising certificate

Clause 6 specifies the matters required to be notified in an application for a practising certificate. Clause 6(1)(d) was amended by the *Notification Regulation* to delete ‘any indictable offence’ and replace it with ‘any offence (other than an excluded offence)’. ‘Excluded offence’ is defined in cl 3(1), as offences under the road transport legislation (formerly, traffic offences) other than specified traffic offences, eg. negligent driving where the barrister was sentenced to imprisonment or fined not less than \$200, furious or reckless driving, or driving a speed or in a manner dangerous to the public etc. Notably, offences of driving with more than the prescribed concentration of alcohol were required to be disclosed: see cl 3(1)(a)(vii). There were a number of consequential amendments made reflecting the amendment to cl 6(1)(d).

Clause 6(1)(e) was introduced by the *Notification Regulation*, requiring a barrister to provide details of any incident which would be a ‘notifiable incident’ described above for the purposes of cl 69E and a statement as to why, notwithstanding, the practitioner is a fit and proper person to hold a practising certificate. By cl 6(3) the Council was given power to require a practitioner to further furnish further information relating to the cause of or circumstances surrounding such incident.

Clauses 6(1A)(g) and 6(1B) made it clear that information previously disclosed in an application for a practising certificate or under clauses 69D or 69E need not be disclosed again.

### Time for notification

Clauses 69D(3) and 69E(3) set out the time within which a notification must be made:

- for an event occurring before 9 March 2001, within 28 days, ie 6 April 2001; and
- for an event occurring on or after 9 March 2001, within seven days of the event.

### Refusing to issue, cancelling or suspending practising certificates

Section 37 LPA provided that a Council may refuse to issue, may cancel or may suspend a practising certificate if the applicant or holder is required by the Council to explain specified conduct by the barrister or solicitor and fails, and continues to fail, to give an explanation satisfactory to the Council.

The president noted in *Bar Brief* that the Notification Regulation enhanced the Council’s powers to investigate matters that may attract exercise of the power under sec 37, by requiring disclosure to be made of specified matters.

### Changes made in July 2001

The most important of the amendments to the LPA was the insertion of a new Division 1AA in Part 3, although there were other, related, amendments. The essential elements of the disclosure regime introduced by the *Notification Regulation* were extended in some respects.

Division 1AA (ss 38FA — 38FJ) is headed ‘Special powers in relation to practising certificates’.

### Obligation to notify under sec 38FB

The main section is sec 38FB. This contains the primary obligation to notify, which is now cast in terms of having committed an act of bankruptcy (defined in sec 3(3)); or having been found guilty of an *indictable offence* or a *tax offence*.

The obligation under sec 38FB applies both at the time of application for a practising certificate – sec 38FB(1); or on one of the specified events occurring at any time after admission as a legal practitioner – sec 38FB(3). Where there is an obligation to notify, the barrister must also provide a written statement in accordance with the regulations<sup>12</sup> showing why, notwithstanding the relevant matter, the barrister is a fit and proper person to hold a practising certificate.

Clause 6(1)(d) of the Regulation still requires that an application for a practising certificate by a practitioner who has been found guilty of any offence (other than an excluded offence) must ‘contain or be accompanied by’ the nature of the offence. The definition of ‘excluded offence’ in cl 3, was inserted by the Notification Regulation<sup>13</sup>.

### ‘Act of bankruptcy’ and ‘tax offence’

A new sec 3(3) was inserted defining ‘act of bankruptcy’ for the purposes of the LPA, in terms of the matters described above as ‘notifiable incidents’. A definition of ‘tax offence’ was also inserted, in sec 3(1) – it means any offence under the *Taxation Administration Act 1953*. Clauses 6(1)(e) and 6(1C) were amended to refer to the new concept of ‘act of bankruptcy’. Clause 6(3) now defines ‘offence’ as including a tax offence.

Section 38FB(7) continues the position which applied under the *Notification Regulation*, as noted above, that the obligation to notify offences arises whether or not the court proceeded to conviction for the offence.

No fresh notification or determination is required where a written statement has previously been provided under sec 38FB or a determination made under sec 38FC (LPA ss 38FB(5), 38FC(7) and Schedule 8, which sets out transitional provisions, cl 69D(4) and 69E(3) of the Regulation).

### Refusing to issue, cancelling or suspending practising certificates

Sections 38FC, 38FD and 38FE provide additional powers for a Council to refuse to issue, cancel or suspend a practising certificate.

Section 38FC(1) provides that a Council must refuse to issue, or must cancel or suspend a practising certificate if the Council is aware that since being admitted as a legal practitioner an

applicant for, or holder of, a practising certificate has committed an act of bankruptcy or been found guilty of an indictable offence or a tax offence *and* the Council considers that act or offence was committed in circumstances that show that the applicant or holder is not a fit and proper person to hold practising certificate. Subsection 38FC(3) and (4) deal with matters occurring very close to the date when practising certificates would ordinarily expire.

Under sec 38FE a Council may refuse to issue or may cancel or suspend a practicing certificate if the applicant or holder has:

- failed to provide a sec 38FB statement when required to do so under the section; or
- failed in the sec 38FB statement to show that he or she is a fit and proper person.

Under sec 38FD a Council may refuse to issue, cancel or suspend a practicing certificate if the applicant or holder has ‘failed to notify a matter (being a failure declared by the regulations to be professional misconduct)’ and the Council considers the failure occurred without reasonable cause.

Further, sec 37(1)(a) was amended, and now provides that a Council may refuse to issue, may cancel or may suspend a practising certificate if the applicant or holder is required by the Council to explain specified conduct (whether or not related to practice as a barrister or solicitor) that the Council considers may indicate that the applicant or holder is not a fit and proper person to hold a practising certificate and fails, within the period specified by the Council, to give an explanation satisfactory to the Council.

### Time for notification after 27 July 2001

Clause 69E as introduced by the *Notification Regulation* was deleted, and new clauses 69E — 69H inserted. Clause 69D was also amended, to refer back to the definition of tax offence in sec 3(1) of the LPA.

Clauses 69D(3)<sup>14</sup> and 69E(2) of the Regulation now prescribe these time requirements for a notification:

- for an act of bankruptcy committed before, or finding of guilt made before, 27 July 2001 by a person who was a barrister at 27 July 2001 – within seven days of 27 July 2001 ie 3 August 2001;
- for an act of bankruptcy committed, or finding of guilt made, on or after 27 July 2001 – within seven days after the act of bankruptcy was committed or finding of guilt made.

Clause 69F(1) provides that for the purposes of sec 38FB(1) an applicant for a practising certificate must provide the written statement required within 14 days after making an application for a practising certificate. Clause 69F(2) provides that for the purposes of sec 38FB(3) a barrister must provide the written statement within 14 days of the ‘appropriate date’. ‘Appropriate date’ here is defined by cl 69F(3):

- for an act of bankruptcy committed before, or finding of guilt made before, 27 July 2001 by a person who was a barrister at 27 July 2001 – within seven days of 27 July 2001 ie 3 August 2001;
- for an act of bankruptcy committed, or finding of guilt made, on or after 27 July 2001 – the (first) date on which the act of bankruptcy was committed or finding of guilt made.

Under cl 69G the statements required under sec 38FB(2) and (4) with respect to a failure to notify must be provided within seven days of the appropriate date: cl 69G(1). ‘Appropriate date’

here is defined in cl 69G(2):

- (a) if the barrister notifies *after* the notification was required under the *Notification Regulation*, and the last day for notification was before 27 July 2001 – 27 July;
- (b) if the barrister notifies *after* the notification was required under the *Notification Regulation*, and the last day for notification was after 27 July 2001 – the date on which the notification was made; or
- (c) if the Council has given a notice in writing under 38FC(2) in relation to the incident that should have been notified – the date on which the notice was given.

### Notices requiring production of documents or information

Section 38FI is analogous to sec 152 in Part 10 of the LPA. The section gives power to a Council or the Commissioner to require a legal practitioner to provide information, produce documents or otherwise assist in or cooperate with the investigation of a matter under Division IAA.

### Failure to notify

A failure to notify can have quite serious consequences. Sections 38FB(2) and (4) provide that a barrister (or an applicant for a practicing certificate) who fails to notify a matter as required by the regulations<sup>15</sup>, where the failure is one declared by the regulations to be professional misconduct<sup>16</sup>, must provide a written statement, in accordance with regulations<sup>17</sup>, showing why despite the failure to notify the barrister (or applicant) is a fit and proper person to hold a practising certificate.

If a Council becomes aware that an applicant for or holder of a practising certificate has, since being admitted as a legal practitioner, committed an act of bankruptcy or been found guilty of an indictable offence or a tax offence, under sec 38FC(2) the Council must, within 14 days, give notice in writing to the applicant or holder dealing with four matters:

- if the Council has not received a statement under sec 38FB in relation to the incident, require the applicant or holder to make a statement in accordance with sec 38FB;
- inform the applicant or holder that a determination in relation to the matter is required to be made under sec 38FC;
- inform the applicant or holder of the relevant period in relation to the determination of the matter and that the applicant or holder will be notified of any extension of the relevant period; and
- inform the applicant or holder of the effect of the automatic suspension provisions in sec 38FH in the event of the matter not being determined by the Council or the Commissioner within the relevant period.

‘Relevant period’ is defined in sec 38FA – three months commencing when (a) the notification is given, or (b) where no notification has been received by the time a sec 38FC(2) notice is sent, the date of issue of the notice under sec 38FC(2). It may be extended by the Commissioner under sec 38FA(2) but such extension is limited to a further month.

### Definition of professional misconduct

As amended sec 127 of the LPA now provides:

- 1) For the purposes of this Part, professional misconduct includes: ...

- (b) conduct (whether consisting of an act or omission) occurring otherwise than in connection with the practice of law which, if established, would justify a finding that a legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of legal practitioners, or ...
  - (c) conduct that is declared to be professional misconduct by any provision of this Act, or
  - (d) a contravention of a provision of this Act or the regulations, being a contravention that is declared by the regulations to be professional misconduct. ...
- 4) For the avoidance of doubt, conduct:
- (a) involving an act or acts of bankruptcy, or
  - (b) that gave rise to a finding of guilt of the commission of an indictable offence or a tax offence, whether occurring before, on or after the commencement of this subsection, is professional misconduct if the conduct would justify a finding that the legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of legal practitioners.

#### Failures to notify declared to be professional misconduct

Clause 69H(1) of the Regulations declares that each of the following failures to notify is professional misconduct:

- (a) a failure to notify, without reasonable cause, information in relation to a finding of guilt of the commission of an indictable offence or a tax offence as required by cl 6(1)(d);
- (b) a failure to notify, without reasonable cause, information in relation to an act of bankruptcy as required by cl 6(1)(e);
- (c) a failure to notify, without reasonable cause, a finding of guilt of the commission of an indictable offence or a tax offence as required by cl 69D in the time and manner specified in that clause;
- (d) a failure to notify, without reasonable cause, an act of bankruptcy as required by cl 69E in the time and manner specified in that clause.

Clauses 6(1)(d), (1)(e), 69D and 69E have been discussed above.

#### Role of the Legal Services Commissioner

Under ss 59E(1) and (2) the Council is obliged to notify the Legal Services Commissioner of notifications received. The Commissioner has broad powers to request information. Further, under sec 38FG, the Commissioner may take over determination of a matter under sec 38FC. The Commissioner must also confirm Bar Council determinations in Part 3 matters.

#### The Court of Appeal decisions

The decisions in *Cummins* and *Somosi* were both delivered on 31 August 2001, after the introduction of Division 1AA into the LPA. Neither was an application under the Division, but rather applications by the Bar Association in the inherent jurisdiction of the Supreme Court for the name of the barrister to be removed from the Roll of Legal Practitioners. It is probably notorious that in each case the barrister had failed for a period of years to file income tax returns or to pay tax.

In *Cummins*, the facts were, briefly<sup>18</sup>, that for a period of approximately 38 years from his admission to the Bar, until late 1999 or early 2000, the barrister did not lodge any taxation returns relating to his professional practice or any personal

income. After returns were lodged, the ATO obtained judgment for a sum of approximately \$1 million. The barrister became bankrupt on his own petition in December 2000. Creditors apart from the ATO were owed less than \$20,000 in total.

In *Somosi*, the barrister had been convicted in the Local Court<sup>19</sup> of 17 offences against sec 8C(1)(a) of the *Taxation Administration Act 1953*, of failing to comply with a notice dated 3 November 1994 requiring him to file income tax returns for each of the 17 years ending 30 June 1978 to 30 June 1994. As at 30 March 2001, the barrister had not paid any income tax for the years ended 30 June 1978 to 30 June 1994.

Mason P had said in *New South Wales Bar Association v Hamman* [1999] NSWCA 404:

[85] I emphatically dispute the proposition that defrauding 'the Revenue' for personal gain is of lesser seriousness than defrauding a client, a member of the public or a corporation. The demonstrated unfitness to be trusted in serious matters is identical. Each category of 'victim' is a juristic person whose rights to receive property are protected by law, including the criminal law in the case of dishonest interception. 'The Revenue' may not have a human face, but neither does a corporation. But behind each (in the final analysis) are human faces who are ultimately worse off in consequence of fraud. Dishonest non-disclosure of income also increases the burden on taxpayers generally because rates of tax inevitably reflect effective collection levels. That explains why there is no legal or moral distinction between defrauding an individual and defrauding 'the Revenue'.

In *Cummins*, Spigelman CJ (with whom the other members of the Court agreed) quoted that passage from *Hamman*<sup>20</sup> and continued:

19 ... in some spheres significant public interests are involved in the conduct of particular persons and the state regulates and restricts those who are entitled to engage in those activities and acquire the privileges associated with a particular status. The legal profession has long required the highest standards of integrity.

20 There are four interrelated interests involved. Clients must feel secure in confiding their secrets and entrusting their most personal affairs to lawyers. Fellow practitioners must be able to depend implicitly on the word and the behaviour of their colleagues. The judiciary must have confidence in those who appear before the courts. The public must have confidence in the legal profession by reason of the central role the profession plays in the administration of justice. Many aspects of the administration of justice depend on the trust by the judiciary and/or the public in the performance of professional obligations by professional people.

...

21 As Kitto J said in *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 298:

'... the Bar is no ordinary profession or occupation. These are not empty words, nor is it their purpose to express or encourage professional pretensions. They should be understood as a reminder that a barrister is more than his client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. He is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with his fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and

exceptional obligations. If a barrister is found to be, for any reason, an unsuitable person to share in the enjoyment of those privileges and in the effective discharge of those responsibilities, he is not a fit and proper person to remain at the Bar.

...

28 In the present case, I am satisfied that the barrister's complete disregard of his legal and civic obligations with respect to the payment of income tax was such that he must be regarded, at the present time, as permanently unfit to practice.

29 ... For almost four decades, Mr Cummins took advantage of the full range of public services made available by taxation, not least in the provision of the court system in which he earned his income. He left the burden of all of this to his fellow citizens. Throughout the four decades he engaged in the rank hypocrisy of advocating that other people should perform their legal obligations, while systematically refusing to perform his own.

30 In the present case, unlike other cases, the barrister did not admit that his actions have jeopardised the reputation and standing of the legal profession. There is no doubt, however, that he has done so. The conduct of a barrister, particularly a barrister who has received the distinction of a Commission as one of Her Majesty's Counsel, who has behaved in such complete disregard of his legal and civic obligations, was necessarily such as to bring the entire legal profession into disrepute. ...

50 It has not generally been useful or necessary to distinguish the terminology of 'professional misconduct' from other phrases such as a 'fit and proper person', 'good fame and character', 'unprofessional conduct', 'unsatisfactory professional conduct' etc. ....

51 The words 'professional misconduct' are broad and general words. Their meaning may vary from one context to another. ...

52 It is possible to confine the words 'professional misconduct' to apply only to conduct in the course of actual professional practice narrowly defined. ...

56 There is authority in favour of extending the terminology 'professional misconduct' to acts not occurring directly in the course of professional practice. That is not to say that any form of personal conduct may be regarded as professional misconduct. The authorities appear to me to suggest two kinds of relationships that justify applying the terminology in this broader way. First, acts may be sufficiently closely connected with actual practice, albeit not occurring in the course of such practice. Secondly, conduct outside the course of practice may manifest the presence or absence of qualities which are incompatible with, or essential for, the conduct of practice. In this second case, the terminology of 'professional misconduct' overlaps with and, usually it is not necessary to distinguish it from, the terminology of 'good fame and character' or 'fit and proper person'. ...

65 The decision of this Court in *Hamman*, to make a finding of professional misconduct in a case of avoidance of taxation, is supported by these authorities.

66 The preparation and filing of tax returns is closely related to the earning of income, including professional income. The link is 'sufficiently close' to justify a finding of professional misconduct on the basis of Mr Cummins' failure to lodge returns for thirty-eight years.

67 Similarly, and alternatively, the extent of Mr Cummins' failure to observe his legal obligations and civic responsibilities by such a systematic course of improper conduct over such a long

period of time is of such gravity as to constitute professional misconduct, for the reasons I have mentioned above in relation to fitness.

...

69 As in the case of the declaration of unfitness, in my opinion, the maintenance of the confidence of the public in the legal profession makes it appropriate to formally declare that Mr Cummins' conduct was professional misconduct.

In *Somosi*, the Chief Justice, with whom the other members of the Court agreed, said

68 The factors to which I have referred in my judgment in *Cummins* are equally applicable here. Mr Somosi acted in complete disregard of his legal and civic obligations. He took advantage of the full range of public services made available by taxation, not least the provision of the court system in which he earned his income. He left the burden of all of this to his fellow citizens. Furthermore, for a period of almost two decades he engaged in what I described in *Cummins* as the hypocrisy of putting himself in a position, as a legal practitioner, in which he advocated that other people should perform their legal obligations, whilst systematically failing to perform his own.

69 In this case, unlike *Cummins*, the Court does have before it some information concerning the conduct of the legal practitioner in an attempt to rectify his failure to comply with his obligations. Mr Somosi did eventually reveal to the taxation authorities his long period of non-compliance...

73 These proceedings are not concerned to protect the revenue. These proceedings are concerned with what Mr Somosi's default reveals about his character and fitness. No doubt the taxation authorities are and were primarily concerned to get what they can. These authorities will no doubt consider issues of punishment for purposes of general deterrence. However, the jurisdiction which this Court is exercising is a protective jurisdiction. It is not directed at punishment. It is not concerned with revenue collection. Whether or not the taxation authorities were prepared to accept three years of returns in total satisfaction of Mr Somosi's taxation obligations, is not a matter entitled to significant weight for present purposes. What the taxation authorities were prepared to accept, in the exercise of their discretion, says nothing about Mr Somosi's character or fitness.

74 The recording of a conviction is often a matter of significance for issues of fitness. It would also be material to an issue of 'good fame and character' which, obviously overlaps with an issue of fitness. The issue of good fame and character has not directly arisen in these proceedings.

75 In the present case the conviction and penalty is not, of itself, a matter entitled to substantial weight. The significant matter is the conduct underlying the convictions. The convictions were for the failure to comply with a notice to file seventeen years of returns within a period of about a month from the Notice. However, the underlying conduct, to which the conviction only indirectly related, was the failure by a legal practitioner, over a long period of time and in a systematic way, to comply with his legal and civic obligations. It is that conduct that is entitled to determinative weight in making the judgments the Court has to make in these proceedings, both as to the findings of fact upon which it acts and also on the issue of relief.

76 I emphasise that, in this case it is the conduct itself that is entitled to such weight, not the fact that in an indirect manner that conduct has manifested itself in a particular conviction with a particular penalty. I am not saying the latter is irrelevant, but in

the circumstances of this case I would come to no different conclusion, either in terms of identifying misconduct or in terms of determining what should be the relief, if there had never been a conviction at all. In the case of Cummins there was no conviction. ...

78 The determinative consideration for these proceedings is that he avoided tax for seventeen years. In the absence of any suggestion to the contrary in his own evidence, I find no difficulty in drawing the obvious inference that his failure to comply with his obligations over that period of time was deliberate and that he intended to avoid taxation. His subsequent conduct does not qualify the impropriety of this failure. Indeed, he has repeated the failure in two subsequent years. ...

81 In proceedings of this character the Court is entitled to assess the underlying conduct on which a conviction is based from the distinctive perspectives of professional misconduct and fitness to practice (see *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 esp at 283, 285-286, 288-291, 296, 297-298, 299-300, 301). In these matters the mere fact of conviction is not necessarily determinative. It is not in this case. ...

83 Mr Somosi did not oppose the Court making a declaration that he was not a fit and proper person to remain on the Roll. For the above reasons such a declaration should be made.

84 Mr Somosi opposed the Court making a declaration that he has been guilty of professional misconduct. [His Counsel] submitted that the scope of professional misconduct should be confined to conduct in the course of practice ... and stated that his client would abide the outcome in [*Cummins*].

85 I consider this issue at some length in my judgment in *Cummins*. It is unnecessary to repeat those reasons here. For the reasons I expressed in *Cummins* it is appropriate to make the declaration in this case.

### ***Murphy v The Bar Association of New South Wales* [2001] NSWSC 1191**

In *Murphy*, McClellan J held that the test to be applied when determining fitness to practice, in the context of bankruptcy, is whether the indebtedness which led to the bankruptcy was brought about or associated with dishonest conduct by the barrister. Conduct which reflects incompetent management of the person's affairs, without the intention to avoid lawful obligations, does not itself justify a finding the person is not 'fit and proper'<sup>21</sup>.

McClellan J had rejected a submission that ss 38FB(1) and (3), 38FC and 38FE of the LPA create a presumption that, without adequate explanation, an act of bankruptcy or a finding of guilt of an indictable or tax offence make a person not fit and proper to hold a practising certificate, and that the decision pursuant sec 38FC as to whether a person is 'fit and proper' should be informed by that presumption. McClellan J considered that sec 38FC should be understood so that the act of bankruptcy raises the occasion for consideration of the practitioner's fitness to practice but does not raise any adverse presumption or impose any onus on the barrister.<sup>22</sup>

The barrister had been an employed solicitor, and then in sole practice until 1998. He was admitted as a barrister in August 1998. The barrister experienced significant increases in his income in the years ending 1990 and then 1992. The first was from practice income and the second attributable to a kindergarten business the barrister owned. In each case there was

a significant tax liability and then a significant provisional tax assessment. McClellan J accepted that the barrister received bad advice that led to him failing to lodge income tax returns or taking steps to vary the provisional tax assessments, so that ultimately the ATO obtained judgment against the barrister for a very significant sum. The barrister had sold kindergarten business for a sum sufficient to clear the debts associated with it, but provided no surplus. The ATO served a creditor's petition. The barrister unsuccessfully proposed a deed of arrangement. It was rejected by the ATO as the most significant unsecured creditor, and the barrister then became bankrupt on his own petition in late 2000.

McClellan J agreed with a submission that the plaintiff could and should have paid more tax than he did in the years after 1993, although he would not have been able to pay the whole debt as by that time his indebtedness was accumulating at a greater rate than he could afford. His Honour found that the barrister honestly intended to try to trade out of his difficulties and by the sale of his remaining assets, to meet all his liabilities; and consequently held that the barrister's conduct could not be described as dishonest<sup>23</sup>. McClellan J. continued:

[177] ... I am satisfied that the plaintiff did not act dishonestly, was not motivated by greed and genuinely, although mistakenly, hoped he could trade out of his difficulties. His conduct, although deserving of criticism, even strong criticism, does not justify a finding that he is not 'a fit and proper person'. He was wrong to take the advice to delay filing his tax returns and he should have addressed his situation earlier and filed for bankruptcy when his position was obviously hopeless. He should also have made more taxation payments, rather than merely hope that from the sale of his remaining assets he would be able to meet all his obligations.

...

[179] However, in my view an inability to meet, for example, one's mortgage commitments or family maintenance obligations, through mismanagement, but without dishonest intent, would be unlikely to justify the ultimate disciplinary response. It would be otherwise if the failure was deliberate and intended to disadvantage the barrister's creditors and advantage the barrister.

...

[182] I do not accept that the plaintiff's failure to pay some of his tax, in circumstances where his ultimate object remained to pay out all his debts including his taxation liabilities, requires the conclusion that he is not a 'fit and proper person'.

Consequently the plaintiff's appeal against the cancellation of his practising certificate by the Bar Council was upheld.

As noted above, the Bar Association has appealed, and the appeal is expected to be heard mid year.

### ***Cameron v Bar Association of NSW* [2002] NSWSC 191**

On 6 April 2001, after gazettal of the Notification Regulation, the plaintiff disclosed two convictions under sec 8C of the *Taxation Administration Act* 1953 for failing to comply with a notice to furnish income tax returns (for the years ended 1995 and 1999) and a further conviction under s 8H of the TAA of failing to comply with a court order to furnish an income tax return (for the year ended 1995); and that he had, on 5 January 2001, been served by the Deputy Commissioner of Taxation with a creditor's petition. In his application for a practising certificate in June 2001 the plaintiff disclosed that he had been a bankrupt, he had had a creditor's petition served on him, he had presented to the Official Receiver a declaration of intention to present a debtor's petition

and had in fact presented a debtor's petition; and that he had been found guilty of an offence other than an indictable offence in the preceding ten years<sup>24</sup>. An annexure provided details *inter alia* of a bankruptcy in December 1994<sup>25</sup> on the petition of the Deputy Commissioner of Taxation and a second bankruptcy in February 1995, again on the petition of the Deputy Commissioner of Taxation. The application did not provide any additional information about the offence or offences of which he had been found guilty.

On 1 November 2001, acting under sec 38FC and sec 38FE(1)(b), the Bar Council resolved to cancel the plaintiff's practising certificate. The plaintiff commenced proceedings in the Supreme Court in respect of the decision, but discontinued those proceedings in December 2001. On 26 March 2002 he filed a fresh summons, which came before Simpson J. His explanation for having discontinued the earlier proceedings was that he had become aware that the July 2001 amendments to the LPA had extended the disclosure requirements so as to require disclosure of any tax offence since admission as a legal practitioner – extending beyond the ten year period referred to in cl 69D of the Regulation – and believed it was inappropriate to appeal to the court without having disclosed further offences of which he had been convicted. On 13 February 2002 the plaintiff disclosed four offences contrary to s 8C of the TAA (for the years ended 1984, 1985, 1987 and 1989) and two offences contrary to sec 8H of that Act, of failing to comply with court orders to furnish returns (for years ended 1983 and 1988).

Simpson J was asked to grant interlocutory relief, including a stay of the cancellation of the plaintiff's practicing certificate and a declaration that he was a fit and proper person to practise as a barrister

It was accepted that the Deputy Commissioner of Taxation had lodged a proof of debt in the 1990 bankruptcy for \$80,504 in unpaid income tax for the period 1979 to 1987, unpaid provisional tax, additional tax for late payment, interest on a judgment obtained, and judgment costs, in total \$278,109.84. Following the 1995 bankruptcy the Deputy Commissioner for Taxation lodged a proof of debt of almost \$90,000, almost \$53,000 of which was attributable to unpaid tax for the years 1993 and 1994. The third creditor's petition presented by the Deputy Commissioner in December 2000 claimed \$157,401.87 made up in part of unpaid tax for 1996, 1997, 1998 and 1999 tax years.

The plaintiff's counsel submitted that he should be seen as incompetent in the management of his own affairs, but not as delinquent, or, at least, not deliberately or culpably so, the plaintiff's troubles began with a failed tax minimisation scheme in about 1990 and he had not thereafter been able to extricate himself from the financial mire into which he had fallen. He relied on McClellan J's decision in *Murphy*. The Bar Association argued that the plaintiff's tax chronology demonstrated a continuous history of failure to discharge his taxation obligations, leaving a clear inference that he intended to adopt this course and that he did so deliberately, preferring all other creditors to the Deputy Commissioner.

The plaintiff pressed the construction of the words 'not a fit and proper person to hold a practising certificate' in sec 38FC of McClellan J in *Murphy*, as denoting dishonesty. The Bar Association expressly renounced the construction adopted by McClellan J but did not seek to argue that Simpson J should not adopt it, recognising the principles of comity that guide first

instance judges. Her Honour said:

[37] I have real reservations about McClellan J's construction of the words in the section; it seems to me that these words are intended to encompass conduct that goes outside dishonesty and embrace significant impropriety, lack of integrity or bad faith falling short of dishonesty. Dishonesty is itself a somewhat elastic concept, not necessarily conveying the same meaning to everybody.

In the circumstances, Simpson J approached the matter on the statutory construction stated in *Murphy*. Her Honour stated:

[39] I have not the slightest doubt that the conduct engaged in by the plaintiff over many years was improper. The question I have to determine, in the circumstances, is whether that conduct should also be characterised as dishonest such as to warrant a conclusion that he is not a fit and proper person to hold a practising certificate.

...

[46] I am satisfied that, on the material before me, the plaintiff has been shown to have been guilty of relevant dishonesty and therefore to be not a fit and proper person to hold a practising certificate under the Act. I have come to this conclusion, as indicated, because it has been necessary to consider the question of dishonesty. Left to myself, without the constraints of *Murphy*, I would have found that the lack of integrity, and the extent of the impropriety in meeting tax obligations over the years, whether properly characterised as dishonest or not, produced the same result.

Simpson J did not need to consider the relationship between s 38FC and 38FE of the LPA discussed by McClellan J in *Murphy*. The proper construction of sec 38FC of the LPA and the relationship between secs 38FC and 38FE will have to await the decision of the Court of Appeal in *Murphy*.

### Issues to note

Some matters can be noted:

**No conviction recorded:** Where a court finds an offence proved but does not formally record a conviction, for example under sec 19B *Crimes Act 1914* in respect of tax offences, there is still an obligation to notify the finding of guilt.

**Time limits:** The time limits imposed by the Act are quite restrictive, and there is only a limited ability to seek an extension, of a further month, from the Legal Services Commissioner: see sec 38FA(2). Section 38FH effects an automatic suspension of a practising certificate where the Bar Council has been unable to determine a matter within the 'relevant period' as defined.

Accordingly, particular attention would be needed, both to events which must be notified, and then to the information to be provided. Because of the time limits and the effect of sec 38FH, it would seem to be in a barrister's own interests to provide a full sec 38FB statement with as much information regarding the circumstances of the relevant matter when making a notification, and thereafter promptly to respond to any requests for further information, particularly any notice served under sec 38FI.

In this regard, assistance may be gathered from papers written in relation to Part 10 matters generally. R R Stitt QC & G C Lindsay SC delivered a CLE Seminar for the Bar 'Ethics and Disciplinary proceedings affecting barristers' on 16 June 1997. The paper, 'Disciplinary proceedings affecting barristers' was revised 28 January, 1999. It is available on the Bar Association web site on the professional conduct page. That paper referred to an article by Jeremy Gormly 'Conduct of Complaints against

Barristers' appeared in the Spring/Summer 1994 issue of *Bar News*. It was subsequently republished in the February 1998 edition of *Stop Press*, and copies are available in the Bar Library and from Professional Conduct Department staff.

One of the points made in Jeremy Gormly's paper is that it is usually desirable that some other person settles any correspondence with the Bar Association regarding complaints. The staff of the Professional Conduct Department suggest that the same advice would apply to notification matters.

#### Risk management strategies to consider:

- proper record keeping;
- employ an accountant or financial adviser;
- get financial records to accountant or financial adviser on time to enable prompt completion of tax returns (and being aware of when tax returns are due);
- make provision for payment of income tax and GST, by setting money aside – which maybe by banking a percentage of gross receipts into a separate account;
- ensure that any change of address (personal or business) is notified to accountant or tax agent, or direct to the ATO, as appropriate;
- ensure that accountant or tax agent brings any notice served by the ATO to a barrister's attention by more than one means, preferably including some form of personal contact with the barrister;
- give priority to complying with any notice to file returns (and if needed, seek an extension of time before rather than after the due date); and
- finally, the Professional Conduct Department would remind us that our own affairs cannot be ignored (personal and family issues, and our own health) while attending to clients' affairs – BarCare is one avenue of assistance for barristers in the first instance at least.

- 1 The assistance of BA Coles QC and Helen Barrett, Deputy Professional Affairs Director, each of whom read a draft of this article, is gratefully acknowledged.
- 2 The text of the Regulation was reproduced in that edition of *Bar Brief*
- 3 See from p44 below, under the heading *Obligation to notify under sec 38FB*
- 4 See at p44 below, under the heading *Time for notification after 27 July 2001*
- 5 Reported at 52 NSWLR 279
- 6 An application for special leave has been filed.
- 7 The Bar Association has appealed to the Court of Appeal against the decision.
- 8 No. 89 December 2001, No. 90 January 2002 and No. 91 February 2002
- 9 As inserted by the Notification Regulation
- 10 The same obligations were imposed on solicitors – the LPA and Regulation refer to 'practitioner' generally, but this article will refer simply to barristers.
- 11 As inserted by the Notification Regulation
- 12 See cl 69F
- 13 See p44 above, under the heading *Applying for practising certificate*
- 14 As amended by the Disciplinary Provisions Regulation
- 15 See clauses 69D and 69E
- 16 See cl 69H
- 17 See cl 69G
- 18 The Statement of Agreed Facts appears at [15] in the judgment of Spigelman CJ
- 19 The convictions were upheld by Graham DCJ in the District Court
- 20 At [18]
- 21 At [45]
- 22 See [13]-[14]
- 23 See [174]
- 24 As required by cl 69D, as inserted by the Notification Regulation
- 25 The reference to 1994 would appear to be an error in the judgment, as it later refers to a 1990 bankruptcy

#### Advertisement

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Applications should be forwarded by 3 June 2002 to:

**Ms Andrea Durbach**  
Director, Public Interest Advocacy Centre  
Level 1, 46–48 York Street  
Sydney NSW 2000  
or [adurbach@piac.asn.au](mailto:adurbach@piac.asn.au).

# Grace Cossington Smith, Justice Meagher and the Bar Association art collection

By Gary Gregg\*

We agreed – indeed, no sane friend of ours would bother to argue – that Art was the most important thing in life, the constant to which one could be unfailingly devoted and which would never cease to reward; more crucially, it was the stuff whose effect on those who were exposed to it was ameliorative. It made people not just fitter for friendship and more civilised (we saw the circularity of that), but better – kinder, wiser, nicer, more peaceful, more active, more sensitive. If it didn't, what good was it? ... *Ex hypothesi* (as we would have said, or indeed *ex vero*), the moment someone perceives a work of art he is in some way improved.

Julian Barnes – *Metroland*

I am happy to be able to report that there is more to the Bar Association's art collection than an infamous air brushed painting of some gel, apparently communicating with herself in a way not encouraged by polite society, at least in public.

If Richard Ackland's mockumentary screened on the ABC is taken as gospel, *that painting* has come to be regarded as an affront by the more politically correct of our brethren (there must be some?) and seemingly by most, but perhaps not all, of our female members.

Fortunately, there exists within the collection a work far more deserving of attention. A work of modest means and purpose, yet a work which fulfils the ideals of art.

\* Gary Gregg is a full-time barrister and a part-time painter. In 1998, at the suggestion of Justice Meagher, and on the condition that Meagher, JA selected the work, Gregg donated a work on paper to the Bar Association. That work now hangs in the common room. Gregg's eighth solo exhibition will comprise drawings and works on paper and will be held August/September 2002 at BBA Gallery, Sydney.



This work, *from David Jones' window* is a drawing by Grace Cossington Smith which the Bar Association is fortunate to have in its collection. It appears to have been rendered in wax crayon and perhaps coloured pencil. Yet, the modesty of its means has an endearing quality which immediately engages the viewer. On examination, you see that it is intimate in scale and purpose. I suspect that it is successful because it has the attributes of the best works of art, it was created for the artist (from a need to create) rather than for an audience.

Probably unknown to most of us, this work has existed within the collection since the 1970's. This is such a good picture that I say without hesitation that one so called politically incorrect work, would have been far better expended on celebrating this lovely little drawing by Cossington Smith.

Grace Cossington Smith, who was born on 22 April 1892, has, in the view of Daniel Thomas, always been recognised as one of the three pioneers, with Wakelin and de Maistre, of Post-Impressionism in Sydney. Thomas was the author of the first article to be published on the artist which incidentally did not appear until March 1967 (*Art in Australia*, Vol. 4, No. 4). He also expressed the view that if Miss

Cossington Smith's work has been less well known than it deserves, it is partly her own choice. It seems that she preferred to stay within the gentle circle of her home – her father, her sister and a few painter friends.

Thanks to recent publications, including *Stravinsky's Lunch* by Drusilla Modjeska, her story and her work are becoming better known by the general public. She is perhaps best known for her late interiors of her house at Turramurra which demonstrate her frequently praised skills as a colourist.

Cossington Smith studied with Anthony Dattilo-Rubbo at his school, 'the Atelier', in Rowe Street, Sydney for a period of about six years between 1910 and 1918. Perhaps influenced by Rubbo, some of her early work had political and social themes (eg., *Strike* 1917), yet from her earliest work until the late interiors, Cossington Smith frequently found inspiration in the landscape. The suburban streets and neighbouring bush at Turramurra have featured in the majority of those landscapes.

As to the work itself, *from David Jones' window*, although signed in pencil by the artist, is undated. Yet evidence suggests that it was done some time in the 1930s. Daniel Thomas, *op.cit.*, refers to 'a rather personal group of hatched linear drawings in coloured chalks and pencils' from around 1930. I believe this work is of that group. In addition, the back of the frame carries a sticker from the Macquarie Galleries (which did exhibit her work) describing this work as circa 1936.

This is a work which re-pays with the currency of pleasure, the investment of observation.

A good work of art does not give itself up too easily. It does not reveal all of its qualities on a fleeting acquaintance. One needs to linger a while, invest time and interest and the rewards will be forthcoming.

Some of those rewards in the case of this drawing include the following:

- Pleasure at the contrast between the

All the life force  
wasted on  
decrying that one  
so called  
politically  
incorrect work,  
would have been  
far better  
expended on  
celebrating this  
lovely little  
drawing by  
Cossington Smith.

historical landscape of the 1930s depicted in the drawing and the landscape of today. For example, observe the ships with funnels and masts and the now demolished buildings to the south and south west of the Barracks. This is similar to the pleasure one derives from looking at an old photograph of say Circular Quay and Dawes Point, but the pleasure is more than curiosity and is heightened because someone did not just point a camera but rendered and interpreted the landscape.

- This work, inscribed *from David Jones' window* beneath the signature of the artist, was drawn possibly from the vantage point of the long defunct but apparently to be refurbished David Jones Café on the seventh floor of the women's store. It looks down on the landscape across the old Supreme Court building on the corner of Elizabeth Street and St James Road, past Queens Square to the Hyde Park Barracks and across the Domain to the harbour.

Shifting the vantage point seems to have been a not infrequent device employed by this artist. See also works in the Art Gallery of New South Wales collection:

- Things on an iron tray* on the floor circa 1928, which, as the title implies, depicts a still life seen from above;
- Circular Quay from Milsons Point 1928* (coloured pencil, crayon) which may well have been a study for
- The Curve of the Bridge 1928-29* (oil on cardboard), both of which observe the principal subject from below.

Although it is unfair in some ways to compare this drawing to her late interiors, it is possible to see in this work why Grace Cossington Smith enjoys a deserved reputation as a colourist. As Geoffrey Dutton wrote in *The Innovators* (1986) for

her, colour, and colour within colour, was the messenger of form. She is one of the supreme colourists among Australian painters. In her late 70s she set down her thoughts on the subject:

- 'All form – landscape, interiors, still life, flowers, animals, people has an inarticulate grace and beauty; painting to me is expressing this form in colour, colour vibrant with light – but containing this other, silent quality which is unconscious, and belongs to all things created.' (GCS quoted in Mervyn Horton, *Present day art in Australia*, Sydney, 1969, p.203)

- 'I have always wanted, and my aim has always been to express FORM in COLOUR – colour within colour, vibrant with light.' (GCS 1967 letter – Art Gallery of New South Wales)

For this work, and for certain others in the collection (apparently including the gel referred to above) we owe a vote of thanks to the Hon Justice Meagher. Some members of the Association may not be aware that Justice Meagher, who held the office of president between 1980-1981, took a keen interest in the Association's collection in his time at the Bar. Legend has it that from time to time Justice Meagher would inveigle and/or strong-arm fellow members to part with funds to enable works to be purchased for the collection. This Cossington Smith work has inscribed in pencil on the back 'sold Meagher and Reynolds \$750'. Justice Meagher told me that the work was purchased in 1974 and donated to the Association in memory of Anthony Vincent, a former member of 8 Selborne Chambers who died in 1973.

Justice Meagher is of the opinion that this drawing is one of the two best drawings Cossington Smith ever did. The other, which is unsigned and undated, is part of his private collection. Also a landscape, this drawing of Black Mountain in Canberra, employs a fauvist approach to colour and is strikingly beautiful.

The Association's records pertaining to the collection are unfortunately incomplete. However, such records as do exist suggest that Justice Meagher also



*Things on an iron tray, 1928*

had a hand in the acquisition of a number of the better paintings in the collection. Mention of just two of these will suffice. The Keith Looby painting *Newly Refined Again* (the judge with the yo-yo) was acquired in 1971 thanks to the then Meagher QC and T O L Reynolds.

Similarly, the painting of Sir Ninian



Gary Gregg, Justice Meagher and the 'other' Cossington Smith painting.

and Lady Stephen by Euan Macleod was acquired in 1982 thanks to the then T. O'L Reynolds, R J Hunter QC, Meagher, QC and Nicholas.

Perhaps the Art Gallery of New South Wales across the Domain is too far to walk for terribly busy barristers wishing to see works of Grace Cossington Smith (although the current exhibition of the sketch books of Lloyd Rees at AGNSW is a delight which should not be missed). However, *from David Jones' window* and the Association's collection is nearer to hand and will amply repay a visit. Those wishing to view Grace Cossington Smith's drawing are invited to contact Mr Chris Winslow, the Association's Public Affairs Officer for assistance.

# No mere mouthpiece: Servants of all yet of none

It has been more than three decades since the publication of Dr Bennett's *A History of the New South Wales Bar* in 1969. In the intervening years, there have been profound changes to litigation and the administration of justice generally, and to the Bar in particular. In many ways they reflect the radical economic changes that have done so much to reshape most other aspects of modern Australia.

In 2002 the New South Wales Bar Association celebrates the centenary of its foundation as a voluntary association with public interest functions – a suitable milestone for the publication of a new collection of essays examining 'the state of the Bar' at the beginning of a new century.

To mark this important and historic occasion the Association, in cooperation with Butterworths, will be publishing a collection of essays entitled, *No mere mouthpiece: Servants of all, yet of none*. The title is an adaptation of the Bar Association's logo used by one

of the essayists, the Hon Chief Justice AM Gleeson AC, to convey a central concept of the Bar: that 'a barrister is not a mere mouthpiece for his or her client'.

The essays, edited by Geoff Lindsay SC and Carol Webster, examine such topics as the relations between Bench and Bar, public barristers, alternative dispute and law reporting. Included among the essayists are the Hon Chief Justice Murray Gleeson AC, Laurie Glanfield AM, Michael Sexton SC, the Hon Justice Keith Mason and Dr J M Bennett. Not surprisingly, contributors such as these add a flavour of primary authority to the publication and provide information not otherwise conveniently available.

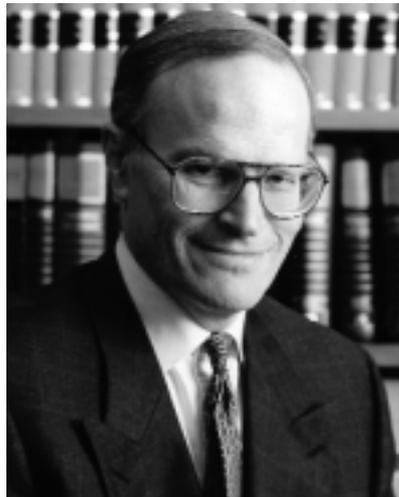
The essays are also entertaining – perhaps exemplified by 'The role of the equity Bar in the judicature era', by the Hon Justice J D Heydon. *Bar News* has obtained permission to reproduce some excerpts, written in His Honour's typically piercing style.

## The role of the equity Bar in the judicature era

... The problems which Lord Selborne LC and Lord Cairns LC, and their Australian political equivalents, had long laboured to cure by fusing the administration of law and equity were real. However, they were radically different from, and much less harmful than, those which were to face judges applying equity in the Supreme Court of New South Wales, and later the Federal Court, in the post fusion period. These problems flowed from contemporary business, professional and legal developments.

An enormous proliferation took place in the quantity of documents which citizens, particularly corporate citizens, used to conduct their affairs. This flowed from the widespread use of the photocopier, the ubiquity of composition by dictating to tape recorders rather than by handwriting, the development of speedy electronic methods of communication, the use of computers for many purposes, and the capacity to compose documents by retrieving their elements from computer records.

Simultaneously there took place the rise of very large firms of solicitors, largely by taking over small firms containing one or two solicitors with special expertise in either the attraction or the servicing of clients. These large firms eschewed the shabby, uncomfortable but cheap and durable offices characteristic of the late Victorian city which



The Hon Justice JD Heydon

to some extent survived the destruction of the 1960s. They sought more lavish pomps and trappings. They wanted the gauds with which sumptuous commercial wealth began to surround itself. They moved to high rise suites which were Babylonian in their splendour. They thought it necessary to acquire increasingly sophisticated business machines permitting speedy documentary reproduction, speedy communication with other branches or agents, and speedy retrieval. Large staffs of salaried lawyers and non-lawyers were seen as essential. The character of relations between the firms and those who consulted them changed. Less and

less was the relationship one between professionals and clients in which the overriding goal was the collaborative performance of a task in a skilful and ethical way. More and more it was relationship between businesses and customers in which the overriding goal on both sides was the making of profits. The consequential rent and wage bills of the large firms, the avarice of their partners and the leveraging of the income earning capacity of their employees all made the generation of hitherto unheard of fees an economic imperative. Legal costs, and in particular those legal costs which could be charged in the preparation of litigation, grew in an unexampled way. For the large firms, as for Dorothy Parker, the sweetest phrase in the English language was 'cheque enclosed'. This had two consequences for the conduct of equity litigation.

The first was that, damagingly for both the Bar and the clients, the large firms tried very hard to 'internalise' the profits to be made. Ill-tempered and pointless paper wars about mutual deficiencies in discovery were commonplace. The size of general discovery in modern conditions rendered the process burdensome for the client and lucrative for the solicitor. Every document inspected tended to be photocopied, without any process of discrimination, many times. The same applied to pleadings, affidavits,

witness statements and analyses of particulars. The prodigious quantity of photocopying that resulted was often carried out by companies owned by the wives of partners. The charges were way above cost, and significantly above what independent firms would charge. It is not clear whether it was felt that the resulting conflict of interest was something of which clients needed to be informed, and it is not clear how far the wives learned of the amounts and sources of the profits made in their name. Encyclopaedic volumes of interrogatories were compiled, and extreme ingenuity was dedicated to the process of objecting to them. As McHugh J said one day, observing a seedy, shabby and depressed person of middle years shuffling along Phillip Street: 'He once had a golden practice as an equity junior, but he made a fatal mistake: he answered some interrogatories'. Constant *agitprop* from solicitors and academic lawyers attacking the non-existent monopoly of advocacy by the Bar, abetted by attorneys-general, law reform commissions, the Trade Practices Commission, the Australian Competition and Consumer Commission and the like, accustomed clients to the view that litigation was run best when counsel were briefed as late as possible. The result was that the key tactical decisions in litigation tended to be made without the restraining influence of counsel.

The prodigious quantity of photocopying that resulted was often carried out by companies owned by the wives of partners.

The second consequence which the large firms had on the conduct of equity litigation was that the intense servicing, or over-servicing, characteristic of pre-trial activity carried over into the trial itself. The volume and complexity of the court's task increased greatly. The activities of the large firms in this process were accentuated by general changes in legal culture and in the external legal order.

...

As a result of the changes in commercial habits, the structure of solicitors' firms, the substantive law affecting contracts, and the laws of evidence and procedure described above, documentary tenders in litigation came often to assume ludicrous proportions: vast quantities of material in the form of agreed or non-agreed bundles were

tendered, often apparently unread by those who had compiled them, and only sparingly brought to the attention of the court. Witness statements became correspondingly bulky. Written submissions became much more common, and much longer than the corresponding oral submissions would have been. The capacity of a single judicial mind to absorb all this was threatened.

Two other background changes took place in this period.

The first was that many more judges were appointed, and from more diverse backgrounds. In 1972 there were three judges administering equity in New South Wales: Street CJ in Eq, Hope J and Helsham J. The first two had enormous practices in equity at the Bar; though that was less true of the third, he had acquired a unique reputation, not won without many sacrifices, for being the favoured child of victory in any tussle before Myers J. Now there are ten judges sitting in the Equity Division. To these must be added the Federal Court judges sitting in Sydney, who administer a substantial equity jurisdiction. The predictability with which legal principle is applied, whether it rests on the application of rules or the administration of discretions, is in inverse proportion to the numbers of judicial officers applying it. That predictability is further diminished in proportion to the diversity of judicial backgrounds. A generation after fusion, a significant number of judges lacked intense practical experience at the Bar in equity; several had spent most of their working lives as solicitors or academic lawyers or both.

The second background change was that judicial style imperceptibly but unmistakably altered. A century ago, fifty years ago, even thirty years ago, the typical judgment was short, nude of all but essential reference to authority, and delivered *ex tempore* after hearing oral argument – or, as Bryce said of Sir George Jessel, at the conclusion 'of so much of the arguments as he allowed counsel to deliver'.<sup>1</sup> But the law has become more complex and uncertain. The materials to be considered in arriving at factual conclusions have usually increased to a substantial extent. Many more cases are reported, in specialised series of reports and otherwise. Many judges, in deciding each new case, tend to examine all earlier cases

Photo: Bill Counsel / News Image Archive



The volume and complexity of the court's task increased greatly.

on the point. Even before computers permitted the easy retrieval of unreported cases, their citation in argument and in reasons for judgment was common. Now that computers permit easy retrieval, and now that services based on the accessing of unreported decisions contribute a significant part of law publishers' incomes, heavy citation of unreported cases is routine, and not from New South Wales alone. Like solicitors, advocates and jurists, some modern courts appear to live in fear of failure through leaving something out. Lacking the time to write short judgments, they write long ones. It seems harder to concentrate on the decisive and the crucial than it is to include the marginal. Throughout the period under consideration, the trend towards incoherence was accentuated by the increasing irrelevance of English decisions. Quite apart from their loss of binding status and thus their loss of any claim to consideration beyond the inherent merit of their reasoning, to an increasing extent their reasoning, however meritorious, came to be irrelevant because they came to be dominated by the need of English courts to conform to the laws of the European Union or to laws derived from those laws, like the *Human Rights Act 1998*. The bulk of the evidence and the move towards lengthy written submissions have

increased the extent to which judgments are reserved, and hence the extent of overall delay in litigation.

In the year when law and equity as separately administered jurisdictions were fused, the leading counsel who practised wholly or significantly at the equity Bar were N H Bowen (for some years absent on ministerial duties), A B Kerrigan, D A Staff, M H Byers (shortly to depart for federal responsibilities in place of R J Ellicott), D L Mahoney, Forbes Officer, W P Deane, F C Hutley, G D Needham, R J Bainton and P E Powell. They were about to be rejoined by T E F Hughes, who had ceased to be attorney-general at the fall of the Gorton government. Among the juniors who were, or were to be, prominent in the conduct of litigation was W J Sheppard, in his 57th year of call, a local equivalent to the legendary Wilfrid Hunt in England. Others included J B Kearney, A J Rogers, T Simos, L J Priestley, K R Handley, R P Meagher, D H Hodgson, A M Gleeson, P W Young, M H McClelland, J M N Rolfe, J P Bryson, M G Gaudron and P G Hely. There were very able solicitors in practice then who were soon to come to the equity Bar with considerable success, such as A R Emmett.

... In this enterprise Bench and Bar were assisted by one particular event. That it occurred anywhere was remarkable. Perhaps the conditions for its development were unique to New South Wales. Certainly nothing like it has occurred anywhere else in modern times. 1975 saw the first publication of R P Meagher, W M C Gummow and J R F

Lehane's *Equity: Doctrines and remedies*. When preparation of that work began, the first-named author was in his late 30s, though perpetually ageless at heart; the other two were in their late 20s - to adopt Coke's words in another context, 'in their youth, (which is their seed time)': *Ipswich Tailors'* case (1614) 11 Co Rep 53a at 53b; 77 ER 1218 at 1219. By 1975 the first had been at the equity Bar for fifteen years and was to be there another fifteen. The second, a commercial solicitor with deep and intense experience of important work, was to go to the Bar the following year for a decade. The

third was an extremely distinguished solicitor for most of his professional life until his lamentably short career on the Federal Court amply showed, even if it had not been made plain many times earlier, a power of clear analysis approaching genius. Each had been teaching at the University of Sydney Law School - 'part time' according to the descriptions of their posts, but in some years approaching full time by conventional academic standards. Each taught equity, but they had taught and were to teach other subjects as well over most of the next three decades.

*Equity: Doctrines and remedies* had crucial importance in two respects. First, it arrested the decay of equity in university law schools. These grew rapidly in number and in population from the late 1960s on throughout the country. In the law schools there was massive pressure to reduce or keep compulsory courses to a minimum in order to accommodate a greater number of optional courses conforming to contemporary *quarante-huitard* tastes. Equity was a prime candidate for jettison or dismemberment. In places where equity was compulsory, *Equity: Doctrines and remedies* caused it to remain compulsory; in places where it was optional, its status did not decline further. To some extent the subject was restored as a field of wide interest among academic lawyers, this being assisted by the writings of P D Finn, particularly *Fiduciary obligations* (1977).

The second great achievement of the work was to reduce the damage which the trends of the age threatened to cause to equitable doctrine in the courts. The courts at the start of the 1970s, and for a little while thereafter, were tempted to follow English decisions by Lord Denning MR and Lord Diplock of a doctrinally loose kind: to these succeeded even laxer allurements from Canada and New Zealand. There were similar Indigenous tendencies. Parliamentary legislators can be voted from office, but it is less easy to stop or control judicial legislation if judicial legislators are sufficiently determined. *Equity: Doctrines and remedies* did as much as any book could do to guide judicial legislators towards legitimacy in the process of judicial legislation. Not the least of its achievements in the age of fusion was its explanation of the true character of 'fusion' and its exposure of fallacies on that subject.

By 1975 most of the leading English works had become mannered if not genteel to the point of being moribund. There were no useful non-English equivalents in the

field. The book burst into this torpid atmosphere like a southerly buster on a humid February day - it was refreshing and caused a noisy banging of loose objects. In places it displayed a sparkling wit. In places it showed a brutal irreverence characteristic of the New South Wales Bar. In places it employed a style similar to that of Disraeli's philippics in 1846 reviling Peel for his betrayal of the gentlemen of England. In places it attained a gloomy effect of sombre magnificence. It was infused with a Tacitean contempt for the unsatisfactory tendencies of the time. It employed a variety of 18th century methods of argument. In cases where pure reason might fail, ridicule was employed. If a pistol misfired, the enemy was knocked down with the butt end. It tossed and gored numerous persons, many being both alive and of high rank. But its success was not based simply on style, or on its total lack of respect for reputations. It was not just something sensational to read on the train. It was the product of massive scholarly labour. It offered a precise analysis of older authorities. It ventured into fields not commonly, and in some instances not at all, analysed in modern works. It located common elements underlying superficially disparate doctrines.

No Australian legal work has ever been more influential in England. It is beyond question that no greater legal work has been written by Australians. It is probable that no greater legal work has been written in the British Commonwealth, with the possible exception of works of jurisprudence and legal history, since the death of Maitland. It has extremely strong claims to be placed on, and indeed at the top of, a short list of the greatest legal works written in the English language in the 20th century. It has the merits of the early editions of the great American treatises - Wigmore, Scott, Williston and Corbin - without their incipient ponderousness. But individual talent can only flourish within a tradition, and the talents of the authors were nourished in large measure by the intellectual tradition of the New South Wales Bar in which they had been brought up...

1 *Studies in Contemporary Biography* (London, Macmillan & Co Ltd, 1903) p. 180

# The launch of the Companion

*Speech delivered by the Hon Chief Justice A M Gleeson AC at the launch of the Oxford Companion to the High Court on 13 February 2002.*

One of the greatest speeches in Australian political history was made in the House of Representatives of the new Commonwealth Parliament on 18 March 1902. Although the subject matter might have appeared dry and technical, it was a passionate, aggressive speech. It was made by the attorney-general, Alfred Deakin, who had a fight on his hands. He was introducing the *Judiciary Bill 1902*, with the principal object of setting up a federal Supreme Court, to be called the High Court of Australia, in accordance with the mandate in sec 71 of the Constitution. But there was resistance to the idea that the Court should be set up so soon; and also to the idea that it should, in its composition, be completely separate from the State supreme courts. Some people thought it should be made up of part-time members; a scratch court of State chief justices sitting as and when available.

Deakin had to persuade Parliament and the public of the importance of this new institution. To do that, he explained to them the nature of federalism. He obviously assumed that most of his audience knew little of federalism. It was not the British system of government; and there were few other examples at that time. The two most prominent were the United States of America and Canada, but in 1902 not many members of Parliament knew much about the detail of how those countries were governed.

Deakin described his proposal as a 'fundamental proposition for a structural creation which is the necessary and essential complement of a federal Constitution'. He said there were three fundamental conditions of a federation:

first, a supreme Constitution; next, a distribution of powers under that Constitution; and third, 'an authority reposed in a judiciary to interpret that supreme Constitution and to decide as to the precise distribution of powers'. The people in the federating colonies had been given the guarantee of an 'impartial independent tribunal to interpret the Constitution'. The Court, he said, would 'define and determine the powers of the Commonwealth itself, the powers of the States ... and the validity of the legislation flowing from them'. He quoted Dicey's observation that, in a federal system, the stress of the Constitution is cast upon the judiciary. And he also quoted Edmund Burke, described in a revealing phrase as the greatest political philosopher of 'our nation', (Deakin regarded his nationality as British), who said that the judicature must be something exterior to the State, giving justice a security against power.

There was an explanation of the differences between the United States and Canadian systems. Deakin saw the High Court of Australia's constitutional role as more like the Supreme Court of the United States than that of the Canadian Supreme Court. He pointed out that, in Canada, federal issues were less acute. Unlike Australia and the United States, in Canada, the provinces had only specific heads of legislative power, and provincial legislatures were subject to federal veto. Appointments of Provincial officials, including judges, were made by the Federal Government. The distribution of power between State and Federal governments in Australia was more like

that of the United States; as was the potential for federal dispute. Deakin noted that the population of Australia at the time of federation was much the same as that of the United States when they federated. Deakin foresaw that the High Court, like the Supreme Court of the United States, and unlike the Supreme Court of Canada, would not give advisory opinions; a difference he regarded as turning upon the special role of the judicature in a strictly federal system.

There was one important respect in which the role of the High Court was to be different from that of the United States Supreme Court.

It was to have a general appellate jurisdiction in civil and criminal cases. Deakin's explanation to Parliament of this subject, naturally, was influenced by the continuing role of the Privy Council. His predictions of the future of that body are interesting, and revealing as to the line then being taken by the Imperial Government in its dealings with Australia.

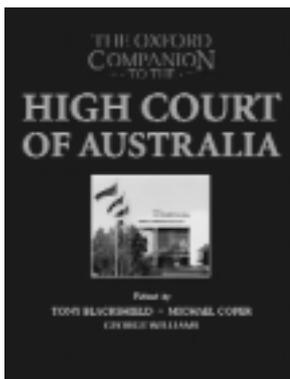
Deakin's speech contains one aphorism that deserves particular emphasis, in the light of some of the entries in the Oxford Companion. He said: 'federation is legalism'. There is a tendency to refer to legalism as if it were was invented by Sir Owen Dixon in the middle of the twentieth century. Doubts have been expressed about its meaning. There is not much doubt about what Deakin meant by legalism; and there is no doubt at all that he saw it as the key to the integrity of the Court and the stability of the federal union.

Deakin's advocacy was not completely successful. He persuaded Parliament to create the new Supreme Court as required by the Constitution, and to give it a separate and independent membership. But he pressed for five justices, and they would only give him three. He pointed out that the Commonwealth was spending three quarters of a million pounds upon war, and asked why could it not afford £30,000 for justice.

The High Court commenced sitting in October 1903. The *Oxford Companion to the High Court* was completed in the year of the centenary of federation; it is being launched at about the centenary of the introduction into Parliament of the Judiciary Bill; and next year the Court will celebrate its centenary.

It is a great credit to Professors Blackshield, Coper and Williams, to their vision, their professional skill, and their industry, that they have combined to produce this monumental work on the history and role of the Court, the cases it has decided, and the people who have participated in its business. There is a need for a wider and deeper understanding of this institution and the part it plays in the life of the nation. This publication will make a major contribution to such understanding. The work is also testimony to the courage of the editors. The contributors have had a lot to say about many people who are still living, and who are not famous for turning the other cheek. As the editors point out, this publication is in no sense authorised by the Court. Most of us had no opportunity to read what was to be said about us, or to correct any factual errors. Inevitably, in a work of this size, there will be some. But we have been invited to point them out to the editors, so that they may be corrected in the second edition, which I assume is only months away.

According to the introductory material, Professor Michael Coper was the convenor of a group of scholars who, in 1994, first conceived this project. Its scale is remarkable. There have been 225 authors,



writing on an astonishing range of subjects, from judicial appointments to unrepresented litigants; from socialism to sexual preferences. The work of the three editors in defining the tasks of each author, overseeing their contributions, and combining what they produced, commands admiration. I congratulate them on their magnificent achievement. I also congratulate their research assistants, who had a formidable task.

Praise is also due to Oxford University Press, which had the perspicacity to recognise the value of this project, the confidence to participate in it, and the technical skill to produce a very handsome publication.

I was given a copy of the book before Christmas, and I have read much of it. It is not easy to read in bed; and it is not everybody's idea of a thriller. But it contains a lot of information that came as a surprise to me. Much of it, of course, consists of interpretation and evaluation; and some of the interpretation and evaluation differs from my own. But that is to be expected. What is fascinating is the contrast between the approaches of different authors to similar topics. There is a good deal of overlap between the various subjects addressed in the book, and I have enjoyed comparing what different people have had to say about the same, or closely related topic. Some of the authors are law teachers and others are legal practitioners. Some are both. One thing that struck me is the gulf that exists

between the view of legal institutions and of the Court from within the universities, and the view from within the practising legal profession. This has often been remarked upon by recent graduates; but it was brought home to me most forcefully by comparing some of the entries in this book. I do not suggest that one point of view is more or less valid than the other. Each side has much to learn from the other. But I wonder if people on either side of the gulf realise how wide and deep it is. It suggests to me the need for some bridge-building.

The entry 'Background of justices' contains information that will mean different things to different people. Some of it may be taken to mean too much; and some, too little. There is something I would like to add to it. It is something that tells me less about the High Court than about Australian society; and, in particular, social mobility. Of the present justices of

the High Court, none comes from a family with a background in the law. In fact, no present member of the Court has a parent who attended University. The six out of seven of us who attended universities all did so with the assistance of Commonwealth Scholarships, without having to pay any tuition fees. We depended upon those scholarships for our ability to receive a tertiary education. We received our educational opportunities during the time of Prime Minister Menzies. The difference between the opportunities made available to us and those that were available to our parents produced far-reaching changes in Australian society during the 1950s and 1960s. Its consequences are reflected in the present composition of the Court. This book contains an interesting and informative entry entitled: 'The Whitlam Era'. An explanation of how six of the present justices of the Court came, unlike their parents, to have the benefit of a tertiary education could perhaps appear in an entry entitled: 'The Menzies Era'.

A challenge confronting readers of this book will be to stand back from the detail, and to draw together pieces of information which, in combination, reveal the changes in the Court and its work

that have taken place over a century. Some of those changes reflect changes in Australia itself, and in its relations with other countries, especially the United Kingdom.

I mentioned earlier that, in 1902, Deakin made it clear that he saw himself and Australia, as British. He envisaged that an Imperial appellate court, resulting from a merger of the Judicial Committee of the Privy Council and the judicial members of the House of Lords, would be our ultimate court of appeal; but with a very small number of Australian appeals. And, as things happened, it was not until the 1980s that appeals to the Privy Council finally ended, and the High Court became the final court of appeal. The influence of the existence of the Privy Council upon the jurisprudence of the Court during the twentieth century, upon the method of judicial reasoning, and even upon the style of judgment writing is a subject worthy of further scholarly attention.

The introduction, also late in the twentieth century, of the requirement of special leave to appeal in civil and criminal cases has had a major effect upon the nature of the Court's work. In the days when civil appeals to the Court came as of right, so long as a relatively modest sum was involved, much of the Court's work consisted of dealing with cases that could be decided by the application to the facts of settled principle. Now we have a much greater proportion of cases where the Court is being urged to develop the law. The Court used to get a fair share of relatively easy cases. That does not happen any more. And a court that spends much of its time applying well settled principles is bound to appear more respectful of precedent than a court that spends most of its time dealing with cases in which someone is trying to persuade it to break new ground.

The creation, in 1977, of the Federal Court also had a major impact on this Court's business. The Federal Court was intended to take over most of this Court's first instance work, other than its Constitutional work, and with one notable exception, (refugee cases), it has done so. An understanding of that change is necessary, for example, in considering the statistics set out on pages 164 and 165 of the book. There you will find the number of occasions on which each justice of the Court (except the originals) had appeared as counsel in the Court before appointment. In considering the bare numbers, it is necessary to remember that, since 1977, many cases that previously would have been argued in the High Court, especially tax cases, are now dealt with in the Federal Court. Counsel before 1977 argued many cases in this Court that would later have been conducted in the Federal Court.

There are other changes as well; some superficial, some fundamental. But one thing has remained the same. This is what was stressed by Deakin in 1902. Federation demands that the Constitution, which embodies the terms and conditions upon which it came into being, be interpreted and applied by a judiciary which can be trusted to be independent and free of political association or influence.

Deakin said that the measures he proposed represented a fulfilment of the purposes of the Constitution, and that they were to be judged, not by their detail, but by their ultimate results. The work of the High Court over a century of federation, is to be judged in the same way: not by its details but by its ultimate results.

This publication will assist in making that judgment. It will also be of great value to Australians who want to know more about their public institutions, their Constitution and their government.

I congratulate all who have taken part in its preparation and publication.

It is not easy to read in bed; and it is not everybody's idea of a thriller. But it contains a lot of information that came as a surprise to me.

## Review of the Companion

The *Oxford Companion to the High Court of Australia* was launched on 13 February 2002 at the High Court. The Companion contains some 400 entries, which cover all of the justices of the High Court, the major areas of law to which the Court has contributed and its most significant cases.

The contributors to the *Companion* include present and past judges of the High Court and of other courts, academics, practitioners and others with interests in the High Court.

Some of the contributions on justices of the Court are piercing. For example, Professor Graham Fricke writes of Frank Gavin Duffy, justice 1913–1931 and chief justice 1931–1935:

Gavin Duffy was 78 when he became chief justice. His capacity for effective output was minimal. Weak and ineffectual in administration, he did nothing to facilitate conferences or exchange of draft judgments, let alone to assist or influence the Court by circulating his own draft judgments. His judicial contribution was scanty in the extreme . . . in seven cases, Gavin Duffy delivered no judgment at all — delegating to another Justice the task of announcing his concurrence. Initially courteous, these announcements grew noticeably more terse. In the end, Dixon was saying simply: ‘The chief justice agrees in this judgment’.

Other portraits are more admiring. David Jackson and Joan Priest describe Harry Gibbs as bringing to the High Court great strength of intellect, wide knowledge and experience, a swift grasp of complex issues, a strong underlying sense of fairness and justice, and outstanding clarity of expression. This portrait also discloses a Jacksonian sense of humour:

An early interest in constitutional matters was shown when [Gibbs] secured the presidency of the University’s Women’s Club, having discovered that there was no

requirement that its members, or its president, be a woman. Chivalrously, he and the supporters who had procured his election resigned shortly afterwards.

Other portraits include Michael Kirby on Edward McTiernan, Bret Walker on Murray Gleeson, Simon Sheller on Michael Kirby, Stephen Gaegler on Gerard Brennan, the late John Lehane on William Gummow, Nicholas Hasluck on Ian Callinan and Kenneth Hayne on Owen Dixon.

There are interesting pieces on important cases. For example, the note on the *Bank nationalisation case* (1947) records the sharp interchanges which occurred between Starke and Evatt. On the 17th day of his address to the Court, Evatt was told by Starke that nothing he had said had added anything to what had been articulated the day before. Evatt replied that he had said more on a certain point ‘if your Honour had been listening’ to which Starke retorted ‘I have been listening for two weeks.’ The case ran for 39 days. After 36 days in Melbourne it was adjourned to Sydney for three days. The case captured headlines as the longest hearing in the High Court and as the biggest and most expensive case in Australian constitutional history, at an estimated cost of £58,000.

Philip Ayres offers an important analysis of the Dixon diaries. He notes:

The Dixon they reveal is largely consistent with the public persona — intensely hardworking (regularly to 1.00 a.m., frequently to 3.00 a.m. or later), civic spirited, skeptical, ironical, dry in wit, classical insensibility (a reader of Greek and Latin literature in the original languages), devoted to a wife and children from whom his work separated him more than he would have liked, an Anglophile through and through, a leading light in the English-Speaking Union and the Australia Institute for International Affairs, supportive of a White Australia like almost everyone else. The diaries also reveal a Dixon easily depressed, even over little matters. For instance, after a day on the Bench putting up with Starkes’ rudeness and Latham’s depressing political statements, he was looking forward to seeing his barrister friend, TS Clyne, whom he had invited to tea through his associate, but there was no answer — ‘another example of the hopeless condition I have attained’ (4 November 1937).

There are entries debating a number of more philosophical topics including values (by Gerard Brennan), sovereignty, originalism, natural law, metaphor and jurimetrics.

There is an entry on notable litigants: a detailed and fascinating review of the Murphy affair by Tony Blackshield; and an entry on women that is critical of the Court’s decision in

*Garcia v National Australia Bank* (1998).

Philip Goad provides entry on the architecture of the High Court which places it in the tradition of 20th Century Modernism and, more particularly, Brutalism. It was ‘an ethic of design that dictated truthfulness to material and structural expression, and clear and direct expression both internally and externally of the building’s internal functions. Such an aesthetic of clarity and honesty seems eminently appropriate for a building devoted to justice.’

Biographies are the focus of the entry by James Thompson. He notes that great biographies of Australian judges remain to be written. Compared to the US (and to a lesser extent Canada and England), biographies focusing on the lives, intellect and professional careers of Australian judges are rare. Major biographies of High Court justices — Griffith, Barton, Isaacs, Higgins, Evatt, Barwick and Murphy — tend to focus on the political aspects of the career of the subject, with relatively little material devoted to their judicial careers. Justices’ papers, draft opinions, correspondence and diaries have not always been fully utilized. Thompson also points out that the situation is exacerbated by the virtual absence of biographical scholarship devoted to other less political justices. He concludes that for those interested in the High Court as an institution of government in Australia much work remains to be done.

Any serious literary work on the High Court could not be complete without a reference to *The Castle*. Rob Sitch writes about the making of the film:

We had no idea how a challenge based on section 51(xxxi) would proceed in the High Court, but like to think that one of the less legal arguments would hold some weight. This is summed up in the statement made by Bud Tingwell’s character: ‘I can’t speak for those who wrote this document but I’ll bet when they put in the phrase ‘on just terms’ they hoped it would stop anyone short changing someone like Darryl Kerrigan’. That struck us as being about right. If you sat down to write a constitution today you would like to think that it protects decent people in the future from being out-manoeuvred or unfairly dealt with by the laws of the country.

In all, this is a lengthy, comprehensive and important work with points of interest in it for scholars, practitioners and lay readers alike.

*Reviewed by Justin Gleeson SC*

## For the public good: Pro bono and the legal profession in Australia

*Edited by Christopher Arup & Kathy Lester,  
Federation Press 2001*



Pro bono legal work, like motherhood, is rarely the subject of critical comment. Unlike motherhood, however, it has rarely been the subject of any significant examination within Australia. It has

not had the benefit – or otherwise – of some Bettina Arndt to stimulate and enrage debate by pieces in the *Herald*. Into this quietude stepped the organisers of the First National Pro Bono Law Conference, held in Canberra in 2000. The book reviewed here contains some of the contributions from that forum. It is a somewhat odd collection, good in parts, but which appears undecided as to whether it is a practitioner's discussion, an academic critique, or a programme for action.

Reflecting this ambivalence, some of the contributions occupy unhappy ground between normative argument and exhortation. The first contribution, by Stephen Parker, seeks to provide some answers to the question of why lawyers should do pro bono legal work. He enumerates practical, tactical and ethical reasons for undertaking pro bono work, but these are not examined in depth. This reviewer found the enumerated reasons sometimes more irritating than persuasive. For example, to assert that '[w]e have fallen into the mindset that lawyers are part of the private sphere' requires a degree of definition and supporting argument that is not provided in the paper. Similarly, Fiona McLeay, in a brief commentary piece, provides four suggestions as to how lawyers might respond to the 'changing professional paradigm', such as that firms 'should begin seriously to engage in the dialogue about corporate citizenship'. Again, the counter-question arises: yes, but why?

Some interesting material does emerge from the report by Lisa Webley of a pro bono survey of young solicitors in England and Wales, carried out in 1998. The (small) study reported that 38 per cent of the solicitors had undertaken some pro bono work, and that the pro bono work of their

firms was undertaken primarily by the more junior solicitors. The range of work varied, but 'poverty' law issues (debt, employment, housing, welfare) featured most prominently, even for solicitors in large commercial firms. Both points raise questions about the competence of the advice being provided, and about the possible mismatch between the skills level and knowledge of those providing the advice.

On the other hand, that it is junior solicitors who undertake much of the pro bono work in law firms should not necessarily provoke condemnation. In this age of contracting out it is not surprising that partners of law firms might seek to satiate their social conscience, or assist their sleep, by delegation of pro bono work. If this means that significant pro bono work is carried on, and so long as adequate levels of supervision are maintained, then it is still to the good. Such delegation is not a luxury open to the Bar, of course.

Webley also notes that the survey suggested that city commercial firms were better at recognising pro bono work than smaller firms. Again, this may not be so surprising when it is understood that one of the motivations for large firms undertaking pro bono work is to ameliorate the alienation that a significant minority of practitioners feel when using their legal skills predominantly for the benefit of large corporations.

Some hint of a broader social perspective on pro bono legal work does emerge from the piece by Rob McQueen. He suggests, for instance, that recent public pressure in the US and Australia to increase pro bono service levels is aimed at the 'top end of town', is a 'prescriptive tax' which governments seek to place on larger corporate firms, and that this reflects 'a repositioning of the state vis-a-vis the profession'. Unfortunately, such provocative notions are not developed as they might have been in this paper, and are a little overwhelmed by unnecessary blasts of social theory.

An historical perspective is provided by Don Robertson in an academic article exploring the intertwined development of the legal profession and pro bono legal work. He argues that the provision of pro bono legal services is tied to Judao-Christian values, that it dates back many centuries, and that the provision of such services has often been mandated by governmental authorities. These points

contrast with the strong modern resistance to suggestions of compulsory service which David Weisbrot reports later in the book.

A brief but interesting history of another kind is provided by Mary Anne Noone, who discusses the development of community legal centres in Australia. She notes that such centres were anathema to standard legal practice because 'they were "free", informal and irreverent, and they talked explicitly about injustice and change'. She also records that they were the target of some hostility from the mainstream legal profession as they emerged in the 1970s. Noone makes the interesting argument that community legal centres grew out of a New Left political sensibility quite different from the pro bono legal tradition reported on by Robertson. This may be so, although the movement might perhaps be viewed instead as a particular manifestation of familiar impulses to do justice.

Another theme of the book is a discussion of practical issues that arise when undertaking pro bono legal work. There is a useful discussion by Elisabeth Wentworth on how commercial conflicts can impact on the area. There is a short piece by the partner of a large firm, John Emerson, reflecting on his experiences. The book would have benefited from the inclusion of more such reflections, from a range of perspectives. There is no similar discussion by members of different types of firms, nor from any member of the Bar.

The final contribution is a report by a pro bono task force, which was convened by the federal Attorney-General after the Canberra conference. It contains some useful ideas and promising suggestions, such as the development of a 'best practice handbook' relating to pro bono legal work. It is to be hoped that the agenda set out is pursued.

As can be seen, therefore, there is some interesting material in this work. But it is unlikely to persuade you to undertake pro bono work if you are not already converted. It cannot be said that it is a necessary guide for practitioners who undertake pro bono work. And although some contributors make interesting academic points, it does not appear to have been intended to be an academic work.

*Reviewed by Jeremy Kirk*

## Lives of the Australian chief justices

### Sir Francis Forbes

First chief justice of New South Wales  
1824 – 1837

By J. M. Bennett  
*Federation Press 2001*

### Sir James Dowling

Second chief justice of New South Wales  
1837 – 1844

By J. M. Bennett  
*Federation Press 2001*

### Sir William a'Beckett

First chief justice of Victoria 1852 – 1857

By J. M. Bennett  
*Federation Press 2001*



Unlike the portraits of later New South Wales chief justices, contemporary portraits of the first, Sir Francis Forbes, depict him wigless. In his recently published biography of Forbes, the distinguished legal historian, Dr J M Bennett, reveals how this seemingly minor fact sheds light on the character of Forbes and the political battlefield he deftly negotiated as the first truly independent judicial officer in the young colony.

Anger at Forbes's aversion to the traditional judicial head-gear came to a head upon the arrival in Sydney on a 'fearfully hot' February afternoon in 1828 of James Dowling to take up his post as the second puisne Judge of the Supreme Court. The contrast between the fully robed and wigged Dowling being greeted by the robed but unwigged Forbes rankled traditionalists such as Dr Robert Wardell, the leader, with William Charles Wentworth, of the Sydney Bar. Not long afterwards, at a 'prickly' dinner at the home of colonial secretary Alexander McLeay, Wardell and governor Darling's private secretary Colonel Dumaresq goaded Forbes into (by his own admission) 'the sin of having slandered wigs'. This was a tactical error for which Forbes was later admonished by the Colonial Office. So, from March 1828, despite his discomfort in the hotter months, he good-naturedly undertook to wear his wig at all

subsequent sittings of the court.

Of course, Bennett's biography considers many larger issues than Forbes's dislike of horsehair. It is the first of an ambitious series of volumes on the lives of the Australian chief justices of the nineteenth century. This intriguing and very readable work shows that the sour assessments of Forbes in earlier biographies are quite wrong and that, despite the coincidental rather than considered nature of his appointment by the Colonial Office, no other appointment '...could have been more fortunate for the future of the Australian legal system than was that of Forbes.'

Forbes's robust and independent character was shaped not in the stuffy Inns of Court in London but in his birthplace, Bermuda, where his early legal career flourished, and Newfoundland, of which he became Chief Justice in 1816 at the tender age of 32. His was a colonial career-path par excellence in an age of enormous challenges in which life-changing opportunities to cross the world could spring out of nowhere.

Bennett builds a convincing case for the pivotal role of Forbes in laying the foundations of an independent Australian legal system which fostered the subsequent development of the rule of law and democracy in what, prior to his arrival, was little more than a military outpost dominated by a class of privileged settlers. Forbes's stand against the excesses of vice-regal authority, such as governor Ralph Darling's attempts to control the press, seems all the more lonely across the mists of time. Yet the court he established is now one of the great courts of the democratic world.

Forbes's position was complicated by the fact that he had to certify laws propounded by the governor as not repugnant to the laws of England before they could be considered by the Legislative Council. His diligent exercise of this and his judicial duties frequently earned him the ire of the governor and self-interested settlers such as the execrable James Mudie, who, in his vituperative *The Felony of New South Wales*, described Forbes as the 'patron or protector of the felony'.

History, most particularly in Bennett's work, has judged Forbes more kindly. He is remembered as a truly important Australian jurist and champion of democracy whose wit, work ethic and good

humour helped him guide his developing court, and the rule of law, through the shark-infested waters of Sydney in the 1820's and 1830's.

In the second volume of his series, Bennett draws a very different portrait of Sir James Dowling, who became the second chief justice of New South Wales upon Forbes's death in 1837. Bennett's judgment that 'perhaps Dowling's very dullness was a stabilising glue in a time of great social change' seems just a little harsh on a man who had a very hard act to follow and whose personal correspondence reveals both self-deprecation and dry wit. In an 1838 letter Dowling complained to his son about his two colleagues on the bench, William Burton and John Willis thus:

Neither of my colleagues particularly love me, but of the two Burton is the least disagreeable. Willis is a fidgety restless conceited self-opinionated fellow and it requires a good deal of forbearance and caution on my part to go on smoothly with him. Some people have the opinion that he is cracked. However I hope to get on without quarrelling. Anything for a quiet life.

Although his father was Irish, Dowling spent most of his formative years in England. Early recollections of his fondness for jokes and conversations give way to the later picture of a dour and dutiful man who ultimately worked himself to death on the bench of the New South Wales Supreme Court.

Nineteenth century London resembles Sydney today insofar as who you knew was at least as important as what you knew. Bennett's skilful and elegantly woven narrative shows how Dowling's career owed as much to chance and patronage as it did to design. It was thanks to his chief patron, Lord Brougham, that he was appointed the second judge to the bench of the New South Wales Supreme Court in 1828.

It was not only Dowling's desire but his natural inclination to stand above the hurly burly of politics and personality in New South Wales. But, like Forbes before him, he found this impossible. Applying the rule of law to the detriment of one of the young colony's powerful individuals automatically condemned Dowling to being that person's enemy. Bennett details some of the painful lessons Dowling learned in this regard during, for example, the lengthy series of proceedings brought for or against two of New South Wales's

most powerful newspaper publishers – Edward Hall and Atwell Hayes. The impression left is that Dowling lacked the energy for these encounters. Yet, when it came to winning the prize of the chief justiceship on Forbes's death, Dowling's doggedness in insisting on his seniority of a matter of weeks over William Burton won through and he became chief justice in 1837.

Stabiliser rather than innovator is perhaps the best assessment of Dowling's career. He managed little progress in the development of trial by jury, for example. But Bennett notes that this really took a generation from the commencement of the Supreme Court to attain its most complete form. During Dowling's term an anomalous hangover from the penal days remained. Criminal matters were tried by a 'jury' of seven military men. The tribunal of fact in civil matters comprised two magistrate assessors and the judge. Bennett notes that the soldiers on criminal juries were frequently bored and responded by behaving like schoolboys. In one case they left insulting messages carved into the jury box for the civil assessors they expected to be there the following day.

In that climate, stability cannot have been a bad thing. They were tumultuous times and Bennett's account of Dowling's role in such events as the Myall Creek massacre trials will fascinate many readers. It won't come as a surprise that he singles Dowling out for particular praise for his pioneering work in legal reporting. This work did not make front page news but it was utterly essential to the establishment of a successful and robust Supreme Court.

William a'Beckett, the subject of the third of Bennett's biographies, also played a role in the Myall Creek trials. He was part of a defence team retained by subscriptions from rural landholders who successfully defended the first trial, which was heard before Dowling. The defence – that no victim could be identified (in fact, mutilation of the bodies rendered that impossible) succeeded, and the defendants were acquitted to the wild cheering of many white settlers in court. But a courageous stand by attorney general John Hubert Plunkett saw new proceedings instituted for the murder of one identified child. A plea of *autrefois acquit* failed before Justice Burton and the accused were found guilty and subsequently hanged.

Bennett notes the parallels between later criticisms of Dowling's conduct of the first Myall Creek trial and the historical criticism of a'Beckett's handling of the criminal trials which followed the rebellion at the Eureka Stockade in Ballarat in 1854. As with Dowling, Bennett proposes a revised assessment of a'Beckett's role in one of the most highly charged political events in Australian history. He also presided over the trial of alleged offenders at the Bakery Hill riots at Ballarat. These riots occurred on 29 November 1854, the day before the Eureka rebellion. Bennett seeks to distinguish the silence from the press and later commentators about a'Beckett's very pro-defence charge to the jury in this trial from the attacks he received in relation to his handling of the Eureka trials.

It is difficult not to feel some sympathy for a'Beckett. His father was a dour London solicitor, said to be the model for the cold-hearted Ralph Nickleby in the Charles Dickens novel *Nicholas Nickleby*. True to this characterisation a'Beckett senior refused to brief a'Beckett junior when the latter was called to the Bar in London, so young William eventually made his way to Sydney and developed a thriving practice. The desire for advancement saw him assume the chief justiceship of the new Victorian Supreme Court in 1852. His irritability on the bench may well have been due, Bennett writes, to a life-long spinal illness rather than dissatisfaction with his work. The Melbourne he presided over was convulsing with one of the greatest economic booms in Australian history due to the rivers of gold running through it from the north-west. The resulting social dislocation and excess appears to have distressed a'Beckett, not to mention the spirit of republicanism which aggressively rang around his courtroom every time another alleged Eureka rebel was acquitted.

As with Forbes and Dowling, Bennett reassesses a'Beckett as a misunderstood figure whose foundational role in establishing the rule of law has been drowned out by the intense politics of a young nation inventing itself.

*Reviewed by Christopher O'Donnell*

## Conflict of laws in Australia (7th ed)

*P E Nygh and M Davies  
Butterworths 2002*



The publication of the 7th edition of this text, in which Peter Nygh is joined as a co-author by Martin Davies (formerly Harrison Moore Professor of Law at the University of Melbourne and now

Co-Director of the prestigious Maritime Law Centre at Tulane Law School), is timely for a number of reasons.

First, it is some seven years since the 6th edition was published. In that time, Australian courts and the High Court, in particular, have delivered a series of important decisions in this area: *Henry v Henry* (1996) 185 CLR 571; *CSR Limited v Cigna Insurance Australia Limited* (1997) 189 CLR 345; *Agar v Hyde* (2000) 201 CLR 552; *Akai Pty Limited v People's Insurance Company* (1997) 188 CLR 418; *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503; *Renault v Zhang* [2002] HCA 10.

Secondly, the other leading Australian text in the area, Sykes & Pryles *Australian Private International Law* (3rd ed) was last published in 1991 and is now extremely out of date.

Thirdly, the leading English texts in the area, *Dacey & Morris and Cheshire & North*, have diminished utility for Australian practitioners by reason of the fact that private international law in the United Kingdom has been radically affected, both in the areas of jurisdiction and choice of law, by the impact of Europe. Choice of law in contract and tort are now governed by statute and questions of jurisdiction and the recognition and enforcement of foreign judgments is predominantly governed by European Council Regulation 44/2001, formerly the Brussels Convention.

This work has always dealt with the subject of conflict of laws in both federal and transnational contexts. In the former context, the decision of the High Court in *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503 is dealt with in numerous parts of the text, as is only appropriate given its importance not only on questions of federal choice of law but

also in respect of forum shopping generally and questions of substance and procedure. There is also an excellent, self-contained discussion of the cross-vesting scheme post *Wakim ex parte McNally* (1999) 198 CLR 511.

In the transnational context, it is unfortunate that this edition of the text literally hit the book shops on the same day as the High Court delivered its decision in *Renault v Zhang* [2002] HCA 10. That decision dealt with not only the choice of law rule for torts (and in so doing, sounded the final death knell in this country for *Phillips v Eyre*) but also dealt with the test for a stay of proceedings, arguably (although not in so many words and over the strong dissents of Kirby J and Callinan J) taking the law on that topic in this country back to the position it was in prior to the High Court's decisions in *Oceanic Sun Line Shipping v Fay* (1988) 165 CLR 197 and *Voth v Manildra Flour Mills Pty Limited* (1991) 171 CLR 538.

It is, no doubt, the fate of all writers of legal texts that a significant and, in some respects, unexpected decision is delivered after the proofs have gone to the printers or soon after publication. Fortunately, at least, in the present case, readers of the 7th edition are alerted in the text to the imminence of the decision in *Renault* which had been argued but was still reserved at the time of the text going to press. The chapter on tort justifies its continued discussion of *Phillips v Eyre* as useful and necessary context for a proper understanding of the area. There can be no doubt that, at least in so far as *Renault* dealt with the question of stay of proceedings, that its treatment of that topic was not expected by Professors Nygh and Davies given their observation in the Preface that 'the High Court of Australia is more willing to decline jurisdiction than its English counterpart'. That proposition is not sustainable after *Renault*.

The chapter dealing with 'Jurisdiction *in personam*' contains a very useful survey of the typical heads or bases of what has traditionally be described as the 'exorbitant' jurisdiction of the supreme courts of the various States and Territories and of the Federal Court, that is to say the bases upon which those courts are authorised to exercise jurisdiction over defendants not present in the forum. This discussion draws attention to and highlights interesting differences as

between the *Federal Court Rules* (Order 8) and amongst the States relating to the available heads or bases for authorising service out of the jurisdiction, differences which may recommend commencement of proceedings in one State (or the Federal Court) rather than another depending upon the particular causes of action sought to be raised.

This edition makes passing reference to the role of the Internet, (see, for example, at p54) and to some of the conflict of laws issues presented by it. These include such topics as the place where a contract is made when an order is placed for the purchase of goods or services over the Internet, and where a person is defamed when a libellous matter appears on an Internet site, more particularly, where such libel is published (as to which, see *Macquarie Bank Ltd v Berg* [1997] NSWSC 526). This issue may be important for both jurisdictional and choice of law reasons. Attention is drawn by authors to the grant of special leave by the High Court in *Dow Jones v Gutnick* [2001] VSC 305 due to be heard during the course of this year and a case which will be of considerable significance throughout at least the Commonwealth and probably beyond in respect of legal issues flowing from the use of the Internet.

One particular strength of the work is its discussion of conflict of laws principles in the context of family law and the Hague Convention on the Civil Aspects of International Child Abduction, no doubt reflecting Professor Nygh's interest in this subject from his time as a member of the Family Court of Australia. The chapter on international arbitration also provides a useful survey and discussion of both jurisdictional and choice of law issues in this area. The important decision of the Full Court of the Federal Court in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc.* (No. 5) (1998) 90 FCR1 is discussed in appropriate detail.

The 7th edition adopts the same chapter headings and subject divisions of the previous edition. To some extent this is inevitable. On the other hand, the subject is not static. There is plainly scope for any future edition of this text to deal with the choice of law rule in restitution or unjust enrichment, for example, a subject that is separately treated in Dicey & Morris and which has been the subject of a number of specialist monographs: see F Rose (ed), *Restitution and the conflict of laws*

(Oxford, Mansfield Press, 1995) and G Panagopoulos, *Restitution in private international law* (Hart Publishing, 2000). Similarly, discussion of choice of law principles in relation to equitable claims would be welcomed: see, in this context, the decision of the Full Court of the Federal Court in *Paramasivam v Flynn* (1998) 90 FCR 489, a decision not referred to in the current edition of the text.

Similarly, some issues which are discussed in the present edition merit, in this reviewer's opinion, more extensive treatment in future editions in view of their practical importance; perhaps the most notable example, in this regard, is the two page discussion in relation to injunctions restraining foreign proceedings. In this context, conspicuous by its absence is any reference to Lindgren J's very important decision in *AllState Life Insurance Co v Australia & New Zealand Banking Group Limited* (1996) FCR 1 and 44, a decision in complex multi-party commercial litigation which was instrumental in putting to an end jurisdictional clashes that had bedevilled that litigation and which probably facilitated its ultimate settlement. That this is a very important area in practice is reflected not only by other recent Australian decisions but by the plethora of cases in England in this area in recent years, prominently reported in *Lloyd's Law Reports*.

If one were to make one general observation about this work it is that, in terms of the relative treatment it affords to the subject's broad division between jurisdiction and choice of law, it perhaps fails to reflect the sea change in the subject's focus in the last 20 years (and certainly since the first edition, published as long ago as 1968) from choice of law to jurisdictional issues. As the decisions in both *Renault* and *Akai* illustrate, even when choice of law issues arise, they typically do so in a jurisdictional milieu. More detailed treatment of jurisdictional issues which, for practitioners, tend to be the subject of most immediate and significant concern, would be welcomed in the next edition.

*Reviewed by Andrew S Bell*

## Australian civil procedure (5th ed)

Bernard Cairns  
Law Book Company 2002



Matters of civil practice and procedure face practitioners every day. Whether it be a decision as to who to commence proceedings against, where to commence those proceedings, or whether proceedings that have been compromised should be discontinued or dismissed. Often these problems are quite straightforward, but more often than not, they are not straightforward.

Most problems, whether they be straightforward or difficult, can usually be worked through by starting at first principles – a sound understanding of the principles on which the civil litigation system in which we practice is therefore fundamental.

There are few modern publications which provide a comprehensive explanation of civil litigation procedures in Australia. Those which do exist are either long out of date, or are contained in specialised loose leaf services which are specifically tailored to the subject matter of that service.

One publication which does provide a modern overview of the civil litigation system in Australia, is *Australian Civil Procedure* by Bernard Cairns, the 5th edition of which was recently published.

This book provides a comprehensive explanation of the civil litigation procedures applying across all Australian jurisdictions, both Federal and State. The book considers all aspects of procedure from the initial stages – jurisdiction, commencement of proceedings and service of process – to the final stages – appeals and execution. The 5th edition now also includes a useful chapter on settlement. The discussion on class actions or representative proceedings has also been expanded having regard to recent, principally Federal Court, decisions, and the section dealing with cross-vesting and cross-vesting procedure has been updated having regard to the decision of the High Court in *Re Wakim; ex parte McEnally* (1999) 198 CLR 511, and the legislative responses thereto.

As with all publications, some topics

and cases are treated somewhat curiously. One example in the present text is the treatment of the decision of the High Court in *State of Queensland v JL Holdings Pty Limited* (1997) 189 CLR 146, which is discussed extensively in the section dealing with case management, although it does not rate a mention in the section dealing with amendments.

The book is in no way a substitute for a looseleaf service dealing with a particular jurisdiction. It does, however, have many practical benefits. In addition to providing a thorough explanation of the fundamental principles underlying civil litigation procedure, the book provides authorities, across all Australian jurisdictions. Often specialist looseleaf services concentrate on the authorities of that jurisdiction, in circumstances where there are very useful authorities to be found elsewhere.

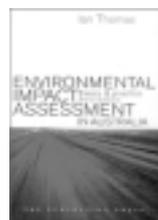
The book is recommended to those practitioners requiring an easily accessible and comparatively inexpensive discussion of civil procedures in Australia.

Reviewed by Ian Pike

## Environmental impact assessment in Australia:

### Theory and practice (3rd ed)

Ian Thomas  
Federation Press 2001



Environmental impact assessment: 'One of the deceitful co-options of the concept of ecology and environment. Whilst sanctimoniously reciting the catechism of 'environmentalism' it anoints and blesses the 'process' of development'. Thus speaks one of the many reviewers (and critics) of environmental impact assessment considered by Ian Thomas in his third edition of *Environmental Impact Assessment in Australia*.

While this third edition follows, in general, the same structure as the first two editions of this analysis of environmental impact assessment in Australia, the content has been updated to take into account the primary legislative changes in each jurisdiction including, in particular,

the introduction of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* ('the EPBC Act') and the introduction of 'integrated development' into the New South Wales planning system by the 1 July 1998 amendments to the *Environmental Planning and Assessment Act 1979*.

The new section on the EPBC Act is particularly useful. In a little over 10 pages, Thomas effectively discloses the essential structure of the Act and explains, in clear terms, the concepts of a 'controlled' action (a form of action which triggers the requirement for approval under the Act), 'matters of national environmental significance' (one of the components of a 'controlled' action – namely that the action has, will have, or is likely to have a significant impact on a matter of national environmental significance) and the administrative guidelines, which provide criteria for determining whether or not any particular impact is 'significant'. Given the complexity of the EPBC Act, this section alone of the third edition makes it a valuable contribution to the understanding of environmental impact assessment in Australia.

There are two other primary attractions of the third edition. The reference list is extensive and enables the reader readily to locate more detailed information in respect of the topics of interest. This is particularly important given that Thomas's work reviews not only a comprehensive range of impact assessment procedures (Chapter three: 'The many faces of impact assessment'), but also the (vast) range of methods and models for predicting impacts (Chapter eight: 'Determining impacts for the EIS'). Given that the range of impact assessment procedures include economic impact assessment, energy analysis and greenhouse assessment, health impact assessment, regulatory impact assessment, risk analysis, social impact assessment, species impact assessment, technology assessment, cumulative impact assessment, strategic environmental assessment and integrated impact assessment, the reference list is essential.

The other particularly attractive feature of the third edition is that both the reference list and the text itself contain numerous references to Internet addresses, both of government and educational institutions, relevant to many of the topics

addressed. In particular, for each jurisdiction in Australia, the brief overview in chapter six ('EIA procedures in Australia') is supported by detailed references, as well as useful Internet addresses to obtain further information.

Legal practitioners who deal with environmental impact statements as part of their legal practice will also be particularly interested in parts of chapter seven: 'Contents of the EIS', including chapter 7.7: 'Monitoring, surveillance and auditing – Checks on the EIS and EIA process'. In this section, Thomas analyses various approaches to monitoring, surveillance and auditing the content of EISs. The vast array of processes and methods for determining environmental impacts in chapter eight will also be a revelation for many readers, including (which was certainly a relief to the reviewer) Table 8.6: 'Overview of methods and their applicability to stages of an environmental impact assessment'. This table, at a glance, summarises the methods available to assess environmental impacts, their strengths and deficiencies.

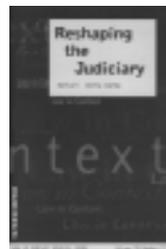
Given, as Thomas states, that EIA processes have been adopted by governments worldwide (and in every jurisdiction in Australia), it is important that the theory (and values) which support EIA receive detailed scrutiny. Thomas fully recognises the risk that EIA runs; that rather than leading to a better decision making, EIA may descend into a form of 'ritual' falling between, on the one hand, developers who may seek it as a mechanism for assisting the approval of proposals and, on the other hand, communities, who expect that it will protect the environment.

While the primary interest of the third edition will be for practitioners of environmental impact assessment itself, it contains much of interest for legal practitioners involved in environmental and planning law. As Thomas notes, EIA has become institutionalised and has formed an industry to look after it. By analysis of the role of EIA, Thomas re-emphasises EIA as a social tool, with a recognised place in the politics of decision making. The reminder is timely.

*Reviewed by Jayne Jagot*

## Reshaping the judiciary: Law in context special issue, Vol 18(1) 2000

*The Federation Press, 2002*



Controversies about the independence of the judiciary are not a recent phenomenon. The substantial caselaw on bias, for example, suggests that litigants have been questioning the independence of judges for hundreds of years. Nor are attempts to make courts more accountable entirely new<sup>1</sup>. However, there can be no doubting the claims of Dr Chris Corns, in his introduction to *Reshaping the Judiciary*, that the past twenty years have seen an unprecedented array of challenges to the judiciary and, in particular, to judicial independence and accountability. Given the recent popular profile and high stakes of these challenges, the collection of essays in *Reshaping the Judiciary* is a topical and compelling contribution to the debate. Now is, as Dr Corns suggests, an opportune time to reflect on these challenges.

But what, exactly, are the challenges to which Dr Corns refers? Anecdotally it seems clear enough to most practitioners (and, no doubt, to judges) that there is increasing pressure on the judiciary to be accountable. Such pressure comes from all quarters but not least from the executive government. Citizens and politicians want to know how judges go about their business and how much it costs for them to do so. One might have thought, however, that such simple principles as conducting proceedings in open court would deal with, at least, the first question. As for the second question, experience suggests that questions of cost, although perhaps a sticking point in relations with the executive, hardly warrant any wholesale reshaping of the way judges go about their business.

Elizabeth Handsley, in 'Can public sector approaches to accountability be applied to the judiciary' asks the pertinent question: what, exactly, do we mean by 'judicial accountability'? The answer, unsurprisingly, is not at all clear. Most notions of accountability, when used in

this context, derive from attempts to make executive government more open, more disciplined, less corrupt and better managed. All of these are, of course, goals that most of us would wish the judiciary also to pursue. However, Handsley cautions that the mechanisms for achieving these goals in the public service do not easily translate to the judiciary. Goals such as efficiency and openness are laudable as far as they go but, Handsley suggests, beg the question.

Handsley's rigorous appraisal of the terminology, criteria and concepts of attempts to achieve public service accountability, and their application to the judiciary, is enlightening. Her conclusion, that judicial accountability is best valued by reference to the public trust upon which judges hold office, avoids the contradictions that are part and parcel of popular debate on this matter (such as calls for judges to follow the rule of law) and provides a starting point for further thought on how accountability can be improved.

One of the more concrete measures adopted in pursuit of judicial accountability in New South Wales recent years has been the introduction in 1986 of the Judicial Commission. Ivan Potas, the Commission's Director of Research, argues in his paper that the complaints function of the Commission has been effective in contributing to public confidence in the judiciary. Potas counters claims that the Commission is a toothless tiger by emphasizing its role in filtering out trivial and insubstantial complaints without referring them to parliament. As it is only Parliament that ultimately has powers of sanction over judges, Potas suggests that the complaints function, whilst perhaps technically 'toothless', is predicated upon strong notions of judicial independence, upon which there is no transgression except in the most serious circumstances.

Professor Allars' paper on the bias rule identifies and explores a number of themes in the debate about judicial independence. Allars examines the rationales for the bias rules, starting with the apparent oddity of the pecuniary interest test for bias (which involves disqualification where there is neither actual nor apprehended bias on the part of the judge), and questioning the various rationales for the rule. She concludes that the pecuniary interest test is ready to be discarded in favour of a single

apprehended bias test based on notions of public confidence. It is a pity that the editors did not allow time for Professor Allars to provide more than a brief postscript in which to develop these arguments in the light of the High Court's decision in *Ebner v Official Trustee in Bankruptcy* (2000) 176 ALR 644.

The significance of Allars' analysis is borne out by her observation that there has been, over the last 20 years, a dramatic increase in the number of applications for judicial recusal for apprehended bias. The reason, she suggests, is the demise of assumptions about the neutrality of judges<sup>2</sup> and an increase in popular perceptions of personal and political prejudice. The popularity of these perceptions can be seen in the array of cases in which applications for disqualification have been made in recent years<sup>3</sup>. Ultimately, these cases reflect the extent to which the judiciary is perceived as being influenced by external political and social considerations.

The trends described by Allars and the apparent popularity of perceptions that our judges lack independence provide an interesting backdrop to Associate Professor John Willis's paper on the magistracy. Willis argues that because of the relative lack of formality and tradition, lower courts have historically been better placed to respond to community pressures. He also points out that the lower courts are very often the courts in which legislatures first attempt to address community problems, often in an innovative way, such as the procedures for dealing with domestic violence by way of, effectively, injunctive relief. Willis certainly has a point and it would be interesting to know his response to the concerns described by other contributors in relation to judicial independence and accountability generally.

Finally, Professor Russell's paper is a potted summary, regrettably all too short, of the role of the courts in Indigenous decolonisation. His conclusion that the Canadian, New Zealand and Australian courts have been important but not constant catalysts of political change by governments is hardly surprising but his analysis of the part played by the courts is useful and informative. Professor Russell does not argue one way or the other for judicial independence or accountability: his thesis is a practical one in which he acknowledges that the courts have good days and bad days when it comes to

indigenous rights and that, ultimately, real political change comes from the Parliament, not the judges.

*Reshaping the Judiciary* is, all told, a refreshing perspective on the state of judicial independence and accountability in Australia. If Senator Heffernan has left you feeling that we all need a little more rigour in our approach to understanding and talking about our judges and how they go about their business, then this collection of essays is an excellent starting point.

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**Reviewed by James Hmelnitsky**

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<sup>1</sup> see the amusing account by Justice Giudice of Justice H B Higgins's use of strike statistics as 'key performance indicators' for the Conciliation and Arbitration Court in a speech given to the Industrial Relations Society of Australia on 21 September 2001.

<sup>2</sup> See also M Allars, 'Procedural fairness: Disqualification required by the bias rule' (1999) 4 *Judicial Review* 469.

<sup>3</sup> Including personal relationships, gender and political affiliation.

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# Chris Geraghty: Cassocks in the Wilderness

By Justin Gleeson SC



Chris at the time he first went to Springwood as a 12-year-old.

Christopher Geraghty has been a Judge of the New South Wales Workers Compensation Court since 1993.

Chris's prior legal career commenced with his BAB/SAB studies in 1978 when he was working at the Health Commission of New South Wales. He had a stint as a legal reporter with Channel 10 in 1979. Between 1980 and 1983, Chris worked as a solicitor in the Litigation Department of Blake Dawson Waldron. Others there at the time include Rod Smith (of 7 Selborne Chambers), Gary Gregg (of 9 Wentworth

Chambers and artistic fame) and David Hall (of Henry Parkes Chambers). Chris did a wide range of litigation, including workers' compensation, personal injuries work, insurance and finance company work.

In February 1984, Chris came to the Bar and read on 8 Wentworth Chambers with Jack Mater. He recalls that Jack gave him the sound advice never to turn up to court in white pants. Other well-known names on the 8th floor at that time included Brian Murray, Brian Donovan, Jack O'Reilly, Peter Taylor, Geoff Lindsay and Lloyd Waddy. About two years later, Chris bought a room on the floor from Peter Young.

At the Bar Chris did a wide range of work, including workers compensation and personal injury work. Between 1989 and 1991 he was one of the counsel assisting the Chelmsford Royal Commission. After returning to the Bar in 1991 he did a wide range of work, including work for the State Crown such as prosecution under the *Pure Foods Act 1908* and the *Fisheries Act 1935*.

Since going to the Bench, Chris has found more time to resume some of his earlier interests. He has taken up again a great deal of reading and says that he has found himself dreaming for the first time in 10 years. Chris also began to write down some of his experiences in his earlier life. This has led to the publication in 2001 of his first book entitled *Cassocks in the Wilderness*. The sub-title is 'Remembering the seminary at Springwood'. The book deals with Chris's life between the ages of 11 and 18. As an 11-year-old he left junior school and spent the next five years doing his senior school studies at the Catholic seminary at Springwood. Those present were either completing their senior school studies with a view to becoming priests or actually studying the first three years of their training to be priests.

*Cassocks in the Wilderness* describes a world which would be totally foreign to most people. The Seminary was a closed and narrow environment. Rules were strictly enforced. There was little contact with the outside world. There was no exposure to poetry, television, newspaper, food or wine or the opposite sex.

Chris says that he commenced to write the book so that it would be an explanation for his sons as to where he had come from. After he had began writing, he realised that it was an important historical document because it records how those in a closed, narrow group do not look to or see values outside the group. He sometimes calls the Catholic Church authorities of those days 'the Taliban'.

Chris also believes, more controversially, that the book might help to explain the environment which created or at least allowed some persons to be ordained as priests who in more recent times have been convicted of crimes in the area of sexual abuse. In a chapter headed 'The system at work', he writes:

Later I came to understand why the juniors and seniors were so strictly separated at Springwood, why senior prefects appeared in pairs when mixing with us juniors. The system was structured for the mutual protection of the young and of those sexually maturing. Juices and fluids were circulating in bodies of boys in their late teens and on the edge of rebellion. Pubescent boys found themselves sealed off, starved of the sight and company of females, with all the powerful drives and impulses of youth conspiring to overflow. A few were delighted to be living among males, while others were content to be living with mates. Most of us suffered from the ache and harshness of a defeminised world.

Chris has received many letters from those who have read the book, some saying that it brings to life vividly an environment they experienced themselves. One wife of an ex-priest has said that, having read the book, she knows more about Chris than she does about her husband. Some have said that they found it quite a disturbing read.

Chris's portraits of some of the teachers of the seminary may seem to some harsh. He writes of Monsignor Charles Dunne:

I did not realize then that the monsignor was strange, that he was (to be blunt about this) a little mad. I was almost sixty before a flash on insight struck and I began to peer into the soul of the monster. He was able to engender fear in the breast of any seminarian, and also in the staff, though they were adults and ordained. He seemed to derive satisfaction, even glee in his power to elicit dread. When he was away in Sydney, a dancing, laughing mood of joy would come over students and staff. But when he was among us, his presence overshadowed all. Students were terrorized by the lazy wave of his fat, freckled hand, by his silent stare, his impatient grunt and by the whiff of tobacco which preceded his appearance. They shuddered at his slow, deliberate drawing in and expulsion of breath. He was the avenging, fearful god-figure in the mountains.

*Cassocks in the Wilderness* is marked by a great quest for honesty about what Chris experienced at that time, how he behaved and matured and the sort of person he became. The book does not pretend to be an objective, historical record of the history of Springwood Seminary than necessarily to reflect the experience of others who were at the Seminary. It is rather deliberately written as a memoir, with everything that follows



On a trip to Egypt in June 2000.

from the immediacy and necessary subjectivity of a memoir. Chris describes how he always seemed at the bottom of the system:

I waited impatiently for promotion to a chapel stall further back from the centre aisle. I also waited impatiently to be moved from the top table, away from the scrutiny of the eating, watching priests. But I never seemed to finish my apprenticeship. That feeling of juniority remained all my life. As soon as my goal was claimed, more was expected. Another goal came into view. No sooner was I a senior at Springwood than I became a junior at Manly, then as a senior in the major seminary I became a junior member of the clergy, and later a junior member of the seminary staff, and later still, a junior solicitor when I was quite senior, then a junior barrister, and finally a junior judge. I always felt that I was at the bottom of the pile, to be seen, observed, assessed, but not heard. I never seemed to be able to demonstrate my loyalty to the satisfaction of others, always under suspicion, oozing rebellion, waiting to be chosen as part of the team.

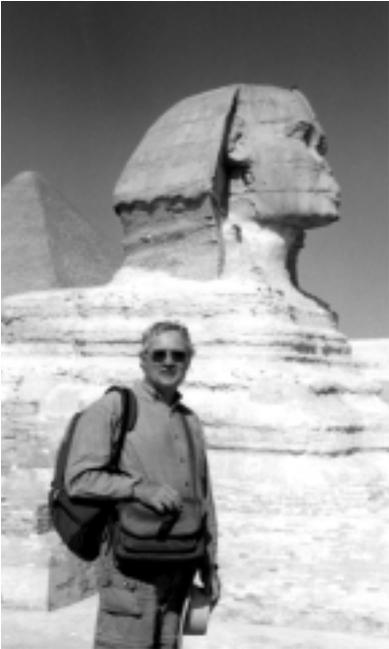
Chris's two sons, now 20 and 22, were amused by reading the book. Even after reading it, it seems to them to be a foreign world.

Chris found time to write the book over the last five years, in particular when he was on circuit with the Compensation Court some 12 weeks a year and during his holidays. As will be well-known, the Compensation Court travels to many places, including Newcastle, Wollongong, Albury, Broken Hill, Byron Bay, Tumut and Batemans Bay, and this provided some of the opportunities for the reflection and writing necessary to create the book.

Chris has further works in the pipeline, including a book which is intended to be published by the end of this year which will deal with his life as a student at the Manly Seminary between 1958 and 1962. Father Ted Kennedy of Redfern will be writing the foreword to that book.

Between 1963 and 1972 Chris was a young priest in a parish and completed his doctorate at Manly Seminary on Irenaeus, the third Bishop of Lyon in the second century AD. He taught at Springwood in the area of liturgy. Between 1972 and 1975 Chris studied liturgy in Paris and subsequently returned to teach at the Manly Seminary. He left the priesthood in 1976, after which he married and moved into a working life in the law.

*Cassocks in the Wilderness* is published by Spectrum Publications, Melbourne.



## What are they doing now?

*This column is an occasional piece which will update readers on what some of our former barristers and judges are now doing.*

Gerald Edward (Tony) Fitzgerald will be known to many from his time as a Federal Court judge (1981 – 1984), commissioner of Inquiry into Corruption in Queensland (1987 – 1989) and inaugural president of the Court of Appeal in Queensland (1991 – 1998). More recently, Tony has been a judge of the Court of Appeal in Sydney (1998 – 2001). However, Tony's time as a judge has now ended forever (he says). He describes his occupation now as 'mediator, arbitrator and dispute resolution consultant'.



As examples of some of the work Tony has done recently, apart from his work in the area of commercial disputes, he conducted a four-month study into issues of justice involving the Cape York Aboriginal communities, providing a report in November 2001. He has also acted as a mediator between the Queensland Police and individual and group demonstrators relating to the CHOGM conference held in Queensland.

Some of his other activities include his position as Chairperson of the Law and Justice Foundation of New South Wales. One of the important forthcoming projects of the Foundation is a survey of the special access to justice needs of socially and economically disadvantaged people (whether indigenous, poor or disabled). He is also Chairperson of the Advisory Board for the Key Centre of Ethics, Justice and Governance established by Griffith University. One of their current projects is the Pathways Project. This concerns the impact of early childhood opportunities on later criminal behaviour.

Tony is also a member of the mediation and arbitration panels established by the body known as ADR Chambers International. This body is a cousin of the original ADR Chambers, which was established in Canada. The Canadian body consists of senior counsel and former judges who have combined to provide a one-stop shopping point for ADR services. Another cousin is ADR UK Limited which, as its web site proudly discloses, contains a large number of the former law lords and former lord justices of appeal as its members.

*Bar News* wishes Tony well in this next and varied stage of his distinguished legal career.



Observed on New Year's Day (2002), in the alpine shelter at Harris Saddle in the Southern Alps, Margo SC reading Odgers on Evidence (800 grams).



## The Hon Justice

### Joseph Campbell

Joseph Charles Campbell Q.C. was sworn in as a judge of the Supreme Court of New South Wales on Friday, 26 October 2001. His Honour was educated at Tamworth High School and the University of Sydney, where he obtained honours degrees in both humanities and law. He began his legal career in 1974 at Allen Allen & Hemsley, where he was articled to John Lehane. A year later he was admitted to the Bar and read with Richard Conti QC, now a judge of the Federal Court. He took silk in 1988.

His Honour established a reputation as a talented and versatile advocate. In his congratulatory speech, the Attorney General, the Hon R J Debus MP, recalled an occasion when those skills were recognised by the Court of Appeal:

Your Honour quickly established a reputation as a talented and versatile advocate. Your skills were recognised not only by your peers, but also by a distinguished Court of Appeal bench comprising their Honours Hutley, Glass and Samuels.

Your skills as a barrister came to the attention of the Court of Appeal in one of your earliest cases, which concerned an appeal from a decision awarding the princely sum of two thousand dollars to a hairdresser whose shop had been flooded after some less than perfect renovations. Your Honour was forced to contend with an appeal court bench that found the decision in the Court below was based on an incorrect construction of the contract.

In concluding his judgment, His Honour Justice Hutley, wrote:

I would like to say how much the court appreciated the argument presented by Mr Campbell, a very junior member of the Bar, who was

faced with what is a most difficult situation for an advocate, suddenly having to deal with the case on an entirely different basis from that which he was originally presented with and came prepared to handle. We hope to see him again in the Court.'

His Honour Mr Justice Hutley was, I might say, my own lecturer in succession at the University of Sydney, and I, along with several generations of law students can testify that His Honour was the least forgiving, the most stringent examiner in the Faculty.

His Honour Mr Justice Glass echoed the sentiments of Mr Justice Hutley saying that he agreed in the reasons for judgment, the order for costs and the accolade to Mr Campbell. I am assured, Your Honour, that such comments were not restricted to this one performance and have continued throughout your career, though most, I understand, have been uttered privately rather than in authorised law reports.

As well as practice at the Bar, His Honour also lectured part time in equity at Sydney University for several years, and later returned as Challis Lecturer in Bankruptcy. His Honour was also a member of the Council of Law Reporting from 1994 to the present, most recently as Chairperson. His Honour made contributions to the Commercial Law Association and the Company Law Discussion Group. His Honour maintained a varied practice appearing in the Supreme, Federal and High courts on matters concerning administrative law, banking, finance and securities law, commercial law, corporations law, insolvency and bankruptcy, intellectual property, trade practices and competition law and in equity. In his remarks, His Honour took special care to acknowledge the assistance he received throughout his career from his extended family and distinguished teachers at school, university and at the Bar.

His Honour's broad range of experience and skills will no doubt ensure that his career on the Bench is as successful and fulfilling as his career at the Bar has been.

## The Hon Justice Terrence Buddin

On 30 January 2002, Terrence Buddin SC was sworn in as a judge of the Supreme Court of New South Wales. His Honour's lengthy education commenced at Barker College and was followed by graduating with a Bachelor of Arts and Bachelor of Laws at the University of Sydney, Bachelor of Civil Laws at Oxford University and a Master of Laws at the University of Illinois.

Between 1975 and 1981 he worked as a lecturer and senior lecturer in law at the University of New South Wales principally teaching criminal law and clinical legal experience. His Honour was one of the original founders of the Redfern Legal Service, the Kingsford Legal Centre and the Arts Law Centre. Between lecturing and establishing these community centres, His Honour also co-authored a book on criminal law which became a standard case book for students and practitioners. His Honour has also published extensively on that subject.

During the mid-1980s His Honour practised in Sydney as a solicitor in a variety of cases, extending to an appearance before the High Court in the trial of the late Lionel Murphy. In 1987 His Honour transferred to the Roll of Barristers and practised at the private Bar until 1990. Between 1990 and 1995 His Honour served as in-house counsel in the Sydney Office of the Commonwealth Director of Public Prosecutions, as well as teaching for the Australian Advocacy Institute. In April 1995 he was appointed the Director of Public Prosecutions for the ACT. There then followed appointment as Senior Public Defender in New South Wales in 1998 and as Crown Advocate in 1999. The following year His Honour returned to the private Bar appearing frequently in criminal matters including as counsel assisting the Police Integrity Commission.

In his speech in reply, His Honour spoke of his academic and professional experiences and his love of cricket which led him to the position of Chairman of the Judiciary Committee of the New South Wales Cricket Association, which has responsibility for all matches played in the Sydney Grade

Cricket competition. His Honour described one experience from that period of which practitioners were urged to take note:

Normally proceedings arise following a complaint made by an umpire about a player's behaviour during the course of a match. On this particular occasion, the umpire at the bowler's end complained that the batsman, whom he had just given out LBW, had displayed dissent as a consequence of that decision. The umpire said that although he had clearly seen the batsman's lips moving, he had been unable to discern what had been said. Accordingly, the dissent consisted of relatively innocuous facial expressions and other gestures. The batsman/defendant was presented with an exquisite dilemma – should he attack or defend?

The batsman assured the Tribunal that it was an essential part of his case to demonstrate that he had been the victim of an appalling decision. In order to recreate the scene for the Tribunal with as much authenticity as he could muster, the batsman not only repeated verbatim what he had said to the umpire upon being given out, but did so at precisely the same decibel level. He spoke forcefully and in full quadraphonic sound. As a result there was little room for misunderstanding his views about the umpire's competence. By this time the batsman was in full stride and his voice reached a crescendo. He was now in full advocate's mode as he prepared to deliver the coup de grace. Stripped of the searing language and the early epithets, the substance of his submission was that if the umpire had been unable, as he had said, to hear those incredibly offensive words which had been shouted at him then that would explain why he had been apparently unable to hear the very obvious inside edge from the bat before the ball hit his pad. As Sir Humphrey of Yes Minister fame may have been moved to say, that was indeed a courageous submission.



## The Hon Justice Ian Gzell

The Hon Justice Ian Gzell was sworn in as a judge of the Supreme Court of New South Wales on Monday, 4 February 2002. In his welcoming remarks, the President of the New South Wales Bar commenced by noting that His Honour had come to us from Queensland, something which is not forgotten, either by the Queenslanders or by those around them. His Honour's practice when he resided in Queensland was not limited to that State; His Honour practised, amongst other places, in Papua New Guinea, Fiji, Singapore, New Zealand and the Solomon Islands. His Honour was a reporter for the Commonwealth Law Reports from as early as 1973. Subsequently His Honour moved to the Sydney Bar and established a varied practice from in 5 Selborne Chambers, with special emphasis on revenue law.

Once in Sydney, His Honour became director of both Barristers Superannuation and Counsels Chambers, of which he was chairman since 1999. In Queensland he had been secretary of Barristers Chambers in the 60s and 70s. He has also been a director of the International Dispute Centre and has made contributions through the Business Law Section of the Law Council, the Commercial Law Association and the Taxation Institute of Australia. Outside the law, His Honour provided financial and moral support of music through the Queensland Philharmonic Orchestra, the Queensland Symphony Orchestra, the National Council of Opera Australia and regional arts organisations.

The President of the New South Wales Bar Association, Bret Walker SC, in welcoming His Honour to the Bench, had the following to say of His Honour's extraordinary career and achievements:

Your Honour comes to this court after a career as a barrister and as a member of

the legal community and, indeed, as a member of the wider community which is exemplary in its service and which is daunting in the combination of high individual achievement and devotion to the common good.

Those are indeed broad words of praise and occasions like these have been known from time to time to attract some hyperbole, but in Your Honour's case, the barest objective description of the post you have achieved, the jobs you have discharged, and the achievements as a legal scholar, advocate and advisor, makes for once the hyperbole quite absent.

Your Honour, you come to this bench with all the best wishes, admiration and congratulations from the Bar. We are sure you will discharge of this bench your duties with the same flair, with the same diligence, and the same excellence as you have displayed elsewhere.

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## His Honour Judge John Nicholson SC

John Nicholson SC was sworn in as a judge of the New South Wales District Court on 23 July 2001.

His Honour was called to the Bar in June 1977. He first went to Wardell Chambers, where he remained until 1984, practising primarily in Industrial Law, Common Law and criminal law.

He was appointed as a public defender on 1 August 1984 and took silk on 4 November 1994. Two years later His Honour was appointed as deputy senior public defender and in 1999 he became the senior public defender.

In that role, and for many years prior to that, his Honour was known for his deep concern for Indigenous people and their experiences under the criminal justice system - at one stage commenting publicly that 'increased incarceration of Aborigines is also a de facto policy of the courts'.

His humanitarian concern was matched by a practical commitment to improving the prospects of Indigenous law students. He was instrumental in establishing a scheme to assist Indigenous lawyers to develop a legal practice by being placed at the Public Defenders' Office. He worked closely with Slattery QC and the Bar Association's Equal

Opportunity Committee in the design and implementation of a similar strategy for the Bar Association. His Honour was also responsible for setting up the Pynn Scholarship at UNSW to enable students to study law later in their working life.

His Honour was, for many years, a vocal critic of sensational, inaccurate reporting by the media of criminal trials and sentencing. He wrote a number of articles on the way in which the criminal justice system has become increasingly driven by the anger of victims and their calls for vengeance. He warned of the futility of the scramble for political popularity by imposing tougher sentences and steadily increasing the prison population.

At the swearing-in ceremony, Walker SC, speaking on behalf of the Bar, recalled the time in February 2001, when his Honour spoke to the Legal and Constitutional Affairs Committee of the Legislative Council about a Bill of Rights. Walker SC said:

The comments your Honour made there managed to summarise, capture and debate in your Honour's well known style many of the themes which dominate your reported words and private work over the last many years. In particular your Honour's insistence on a fair trial where a trial is between the state and the accused and where the trial is not an adjustment of some other more diffuse set of social rights and obligations came over clearly.

...

You have graced the profession with your energetic advocacy for what can only be described as a robust civil rights approach to the practice of law and the development of policy concerning it. You will not be forgotten for your gallant but unsuccessful attempts with respect to dock statements. You will not be forgotten for the manner in which you joined in what eventually became the High Court's condemnation of the legislation with respect to Kable.

For all those reasons the public interest in New South Wales is greatly enhanced by the appointment of your Honour to this bench and the Bar in particular wishes you well in the challenge you have set yourself and looks forward to participating with you in meeting that challenge.



## His Honour Judge Stephen Walmsley SC

Stephen Walmsley SC was sworn in as a judge of the District Court of New South Wales in August 2001. His Honour was born in Sydney and educated in the public school system in Yass. He later attended Canberra Grammar School and the Australian National University. His Honour practised as a solicitor at Messrs Allen Allen & Hemsley and then as a partner in Macphillamy Cummins & Gibson, solicitors in Canberra. He also tutored and lectured in the Law Faculty and Legal Workshop of the ANU. His Honour was called to the Bar in Canberra in 1981 and practised there until returning to Sydney in 1988.

His Honour played a large part in the life of the Canberra legal profession as a solicitor and barrister, becoming a member of the Bar Council and one of two directors of the chambers in the Territory. As well as being a highly respected and fearless advocate, His Honour gave generously of his time and skills to assist the Bar Association and the junior Bar. He served on the Supreme Court Common Law Users Committee and was the Bar's representative on the working party on medical negligence established by the Minister for Health. He also assisted *ex-officio* in the work of the Common Law Committee as well as serving on the Professional Conduct and Education Committees and assisting the advocacy training programme, including training aspiring advocates at the fledgling bars of Bangladesh and Tonga.

After some gratuitous references to His Honour's taste in jackets and ties, Katzmann SC, speaking on behalf of the Bar, recalled two of his Honour's more interesting cases in the following terms:

Some of Your Honour's cases have been as colourful as Your Honour's jackets. The most obvious example is *Fasold v Roberts*, the so-called *Noah's Ark case*, where Your Honour appeared for the applicants seeking various remedies for allegedly misleading and deceptive conduct and for breach of copyright arising out of some public statements about the supposed site of the remnants of Noah's Ark. My favourite, however, is a recent appeal case in which Your Honour appeared for a man who felt that his work injury, which caused him to fracture his hip, was a punishment from God for his peculiar sexual practices involving as they did a *ménage à trois* with his wife and the family dog.



## His Honour Judge Nigel Rein SC

Judge Nigel Rein SC was recently appointed to the District Court after a distinguished career at the Bar.

After emigrating from England with his family at the age of eleven, Judge Rein attended Vaucluse Boys' High School where he became Head Prefect and was an outstanding debater. He obtained Arts and Law degrees from Sydney University and undertook postgraduate articles at the then Minter Simpson & Co. After working as an articulated clerk in Israel, he was employed as a solicitor by Stephen Jaques & Stephen in Sydney. He commenced employment with Dudley Westgarth & Co in 1981 and became a partner of the merged firm of Westgarth Baldick in 1983.

He was admitted to the Bar in 1984 and immediately developed an excellent commercial practice, appearing in many professional liability, building and construction law and maritime cases. His main interest was however in insurance and he became a 'guru' in that field.

His appointment as senior counsel in 1999 was a popular one and his appointment to the District Court Bench has been widely acclaimed.



## His Honour Judge Anthony Blackmore SC

Anthony Blackmore SC was sworn in as a judge of the District Court of New South Wales on Monday, 4 February 2002

His Honour was educated at Normanhurst Boys High School where he is remembered for both his academic achievements and enthusiasm for sport. He excelled at squash, playing at a State level while at school and competitively for many years after that.

In 1975 at just 19, His Honour commenced work in the Attorney General's Department, in Magistrates Court administration. In 1979, he took up a position as a legal clerk at the Corporate Affairs Commission of NSW. It was during his time at the CAC that he was admitted as a solicitor (in 1980) and admitted to the Bar (in 1984).

His Honour set up chambers at ground floor Wentworth Chambers, principally practicing in criminal law, administrative law, company law and taxation, appearing in a full range of civil and criminal cases including Local, District and Supreme Court trials and appeals. He was often briefed to advise and appear in complex corporate criminal cases. For example, in the *Cambridge Credit* litigation as junior counsel for the prosecution and in relation to the prosecutions that flowed from the failed *Balanced Property Management Trust*. He also appeared for the defence in such cases as the alleged conspiracy charges flowing from the 'bottom of the harbour' tax investigations. His Honour's appearances extended to a number of administrative cases, particularly those related to the development of corporate

regulation under the Companies Acts and Australian Securities Codes.

In 1991, His Honour accepted an appointment as a Crown Prosecutor, appearing in many trials in both the District Court and Supreme Court often prosecuting police officers, lawyers and other public officials. Such cases are frequently the subject of appeal, however His Honour holds the enviable record that no conviction was ever overturned in any of the cases in which he appeared.

In September 1997, he was appointed to act as Deputy Director of Public Prosecutions and subsequently appointed as the Deputy Director in January 1998. In 2001, he was appointed Senior Counsel.

His Honour's contribution to the law has not been limited to the pursuit of a career as prosecutor. For a number of years, he was an active member of a Professional Conduct Committee of the Bar Association; gave talks to the Bar Readers' course on the role of the Director of Public Prosecutions; regularly attended and presented papers at both local and international fora relating to criminal law issues; and, is a co-author of the one of the leading legal services in criminal law.

The Attorney General concluded his remarks with the following observations:

I trust that your judicial appointment will be performed with the same skill as your performance on the fairway in your new sport of golf. Your acquaintances have asked me on this occasion to advise you to work on your putting which I hear is more closely reminiscent of your earlier downhill slalom exploits – veering here and there and always on the verge of complete loss of control.

You possess the personal qualities and ability desired of a District Court judge, and in that role, Your Honour will preside with integrity, fairness and independence, and continue to earn the respect of the legal profession. I welcome your experience and expertise, which I believe will enrich the District Court Bench to the advantage of all those who appear before you...

## The Hon Justice Mark Le Poer Trench

Mark Le Poer Trench was sworn in as a judge of the Family Court of Australia on 15 October 2001.

His Honour began his Bachelor of Law degree at The Australian National University in Canberra in 1967 before moving to Sydney in 1969. He obtained articles with Dunhill Barker under the supervision of Keith Robinson and was admitted as a solicitor of the Supreme Court of New South Wales in 1974.

His Honour was called to the New South Wales Bar in 1980 and moved to chambers in Parramatta. There he practised with Ian Coleman, now the Hon Justice Coleman of the Family Court. In 1985, along with Peter Maiden, Lynn Judge and others, his Honour established Lachlan Macquarie Chambers and later Arthur Philip Chambers, also at Parramatta.

At the Bar, his practice focused principally on family law, appellate advocacy, children's matters and de facto relationships. A notable case in which his Honour appeared in 1992 involved the removal of children from the Family of God religious sect.

In addition to running a busy Bar practice, his Honour was a long-serving member of the Legal Aid Commission's Family Law Review Committee, a lecturer in advocacy at the College of Law and a member of the Bar Association's Family Law Committee.

Ian Harrison SC, speaking on behalf of the Bar, made the following observations which reflected the esteem in which his Honour is held:

Over time, your Honour took a leading role in the growth and development of the family law Bar at Parramatta. They are, and remain, a tightly knit group of practitioners. That closeness was historically forged, at least in part out of the violent and tragic events involving, or at least directed at some members of this court, in the early 1980s.

Your Honour's appointment comes with a certain air of inevitability. You have for many years been highly regarded, both by the Bench and your colleagues, as a competent and effective counsel in this court.

## Peter Comans (1953 - 2002)

*A funeral oration delivered by the Hon Justice J D Heydon on 29 April 2002.*

Peter Comans graduated from The Australian National University in economics (with distinction) and law (with honours). He was Sir Anthony Mason's associate for a year; he obtained a Masters degree in law from the University of Virginia and worked for eight years in the Attorney-General's Department, including two years at the Trade Practices Commission.

When Peter came to the Bar in early 1986 he speedily built up a practice ranging over the whole of federal administrative and trade practices law. For the Trade Practices Commission and for the Australian Government Solicitor, he soon became one of a tiny handful of juniors of first preference. He did an immense amount of important advisory work for them and for private clients. Prominent Queen's counsel frequently sought his aid. He appeared before the Federal Court and the Trade Practices Tribunal in many heavy cases of social or legal significance. He developed an Australia-wide reputation.

To the fulfillment of his professional duties he brought several characteristic skills. He had a wide knowledge of the law. He could perceive and focus on the goals of clients. He was able to master and simplify complex factual material. He had acute analytical powers. He was willing to work intensely hard for long periods. He had tremendous will to win a case or solve a problem.

He devoted much time gratuitously to the affairs of the Bar. At that time the Bar was under almost constant investigation and attack from government agencies. He drafted many forceful letters and submissions in resistance to their tactics.

Throughout his years at the Bar he was a cheerful and genial companion. The members of his floor habitually met at about 5pm to take mild refreshment after their strenuous daily labours. At these gatherings he loved hearing and telling anecdotes about events in court and the characters of Phillip Street.

He also had the charm of mild eccentricity. Alec Leopold gives the following examples:

- He could concentrate so hard on his own thoughts while walking in the street that he would fail to notice friends passing by inches away.
- Jenni often had to ring his mobile number to find out which taxi he had left it in, together with numerous other valuables.
- He established a record among High Court associates by being the first to fall down a gully and into a patch of thorns after being the victim of what would now be called road rage. His arrival at work the next day with his face swathed in bandages must have been an alarming experience for Sir Anthony Mason.

Peter had one other rare attribute: a high degree of physical courage. He suffered chronic back trouble, which occasionally flared up severely. Sometimes he could not sit or move without agony. But he rarely showed it.

Peter would have adorned the inner Bar. He would have been an admirable Federal Court judge. But the Bar can make too many demands. Perhaps he gave to his clients too generously of himself and thereby wore out some vital inner spring.

A look back over his professional life may be obscured by fog and darkness in the immediate foreground, but further back in the past the land is bright. It affords a vision of a man in the vigorous prime of life, a man who practised a profession to which his skills were ideally suited, a man who did so much good, a man who had so much love for his family, and a man who brought so much happiness to all his many friends. That is the vision which will dominate the memories of his many professional colleagues: a vision of a fine advocate, a fine lawyer, a fine friend, a fine man.

## Penny Wines (1968 – 2002)

*Bar News* records with great sadness the death in February this year of Penny Wines who was called to the New South Wales Bar in February 1995, following a number of years at Mallesons Stephen Jaques.

She read with Richard White SC and was associated with both 7 Wentworth and the 6 Wentworth/Selborne. She rapidly built up a large junior commercial practice, notably being involved in the Super League litigation in its various manifestations.

Penny was a dynamic and thoroughly engaging person, extremely articulate and with a sharp wit. She had been a champion school debater and went on to debate for both Sydney University and the Women's College. She was also an avid cricket follower. In this, she was perhaps something of an iconoclast, apparently having Geoffrey Boycott as her cricketing idol.

Although Penny had not practised at the Bar for the last couple of years, and her overall career at the Bar was short, the very significant representation of the Bar at her funeral at St David's Church, Lindfield, was testament to the impact she made on those with whom she had professional contact in that short period. The funeral was a moving occasion for all concerned. Her premature passing was tragic. She is fondly remembered and will be greatly missed.

# The common law phrasebook

by Professor Wiesel Werds of Munchen Polytechnik

Sometimes while in a foreign country you can be overwhelmed with an urge to speak a few useless phrases to the locals in their own language – hence the proliferation of foreign language phrasebooks. Whether it is true or not, the thought behind the use of a phrasebook

is to attempt to gain some better insight into the local culture.

I think the same might apply in the law. Picture an equity lawyer straying into a common law court (an image of a mousy English tourist with a box camera, shorts and long socks stumbling into a hill-tribe of *Cromagnons* comes to mind). Can the equity lawyer be made to understand what is going on?

For this reason, I have produced a phrasebook which translates common law speak into English for the use of equity adventure travellers. I hope it is of some use.

## Between counsel during settlement negotiations

Settlement negotiations at common law are conducted with admirable frankness, despite the fact nobody says what they truly mean. This frankness is achieved by employing key phrases, the meaning of which is well-understood amongst the initiated.

Common law speak	English
'I am instructed to put an offer of [sum of \$]'	'The clients will not listen to my advice'
'I'll kick off negotiations with an offer of [a sum of \$]'	'I haven't spoken to my client yet'
'That's ridiculous'	'We should continue negotiations'
'How can you justify that?'	'That sounds reasonable'
'You've got to be joking'	'OK. I will seek instructions to put a counter-offer'
'Our offer is [sum of \$] and that's it'	'Please put a counter offer'
'Our offer is [sum of \$] and I haven't got a penny more'	'I have \$10,000 up my sleeve'
'My people'	'People' means the common lawyer's clients. Strangely, the plural is employed even if there is only one client. A client can also be known as 'the punter' or 'the customer'
'My people would like to settle this matter'	'I need to get away as I have another case'
'That is our absolute bottom line'	This is how plaintiff's counsel indicates that the offer is getting close to, but has not yet reached, the 'bottom line'
The equivalent phrase used by defendant's counsel is	'That is our absolute top dollar'
'If this case does not settle it could run for days'	'I have a restaurant table booked for one o'clock'
'We will need to make a phone call'	This is used by defendant's lawyers to pretend that their instructions are exhausted and it is necessary to call the insurance company to get more money. It is not a direct lie because a phone call will be made to book a table at a restaurant
'I will put the offer to my people, but I want you to know that I will not recommend it'	'The case has settled'

## By Counsel to the Court regarding settlement negotiations

Nearly all of the available court time in the common law courts is spent keeping the judge off the Bench by taking a series of short adjournments. For reasons not readily able to be understood, this is justified on the basis that the most efficient use of court time is not to use it at all. The purpose of the short adjournments is, of course, to conduct settlement negotiations, but, oddly, the word 'settlement' is never allowed to be said; instead weird euphemisms are employed.

Common law speak	English
'May the parties have some time for discussions, your Honour?'	This is the classical method of getting the judge off the Bench. Usually the judge will respond by feigning resistance and then say (voice dripping with reluctance) 'Well, all right – provided the parties assure me this might be leading somewhere'
'This case could profit from some discussion between the parties'	The counsel who states this needs to go to the toilet'
'Thank you for the time your Honour. Some progress has been made, but nothing has crystallised yet'	This means, although the court gave an adjournment to permit settlement negotiations, the parties have not yet exchanged offers
'Thank you for the time your Honour, but the parties need a little more time to see if discussions can be advanced'	'By the time I went to the toilet and got some coffee, we had no time to exchange offers in the 20 minutes you gave us'
'Your Honour, my learned friend has put something meaningful which may well shorten the case'	This is, in fact, a method of calculating time. It means it is a quarter past to me twelve on a Friday. This leaves time to draw terms of settlement and to get off to lunch

**By Counsel to the Court during submissions**

Common law speak	English
'Your Honour, this case raises a difficult legal issue'	The counsel who says this is actually stating in open court that his or her client is willing to settle on any terms available
'Your Honour, my client's case is very simple'	a) If said by the plaintiff's counsel it means that there is no evidence to support the plaintiff's case b) If said by the defendant's counsel it is a concession of defeat
'These proceedings fall into a narrow compass'	Although it is often said, no one knows what this statement means
'The damages claimed are calculable on a Malec v Hutton basis'	'The plaintiff accepts that he/she is unable to prove his/her case on damages'
'Your Honour should allow a buffer'	This is a concession by counsel that there is no intelligible basis to support an award of damages

**By the Court ruling on objections to evidence**

Common law speak	English
'I reject the question in that form, but you may put it again'	'Sorry, I wasn't listening'
'I will allow the evidence. It is a question of weight and I will ask counsel to address me on it during submissions'	'This evidence is inadmissible, but crucial. If I do not let it in the plaintiff will lose for sure'

**By the Court during the course of judgment**

Every case is different and must be tried and decided on its own merits. At common law individual justice is achieved by the trial judge drawing upon a bank of standard incantations.

Common law speak	English
'Taking a broad-brush approach ...'	This has two potential meanings: a) If it is said on a Wednesday, it means the judge needs to get away to golf or the races; b) On any other day, it means 'I wish it was Wednesday'
'I would infer ...'	'There is no evidence which would permit me to make a finding on this issue'
'The sum which I allow under this head of damages must, of course, be heavily discounted'	'I should not have awarded this head of damages in the first place'
'On balance ...'	'This means 'buggered if I know' and is a method of reasoning commonly applied by judges, but rarely explicitly acknowledged.
'Exercising my discretion ...'	'I do not know or understand the governing legal principles'
'I watched and listened to [witness name] carefully while he/she gave his/her evidence and I have formed a view, based upon my observations in Court, that his/her evidence was not reliable'	'This case looks like it is on the way to the Court of Appeal so I better stitch it up'
'Doing the best I can ...'	'See 'Taking a broad-brush approach'
'Taking into account the whole of the evidence ...'	'I bet I have forgotten something'
'The damages are not capable of precise, mathematical calculation.'	See 'Taking a broad-brush approach'
'Taking a robust and pragmatic approach ...'	'The evidence in this case is very thin'
'I have taken into account the helpful submissions of Counsel for the Plaintiff/Defendant'	'Thank you for employing the code words which told me that you conceded defeat'
'I listened closely to counsel's careful submissions...'	'I was compelled to sit through submissions which were repetitive and/or boring'
'The plaintiff/defendant was very ably represented by [counsel's name]...'	This means the party represented by the named counsel has lost

# All at sea: The great Bar boat race



Sailing close to the wind:  
Peter Whitford and Stephen Robb QC



## Annual Bench & Bar v solicitors golf match

By D M Flaherty

A near perfect summer day greeted all the players for the annual Bench & Bar v solicitors golf day held at Manly Golf Course on Thursday, 17 January 2002.

The only valid excuse for not playing well under such perfect conditions was incompetence which, unfortunately, was all too pervasive in the Bench and Bar team - with some notable exceptions, including the efforts of Justice Roger Gyles. There were 13 games played, of which four were 'all square'. Of the remaining nine games, the solicitors won seven, with the Bench and Bar team winning only two.

Thus the solicitors, once again, won the mace of the late Justice Herron for another year. It was re-presented to Roger Williams, the Captain of the solicitors' team, by Justice Keith Mason, the Captain of the Bench and Bar team.

After the presentation of the various prizes a large field retired to the picturesque surroundings of the dining room of the Manly Golf Club for the now traditional post match dinner

### The individual results were as follows:

#### 4BBB

Winners	John Bell & John Newnham	45 points
Runners up	M Gianacas & R Hingston	44 points

#### Singles

Winner	Justice Roger Gyles	41 points
Runner up	Michael Kissane	36 points

#### Nearest the pin

3rd hole	M Egerton	203 cm
18th hole	M Kissane	167 cm

#### Longest drive

Winners	John Harris
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#### Best 1st nine

Winners	Libby Moss & Ron Moss	23 points
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#### Best back nine

Winners	Justice Roger Gyles & Greg James	24 points
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# Cricket report

By Andrew Bell

'Bradman Cup retained: Hodgson bowled by 10 year old' read the headline of the *Southern Highlands Chronicle*, recording at once the victory by the 11 Selborne / Wentworth in the tenth match for the Lady Bradman Cup and the dismissal of Edmund Barton's skipper, the redoubtable Thos Hodgson, by Philip Durack's son, Tim, resembling the father in all but the absence of (distinguishing) grey hair.

The match was played before a small crowd of several thousand at the picturesque Bradman Oval on Saturday 6 April 2002. Hodgson called correctly and elected to bat. Alex, son of Broun QC, and Phillip Wood, a local solicitor, combined well to give Edmund Barton a solid start. John Griffiths, described in these pages some years ago now as an ageing but legendary firebrand, continued to conjure up images of Dennis Lillee at Lilac Hill in his autumnal years, opening the bowling from the Mount Gibraltar end. Recent recruit, Richard Lancaster, opened the bowling from the Burrawang end, using his height to extract minimal bounce. Rod Mater, batting at No.3 for Edmund Barton, can usually be relied upon for a solid 40. He was unfortunate, however, to encounter Philip Durack, the thinking man's Shane Warne, who delivered seven overs for a return of 3/6. Hodgson's dismissal by Durack the younger has already been alluded to and will not be dwelt upon. Bedrossian, batting at No.8, struck a useful 34 (including three sixes) as Edmund Barton powered to 9/163 off its 35 overs.

One highlight for cricket statisticians and historians of the game generally was John Atkin's cameo at No.10. It was through Atkin that Poulos, though 'overseas abroad', as he would say, played his own role in the game. Some years ago, a local rule was introduced that batsmen had to retire at 40, could not be out for a duck but, if dismissed for a duck, then had to retire at 10 unless dismissed sooner. In the summer of 1997, in what has come to be known as the Poulos Amendment, the rules were altered to permit a batsman to be thrice dismissed for zero before saying *adieu*. Atkin made



'Farmer' John Griffiths



'Copybook Holmes'



Lancaster takes strike



The 'Thos'



Three generations



Gracious in victory

history. Greenwood was the accurate bowler.

In reply, Lancaster (21) and Bell (41 retired) had a bright opening partnership although the latter, who had been seen consuming large quantities of aspirin in a desperate attempt to thin the blood and anticipate the cramps, refused to provide the stewards with a sample. Broun QC, *en route* to or from Brigadoon – it was not clear – and resplendent in a fetching lightweight tartan with Order of Australia medal proudly pinned to his breast, saw his son despatched for six from the second ball of the innings. Greenwood and Durack contributed 29 and 24 respectively, Greenwood being stumped by Hodgson off the tantalising Mater in a shot of breathtaking premeditation. Pike continued his unhappy association with this match when he was dismissed leg before wicket for four, shortly before the ball had left the bowler's hand. His major contribution to the day was with his camera.

11th floor alumnus, Emmett J., dropped by for a spot of umpiring. His judicious decision to reserve on a number of close appeals was appreciated. Just

when it looked like the 11th floor was cruising for victory, the fall of Kirk (7) and the aforementioned Pike (4) brought together Holmes (10 not out) and Griffiths (17 not out) to see it home with a number of overs to spare. Holmes sustained the usual injury.

The Senior Vice-President and media darling, Harrison SC, who had earlier taken 2/20, made a typically gracious speech accepting the somewhat tarnished trophy. Cricketing author and Edmund Barton *apparatchik*, Roland Perry, again generously donated several of his excellent cricketing books to honour good performances. Durack was man of the match and, as Meagher JA, whose profile was spotted late in the day subjecting himself to his weekend training routine in the Highlands, was heard to observe: 'As I have always said, *mens sana in corpore sano*'.