THE JOURNAL OF THE NSW BAR ASSOCIATION | SUMMER 2008/09

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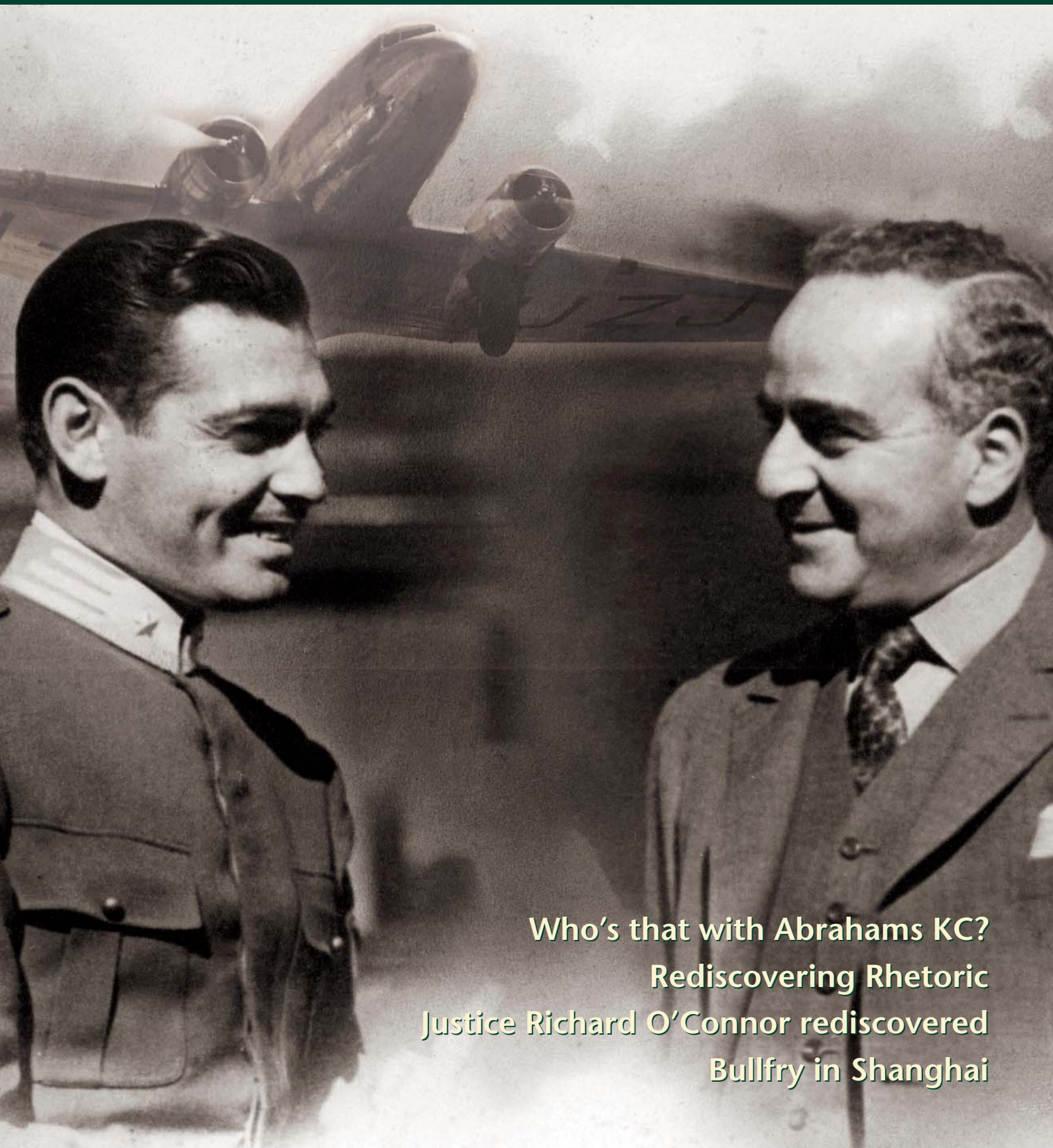

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What price security?

As the editor has written, there is no doubt that all of us will be affected by the global financial crisis. For some, this will mean an increase in work – with a rise in insolvencies, for example. For some it will come on top of a steady downturn in work brought about by sequential legislative changes over the last decade, a decline in litigation and a surge in alternative forms of dispute resolution in which solicitors and non-lawyers have taken part in many cases without recourse to the bar. This is, however, no time to despair. These sort of changes occurred throughout the 20th century. When I first came to the bar tenancy work, which had sustained many barristers' practices, was on the decline and many despaired. Before I arrived, when no-fault divorce was to be introduced, many thought this was the end of civilisation as they knew it. In each case the bar did not just survive; it thrived. New legislation brought with it new challenges, new causes of action and new conundrums for barristers to help solve. Although many of us were slow to take to the new forms of dispute resolution, particularly mediation, the bar has now embraced it and many barristers have become talented mediators. Most of us recognise the value of mediation for many cases and use our advocacy skills, albeit that they may need to be modified, to excellent effect during mediations. The institution of the bar is solid. The barrister's talent for persuasion is much sought after and not just in the traditional areas of practice. Change brings with it new opportunities. If there is a reduction in paid work, use the time to give back. Do some pro bono work. Put your name forward to do legal aid work. Offer your services as a lecturer or to a worthy cause. That may have a spin-off effect, too. It may introduce you to new areas of the law and new sources of work. It may broaden your mind. We should embrace the future, not fear it. As Lionel Murphy said of those who believed their professional lives were finished when the Family Law Act was introduced: 'The bar is like life – one door closes and another opens.' But as Neville Wran added, 'like Lionel Murphy, you always have to remember to turn the knob'.[1]

What price security?

In February 2008 the New South Wales Government opened a new ten-court facility in Parramatta to be known as The Sydney West Trial Court Complex. The new courts provide for glassed-in rooms, to be used as docks. With the exception of the largest court in the complex, currently being used for the trial of multiple accused on terrorist offences, each has two docks on the side of the courtroom. One is a conventional dock; the other is a secure, glassed-in room behind the conventional dock. The government describes this arrangement as a flexible dock. The purpose, we are told, is to give the judge the option of housing the accused in a secure facility if he or she poses a security risk. Such a risk may arise during the course of a trial or before it commences.

In August this year, before a trial in the largest courtroom in the complex commenced, a successful application was made to have the fixed glass screen removed. That application raised issues that arguably affect the so-called flexible docks as well and give rise to concerns about the extent to which fundamental human rights are compromised for the sake of expediency. Both would appear to interfere with the ability of a lawyer to take instructions and provide advice in confidence and both create an impression of danger. Neither permits face to face communication, for example, and anything the lawyer says can be heard by all accused who might be in the dock at the time. While the use of a glass cubicle is not too much of a problem in a magistrate's court or in a court where guilt is being assessed by a judge alone, it is a potential risk in any jury trial. Moreover, the presence of two docks in a courtroom – one closed, the other open – only serves to emphasise the prejudice to the trial of the accused consigned to the closed dock. It is one thing if the reason for the confinement was obvious to a jury, such as where there had been a violent outburst in the courtroom, but another if the jury is left to speculate about the reason why the conventional open dock has been left vacant. Such prejudice is unlikely to be curable by a direction from the judge; indeed, a direction could actually enhance it.

An English study of docks published over 40 years ago reported that simply having a dock undermines the presumption of innocence.[3] And in the US there have been a number of cases where the issue has arisen. In one, *Walker v Butterworth,* 599 F.2d 1074, 1080 (1st Cir.1979) the US Court of Appeals for the First Circuit said that:

> The practice of isolating the accused in a four foot high box very well may affect a juror's objectivity. Confinement in a prisoner dock focuses attention on the accused and may create the impression that he is somehow different or dangerous. By treating the accused in this distinctive manner, a juror may be influenced throughout the trial. The impression created may well erode the presumption of innocence that every person is to enjoy.

In another, *Young v Callahan,* 700 F.2d 32 (1st Cir. 1983), the same court described the use of a dock as 'a form of incarceration' and inconsistent with the presumption of innocence. It held that, absent security considerations, it was a violation of the accused's 14th Amendment rights to place him in a dock. The court endorsed a submission from the accused's counsel in the following terms:

While the use of a glass cubicle is not too much of a problem in a magistrate's court or in a court where guilt is being assessed by a judge alone, it is a potential risk in any jury trial.

> Any suggestion that [appellant] was a dangerous person, implanted in the minds of the jurors through observation of [appellant] confined in the dock day after day, may have tipped the scales of justice.... [A]ny implication that [appellant] was the type of person whom it was necessary to segregate from jurors, spectators, court personnel, and even his own counsel ... cannot fail to impact upon juror deliberation.

The presumption of innocence and the right to a fair trial are basic tenets of the common law and are incorporated in all human rights instruments. It should be zealously guarded. Hopefully, judges will make use of the secure dock sparingly and will resist the temptation to use it merely because the accused has a criminal record for offences of violence or as a punishment for misbehaviour where there are no security issues.

The Bail Act and the presumption of innocence

And speaking of the incursions into the presumption of innocence, the Hon Justice Harrison made some insightful observations on the subject in the context of the Bail Act in his after-dinner speech at the International Criminal Law Congress in Sydney on 11 October. After his customary dose of humour he reflected on the early days of the Act when the presumption in favour of bail was paramount and lamented the changes that have occurred since then which have seen increasing numbers of people incarcerated pending trials at which they are ultimately acquitted

As former Supreme Court justice the Hon Adrian Roden QC wrote in his forward to the late Brian Donovan's book *The Law of Bail,* published in 1981:

> The presumption in favour of bail, subject to stated exceptions, is now formally recognised as a natural concomitant of the presumption of innocence. The section 9 presumption can of course be displaced, and frequently is; but it serves as a valuable reminder that, subject only to the circumstances specified in section 32(2), refusal of bail is no longer available as a disguised form of preventive detention.

The current Bail Act bears only a passing resemblance to the initial 1978 version. Then there were only six exceptions to the presumption in favour of bail. Now the exceptions are numerous. Then there were no presumptions against bail. Now the presumptions against bail are multifarious. A 2002 parliamentary briefing paper explained that:

> Over time the exceptions proliferated, removing the presumption in favour of bail for certain domestic violence offenders in 1987, murder in 1993, manslaughter and a range of sexual crimes in 1998, possession of prohibited firearms in 2001, and so on. A presumption against bail was imposed in 1988 upon certain drug offences involving commercial quantities.

Since 2002 the Act has been amended several times to increase the number of offences where there is a presumption against bail.

As Justice Harrison pointed out in his speech to the delegates attending the International Criminal Law Congress, what these changes do is 'put pressure upon the courts and the prosecuting authorities to opt for the 'safe' course of refusing or opposing bail so that no newspaper can then say 'I told you so' if a person reoffends or absconds'. Justice Harrison described this approach as 'entirely cynical' and one which 'emasculates the principles which should always guide our thinking'.

Article 9(3) of the International Covenant on Civil and Political Rights provides that 'it shall not be the general rule that persons awaiting trial shall be detained in custody' although release may be subject to guarantees to appear for trial and, should the occasion arise, for execution of the judgment. Article 14(2) provides that 'everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'. Both the ACT Human Rights Act and the Victorian Charter of Human Rights and Responsibilities have incorporated these matters into local law.

The European Convention on Human Rights had a significant impact on the operation of the United Kingdom bail laws. The English courts have interpreted the presumption against bail in a way that favours the accused's liberty in cases where the court is unsure whether to release the accused on bail, so that although there may be an evidentiary burden on an accused to point to or adduce evidence to show exceptional circumstances, the legal burden of proof remains with the prosecution.[4] In New South Wales the statute expressly provides that the accused bears the burden of proof that bail should not be refused.

In a very interesting paper delivered to the National Access to Justice and Pro Bono Conference in Melbourne in August 2006, entitled 'Golden Thread or Tattered Fabric: Bail and the Presumption of Innocence' the late Justice Connolly of the ACT Supreme Court noted that the state with the highest number of remand prisoners (South Australia) had a Bail Act with a wide discretion and that Victoria, the state with the least number of remand prisoners, had a more prescriptive regime.[5] Justice Connolly also considered the potential impact of statutory bills of rights on bail law and practice in this country.

This year in Victoria, relying in part on the guarantees incorporated into the Charter of Rights and Responsibilities, Bongiorno J released a man who was in custody awaiting trial for a number of charges including aggravated burglary where, as in NSW, there is a presumption against bail. His Honour observed that 'having regard to the seriousness of the offence itself, the relatively minor injuries suffered by the victim and the antecedents of the applicant (even including his prior conviction for assault), it is by no means certain that the applicant will not have served more time in gaol on remand than he would be required to serve under any sentence imposed by the County Court if he is not granted bail.' This was a matter, not surprisingly, that caused him some disquiet:

> That a person may serve more time on remand than his ultimate sentence is a significant matter on any consideration of bail at common law. It is of even greater significance now in light of the existence of the Charter and the provisions to which I have referred. If the Charter in fact guarantees a timely trial, the inability of the Crown to provide that trial as required by the Charter must have an effect on the question of bail. It would be difficult to argue that a trial which may well be not held until after the applicant had spent more time in custody than he is likely to serve upon a sentence would be a trial held within a reasonable time. The only remedy the Court can provide an accused for a failure by the Crown to meet its Charter obligations in this regard (or to ensure that it does not breach those obligations so as to prejudice the applicant), is to release him on bail – at least the only remedy short of a permanent stay of proceedings.[6]

For far too long we have seen governments of all political persuasions respond to the latest cry from the tabloid press or the radio 'shock jock' with amendments to the criminal law, sentencing and/or procedure that have little to do with the administration of justice. A new set of rules and a new way of governing are long overdue.

Justice Harrison's contribution to the debate in this area is an important one. Let's hope it doesn't fall on deaf ears.

Ignorance of the law no excuse for government

A recent survey carried out by the Bureau of Crime Statistics and Research, which revealed that most people thought sentences were too lenient, also demonstrated high levels of ignorance in the community about the crime rate and the way the criminal justice system has responded to it.[7] The lowest levels of confidence in the system were demonstrated in those survey participants who knew less about the facts and whose principal sources of knowledge were the tabloid press, television or radio news, talk back radio or hearsay. The Bureau concluded that the results of the survey were 'consistent with the hypothesis that public ignorance about crime and criminal justice is at least partly to blame for lack of public confidence in the NSW criminal justice system' and that one way to improve public confidence was to improve public understanding of the basic facts.[8]

There can be no doubt that there is an urgent need for properly funded community education in this area. Equally, there can be no doubt that the journalists and their employers have a responsibility to get the facts right. Sensationalising individual cases distorts the facts and contributes to distorted public perceptions. Since so many times there has been a rush to legislate in response to these distorted perceptions, the role of the media can be a dangerous one. Responsible media proprietors should eschew sensationalism.

It is to be hoped that the government remembers the results of this survey before it moves, yet again, and without any sound reason, to increase sentences.

Submissions to government

Over the past twelve months the association has worked overtime to produce submissions to government on a range of subjects often at short notice. The Bar Council is extremely grateful to all those members of standing and ad hoc committees who have contributed to them. They include submissions on the following subjects:

- to Commonwealth and NSW attorneys-general concerning the review of Commonwealth and New South Wales counter-terrorism laws;
- to the state attorney general concerning the review of the law of vilification in New South Wales;
- to the attorney general on changes to the law of consent in relation to sexual offences incorporated in the *Crimes Amendment (Consent – Sexual Offences) Bill 2008;*
- to the attorney general on the NSWLRC report on jury selection;
- to the NSW Sentencing Council on reduction of penalties;
- to the Uniform Rules Committee proposing a Practice Note re unnecessary requests for particulars;
- to the attorney general on the question of under-representation of Indigenous people on juries;
- to the NSWLRC review of the law of complicity;
- to the minister for planning about the *Environmental Planning and Assessment Amendment Bill 2008;*
- to the ombudsman on the review of the Freedom of Information Act;
- to the NSWLRC on its review of the *Mental Health Act 1990* & *Mental Health (Criminal Procedures) Act 1990;*
- to the Ninth Review of the Functions of the MAA and MAC and First Review of the exercise of functions of the Lifetime Care and Support Authority (Law and Justice Committee, Legislative Council);
- to the attorney general regarding s50 of the *Civil Liability Act 2002* – intoxication and minors;
- to the attorney general concerning reform of the laws of vilification;
- to the attorney general in relation to the *Succession Amendment (Family Provision) Bill 2008;*
- to the attorney general with respect to the *Public Trustee Regulation 2008;* and
- to the Motor Accidents Authority regarding the MAA Claims Assessment & Medical Assessment Guidelines for 2008.

In addition I have written to the attorney general on numerous occasions and to a number of other government ministers about various aspects of government policy and action.

Reforms to tort law

Frustrated by our past inability to persuade either government or opposition about the need to wind back so-called tort law reform, particularly in the areas of industrial injuries and disease and motor accidents, the association has opted to focus on piecemeal reforms by targeting some of the more iniquitous provisions of the legislation. Aided by some excellent work from the Common Law Committee, I recently wrote to the responsible ministers about the operation of s151Z(2) of the Workers Compensation Act and the inequities arising from a finding of contributory negligence suggesting some changes to remove both unfairness and anomaly in the operation of the legislation. They are yet to reply.

Raising the profile of the bar

This year two important initiatives have been taken to raise and improve the profile of the bar. First, recognising that attitudes are generally moulded at a young age, the Working Party on the Bar in the Community chaired by Margaret Cunneen SC has prepared a curriculum for primary schools to bring the profile of the barrister and the barrister's work to young children. The director-general of education and the minister have approved the project which will be trialled during Law Week 2009 (11-17 May 2009).

The second initiative is due to the work of the ADR Committee under the leadership of Angela Bowne SC. It involves the partnership between Counsel's Chambers and the NSW Bar Association (at no cost to the association) in the New South Wales Bar Dispute Resolution Centre.

Oral history programme

The Bar Association is embarking on a programme to record the history of the bar through interviews with barristers which will be recorded for posterity. During the first six months of next year I anticipate being able to hold what I expect will be the first episode of the programme which

The Sydney West Trial Court Complex.

will feature some of our longest serving barristers and former barristers reflecting on their lives in the law. It promises to be an entertaining event for both the participants and the spectators. Details will be announced in *In Brief* in due course.

Making your opinion felt

As I did last year, next year, I will be attending all of the six CPD conferences. Please take the time to speak to me and let me know how you feel about what the association is doing well, what it isn't doing but should be doing and what it could do better. If, during the course of the year there are any issues that are bothering you take them up with the Bar Council, either by approaching a councillor and asking him or her to raise it for you or writing to me at president@nswbar.asn.au or to the executive director at executivedirector@nswbar.asn.au.

Compliments of the season. Have a happy and restful break.

Endnotes

1. NK Wran, 'Murphy the Reformer' in J Scutt (ed) *A Radical Judge,* McCulloch Publishing, 1987, p.21.
2. *R v Baladajam & ors* [No. 41], 26 August 2008, unreported.
3. L Rosen, 'The Dock: Should it be Abolished?' *Modern Law Review,* 1966, 29, 289-300.
4. See, e.g. *O(FC) v Crown Court at Harrow* [2006] UKHL 42.
5. That having been said, in 2006 the South Australian Parliament amended its Bail Act to introduce a presumption against bail for certain classes of offences. See *Bail Act 1985* s10A, incorporated by s13 of the *Statutes Amendment (Vehicle and Vessel Offences) Act 2005* (SA) (which, of course, is where you would expect to find it!) which commenced on 30 July 2006.
6. *Gray v DPP* [2008] VSC 4.
7. C Jones, D Weatherburn & K Mc Farlane, 'Public confidence in the New South Wales criminal justice system,' *Crime and Justice Bulletin,* August 2008.
8. Ibid., at p.14.

| EDITOR'S NOTE |

2008 has been a tumultuous year. The impact of the global financial crisis almost certainly will continue well into 2009. No sector of the community, including the bar, will be immune. Some individuals will be affected by virtue of their personal financial arrangements; others may be affected by shifts in the nature and volume of work at times of recession. In terms of commercial practice, there has already been a shift in emphasis towards insolvency work and parties seeking to extricate themselves from commercial arrangements entered into in more propitious times. Provided it has the financial capacity to do so, there is also likely to be a burst of regulatory cases mounted by ASIC.

Institutions will also be affected. The Supreme Court has already felt the indirect impact of the global financial crisis which is said to have contributed to the state's parlous financial condition in the form of the introduction of daily hearing fees in civil cases. This shift towards 'user pays', under the pretext of a need to raise revenue, is not a development which should pass without comment, and the Bar Association must remain vigilant that what appears, at the moment, to be a relatively modest fee is not subject to subsequent increases which contribute to and may drive a perception that access to justice is a privilege which must be paid for rather than a fundamental right in a democracy governed by the rule of law.

Amidst the gloom, the recent and truly historic election of Barack Obama as president of the United States has generated a sense of excitement and optimism. The president elect has proved himself to be a masterful orator. His powerful speeches, including his acceptance speech, greatly contributed to his overcoming criticism of lack of experience. Unsurprisingly, the power of oratory and rhetoric is a subject which has captured the interest of the New South Wales Bar and the recent series of lectures, tracing the history of rhetoric through classical antiquity to modern times, has now been collected in a book entitled *Rediscovering Rhetoric* edited by Justin Gleeson SC and Ruth Higgins. That book was launched by Chief Justice Spigelman on 14 November 2008 in the Banco Court to much acclaim. His Honour's remarks on that occasion are reproduced in this issue.

2008 also marked the retirement of one of the great masters of rhetoric produced by the New South Wales Bar, the Hon AM Gleeson AC QC. Although it is now more than 20 years since his Honour's verbal skills were on display behind the bar table, they are already the stuff of legend. His Honour's written work is of course available in the form of judgments in the *Commonwealth Law Reports* which are typically characterised by a crisp identification of the key issue or issues, effortless distillation of the arguments and clear exposition of the law. Chief Justice Gleeson's retirement, and the swearing in of his successor, Chief Justice French, are fully covered in this issue.

As I have noted in previous issues, the bar's CPD programme has been one of the great initiatives of the last five years. Apart from ad hoc series such as the rhetoric lectures, comprehensive presentations are regularly made about all aspects of practice. One recent presentation by Justice Brereton on appearing before a duty judge forms the centrepiece of this issue's Practice Section, together with Justice Beazley's invaluable paper on Calderbank offers and some key observations by Justice Bergin in relation to appearing in the Commercial List.

More by accident than design, this issue also has a heavy historical flavour. David Ash begins his brilliant piece on Justice Richard O'Connor with the observation that 'We know too little about the third member of the first High Court'. He then proceeds, in his own inimitable style, to rectify that situation in the second of his series on High Court judges hailing from the New South Wales Bar. There is also a fascinating account of the career and heroism of Percy Storkey, the only member of the New South Wales Bar to have been awarded the Victoria Cross, as well as a moving piece by Anthony Abrahams about the Kyeema air disaster in 1938 in which his grandfather, Leonard Abrahams KC, then the leader of the New South Wales Bar, and his junior, the reputably brilliant Alfred Gain, perished.

Finally, it would not be a summer issue of *Bar News* without noting the peregrinations of Bullfry who this issue finds himself in Shanghai, full of dumplings and Tsingtao, and musing on the notion of a career judiciary. Bullfry is a minor literary masterpiece and the scribblings of Aitken and his faithful illustrator, Poulos QC, are greatly appreciated.

It remains to thank the members of this year's *Bar News* committee for their considerable efforts, to wish all members of the bar a Happy Christmas and good reading.

Andrew Bell

The president elect has proved himself to be a masterful orator. His powerful speeches, including his acceptance speech, greatly contributed to his overcoming criticism of lack of experience.

Specialisation at the bar

Dear Sir,

Duncan Graham is a barrister for whom I have the highest regard and respect. However, I must respectfully disagree with the views he has expressed in his article 'Specialisation at the bar', (Winter, 2008).

It is the ultimate goal of every barrister to one day achieve judicial office. Judges both at the first instance and appellate levels in the state and federal courts hear different cases involving different legal issues every day.

Being a judge, of its very nature, requires skill and expertise in almost every conceivable area of law that may be placed before the court for determination. Moreover, our greatest appellate advocates, whom I need not name but who are well known to readers of this publication, make applications for special leave to the High Court and agitate appeals in that court on a regular basis in almost every conceivable area of law. They do so because they are outstanding lawyers who are capable of grasping an area of law foreign to them within a brief period of time by extreme dedication, research and skill.

The bar makes a fatal mistake if it encourages members to specialise in one particular area of law. The reasons for this are obvious and are backed regrettably by historical fact. It comes as no surprise that parliaments are the sworn enemy of the barrister. Any barrister who made the fundamental error of specialising in workers' compensation matters, running down cases, cases against councils or unfair dismissal/unfair contract cases in the Industrial Relations Commission of New South Wales will tell you that they have lost practices literally overnight because they made the fundamental mistake of specialising in one particular area hoping blindly that parliaments would not intervene and by the stroke of the pen destroy their practices in the blink of an eye.

It is very sad indeed to see senior personal injury and industrial advocates now in what should be the prime years of their careers learning new areas of law with great difficulty and having to shoulder substantial scepticism from solicitors who know only too well from whence they came.

The bar makes a fatal mistake if it encourages members to specialise in one particular area of law.

It is a fact that all courts regularly invoke not only common law doctrines but equitable doctrines. Any family lawyer will tell you that having regard to the third party provisions of the Family Law Act one must have a sound knowledge of banking law and practice, equity, inquiries as to damages, general equitable doctrines and bankruptcy.

It has certainly been my experience in over 20 years in this profession that from time to time points will be raised against you in a case, be it a common law matter, an equitable cause or appeal, which involve complex questions of law or statutory construction which one otherwise would not expect in the cause being agitated before the particular forum.

It is the generalist who best serves his client in this particular situation. The specialist who simply 'rolls his arm over' and expects 'the usual orders' or 'the usual result' does so as a blind optimist.

Barristers should be encouraged, indeed it should be a requirement not only for the benefit of clients but for the benefit of the barrister's practice, that they be capable of accepting briefs in at least five areas of law.

The criticism that Graham makes regarding 'dabbling' is covered by the Barristers' Rules. If barristers elect to accept a brief in a jurisdiction where they do not have a sound knowledge of the law or procedure and in effect use their client and the case at hand as work experience then they face disciplinary action in circumstances where they should have declined to accept the brief.

Specialist accreditation will shut out barristers who have skill in the area said to require specialisation but yet elect to practice in other areas of law because they are equipped with a skill to do so.

Allowing specialist accreditation is in effect guaranteeing the barrister that nothing will happen in their particular area of practice so far as parliaments are concerned. To say this is an exercise in blind faith, having regard to WorkChoices, the *Motor Accidents Compensation Act 1999* and the *Workplace Injury Management Act 1998* etc, it is professional suicide.

The greatest protection against Graham's criticisms comes from the Barristers' Rules themselves. Strict adherence to those rules and working within ethical constraints does away with all of Graham's arguments and with the greatest respect to him, barristers should be encouraged to practise in as many areas as possible and further encouraged to decline to accept briefs in areas of law where they would otherwise infringe the Barristers' Rules and aspire to achieve at an appropriate point in their career, judicial appointment where they will become the ultimate generalist because of their excellence in the practise of law.

For these very important reasons the bar must reject any specialist accreditation system and embrace strict adherence to the Barristers' Rules.

David E Baran

Jack Shand Chambers

Access to court information

By Attorney General John Hatzistergos

New South Wales is leading the nation with reforms that will ensure that court processes are open to public scrutiny. In July this year I presented the *Report on Access to Court Information* to the Standing Committee of Attorneys-General as a blueprint for consistent national rules on access to court information.

The NSW Government intends to implement the recommendations of the report through legislative amendments to the *Criminal Procedure Act 1986* and the *Civil Procedure Act 2005*. The reforms are anticipated to take effect next year.

Adherence to the principle of open justice is increasingly dependent on the capacity of the media and the public to access court documents and other information. Court reforms that have improved the efficiency of court procedures mean that information that used to be provided to the court orally is now tendered to the court in the form of documentary evidence, statements and affidavits. In today's courtroom a person sitting in the public gallery will often come away with only a vague understanding of what took place.

The report provides a framework for a new uniform approach to access across all NSW courts. It will replace the current complex rules that allow court officials to exercise vague discretionary powers on access with a simple and uniform classification system.

Under the new system court information will be classified as either 'Open Access' or 'Restricted Access'. If information is classified as open access then any member of the public will be entitled to obtain a copy of the information without having to satisfy a court official that they have a sufficient interest in the proceedings or reason to be granted access. The report identifies the type of information that should be available to the public, which includes judgments, transcripts, statements, affidavits, indictments, fact sheets and pleadings in open court proceedings. These categories will be subject to exceptions. For example, sexual assault and children's court proceedings will be excluded, while sensitive information such as victim impact statements, medical, psychiatric and pre sentence reports will also be excluded.

If court information does not fall within the category of open access then it will automatically be considered restricted access. Access to restricted information will still be available if the court grants leave to access the information or where there is a special legislative right to allow access. The court will be required to have regard to various matters when determining access to restricted information including the extent to which the principle of open justice is affected if information is not released, whether the privacy or safety of an individual is compromised by the release of information and whether the release of information adversely affects the administration of justice.

The report also acknowledges the special role of the media in informing the public of what occurs in our courts. The media will have a right to access any information admitted into evidence that can readily be reproduced in documentary form unless the information is subject to a restriction against publication.

While the recommendations in the report significantly expand the rights to access court information, they also seek to protect personal and sensitive information. The new regime will allow parties to remove unique personal identifiers such as dates of birth, residential addresses, financial and other personal details from documents that are open to the public. Legal practitioners will need to be cognizant of the new regime when drafting pleadings and affidavits used in court proceedings and should omit unnecessary personal details or include this information in a restricted annexure to the document. Courts also recognise the need to protect against unnecessary release of personal information. On 10 December 2007, the Supreme Court introduced a policy on the anonymisation of personal information that is recorded in transcripts and judgments to prevent the risk of identity theft. Under the new regime all courts will be required to take a similar approach.

The report also reviews the impact of non-publication and suppression orders upon access to court information. Protections against the publication of sensitive information will be enhanced by providing a general restriction against the publication of personal unique identifiers, the identity of parties involved in domestic violence proceedings and family property disputes.

The report addresses concerns raised by media and law publishers that it is often difficult to confirm what information is subject to a non-publication

In today's courtroom a person sitting in the public gallery will often come away with only a vague understanding of what took place.

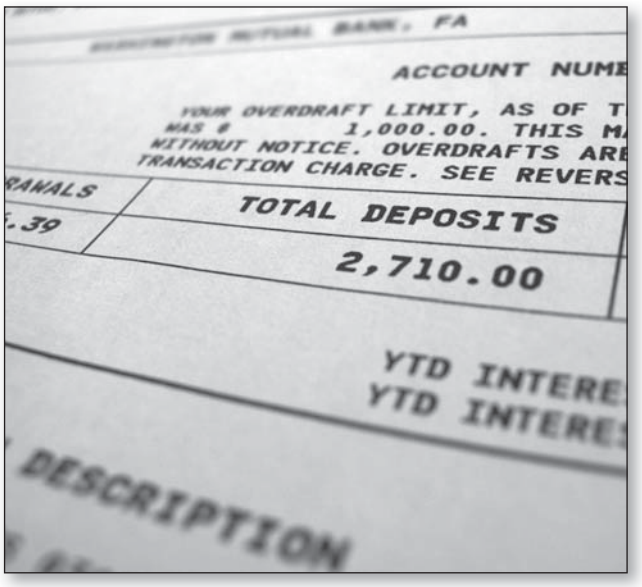
order. If the term 'publication' is taken in its wider meaning, it prevents the court from conveying to the media or legal publishers what information is subject to the order as communication of this information is, in itself, a publication and could therefore be in breach of the order.

The terms 'non-publication' and 'suppression' are used interchangeably by both the courts and the legislature. The report recommends that a clear distinction should be drawn between the effect of a non-publication order and a suppression order. The purpose of making a non-publication order is to prevent the publication of information to the wider community. For example, the prohibition against publication in section 11 of the *Children (Criminal Proceedings) Act 1987* is intended to ensure that names of juvenile offenders are not broadcast by the media to the wider community. A suppression order, on the other hand, denotes a more extensive restriction and may prevent the disclosure of information to any person. A suppression order may be necessary in order to protect information that may compromise national security or to protect the welfare of an informant witness.

There have been some misunderstandings about the report's recommendations. For instance, in the *Sydney Morning Herald* on 2 August 2008 Matthew Moore argued that existing restrictions in relation to sexual assault cases are to be broadened into a blanket exemption. This is not the case. What the report recommends is that the current protections for sexual assault victims are maintained and reflected in the new regime. There is no point in a court using a pseudonym for a rape victim if an affidavit with her real name is made publicly available at the same time. While media access and open justice are important there are some areas, such as sexual assault, where victims deserve the right to protect their identities if they wish.

The media will have a right to access any information admitted into evidence that can readily be reproduced in documentary form unless the information is subject to a restriction against publication.

It was also suggested that the government intends banning the publication of prior criminal convictions and traffic fines. Again, this is not what the report recommends. While the report suggests that there needs to be some limitation on providing access to criminal records that are used in courts, it only recommends that criminal and traffic history records should not be published in their entirety. It will not prevent the publication of information on prior offences taken into account during sentencing.



Establishing a new regime where the majority of court information will be open to the public creates the opportunity for the court to review the way in which access is facilitated. The introduction of JusticeLink may provide the capacity for certain information to be obtained electronically. It will have the potential to streamline procedures and lessen the current geographic barriers associated with attending a court registry in person to obtain information.

The NSW Government and judiciary are committed to an open justice system. The reforms have been developed in consultation with legal stakeholders and the courts and reflect an appropriate balance between competing considerations of open justice and individual privacy. The reforms are supported by the courts and have been widely praised by media commentators.

The new access regime is the product of a continuing co-operative relationship between government and the judiciary that has delivered other major reforms such as the *Civil Procedure Act 2005* and Uniform Civil Procedure Rules. The new access regime will ensure that New South Wales courts continue to set the national benchmark in terms of progressive and innovative procedural reforms.

A copy of the *Report on Access to Court Information* is available at the Lawlink website: http://www.lawlink.nsw.gov.au/lpd

The costs circus

By Duncan Graham

An inordinate amount of professional and court time is taken up by issues relating to costs. The bar should investigate ways to remedy this. One method would be to introduce percentage fees in civil litigation.

Barristers are generally conservative. As a group, they resist change. They are frightened by it. Or they are apathetic towards it if it does not directly affect them. This attitude explains why barristers are so vulnerable to unpalatable practices being forced upon them by government. The apparent willingness to accept their rights being trampled on by others also explains why barristers are soft targets for the media. Recent media publicity about legal costs is likely to herald further inroads into practice at the bar.

I have previously suggested specialisation as a means of improving practice at the bar. Changing the way fees are charged and the system by which responsibility for costs accrues is another way in which practice as a barrister may be improved.

Costs issues create problems at a number of levels. At the client interface, legislation requires voluminous explanations about the fees that will be charged. Costs agreements contain many clauses that the average lay person litigant cannot possibly understand. The unstated premise to the whole costs disclosure legislation is that lawyers are intrinsically dishonest or, at the very least, greedy. The profession should not continue to accept this innuendo. No other profession requires its members to jump through so many hoops before being paid.

Costs problems arise at the interlocutory stage. Too often, an interlocutory argument is substantively resolved, only for a needless costs argument to supervene, leading to hours being spent in court waiting to get on to argue which party should bear the costs burden of the application. Given that many seem incapable of realising that the costs of an interlocutory application are largely irrelevant to the overall resolution of proceedings, it would be preferable if the question never arose at all.

Costs also interfere with pre-trial dispute resolution. The lack of certainty about what a plaintiff may get in his or her hand often derails negotiations. A conflict may arise in speculative litigation between the client's interests and that of the lawyers in being paid.

In relation to hearings, there is a vast jurisprudence on offers of compromise, Calderbank letters, etc. We have costs assessments, appeals on costs, textbooks on costs. The fact there are different categories of costs confuses further. A great deal of correspondence involves threats of indemnity costs orders, personal costs orders and the like against the loser.

Most barristers, despite the cab rank rule, refuse to accept 'no win, no fee' cases because they do not have the gumption to run the risk of losing.

Finally, difficult costs issues arise with 'no win, no fee' litigation. Barristers who charge on a 'no win, no fee' basis are only entitled to recover fees at hourly or daily rates not significantly different from those charged by their colleagues who do not charge on this basis. If barristers were not prepared to enter 'no win, no fee' retainers, many deserving litigants would not be able to assert their rights in court. The fact that these are mainly personal injury cases means that, by and large, the profession and the government could not care less. Plaintiff personal injury lawyers are generally perceived as 'ambulance chasers' or 'rip off merchants'. While there may, in the past, have been some spectacular negative examples of how not to charge in 'no win, no fee' situations, the vast majority of barristers who charge in this way are done a great disservice. Most barristers, despite the cab rank rule, refuse to accept 'no win, no fee' cases because they do not have the gumption to run the risk of losing. In every other profession in which a professional engages in a speculative transaction, a success fee is charged. Often both a success fee and a base fee are charged. There is no other way to compensate the professional for the risk he or she accepts in providing professional services on a speculative basis, the debt that invariably has to be carried for the period of the transaction, and the associated stress caused by the fear of financial loss. Why lawyers, particularly sole practitioners such as barristers, cannot be similarly protected is unclear.

It is a circus.

Costs and fees in the legal profession should be contrasted with the situation that exists in other professions. No other profession wastes as much time on these issues as lawyers.

Two changes would help ameliorate many of these difficulties. The first is to adopt a 'user pays' rather than a 'loser and user pays' system. The second is, at least in civil litigation, to permit percentage fee arrangements in which the lawyers for a party would be paid a percentage of the damages recovered.

In the Australian adversarial system, costs are paid on a 'loser and user' basis. The losing party must pay a proportion of the costs of the successful party together with its own costs. In personal injury 'no win,

no fee' litigation, no fees are paid by an unsuccessful plaintiff to his or her lawyers. The 'loser and user pays' system is responsible for the laws about offers of compromise, Calderbank letters together with all the acrimonious correspondence between solicitors about costs. It is a system that seeks to punish either the losing party or its representatives for commencing or defending proceedings. While unmeritorious cases may occasionally be commenced, such claims should theoretically not see the light of day if solicitors and barristers performed their professional duties properly and made sensible and appropriate assessments of the prospects of success. Costs penalties should not be used to supplant the proper role of the barrister in assessing the merits of a case.

The threat of the losing party paying costs may be thought of as a device to reduce the amount of litigation. If so, it is not a device that is working. It is unlikely that changing the costs system will result in the floodgates being opened and a deluge of litigation pouring into the registries. With smaller cases, the percentage fee cap will make it as uneconomical to prosecute some cases as presently exists.

The mere mention of a percentage fee structure is usually met by anxiety about introducing an American-style system into the country, which will have the same destructive consequences as the introduction of the cane toad. Everyone is familiar with the United States' 'user pays' system for costs. Plaintiff lawyers are paid out of the damages recovered if their clients are successful. Defendants must pay their own costs. This fear is unwarranted if only for the absence of multimillion dollar exemplary damages payouts in Australia. There will be no plaintiff lawyers flying around in Gulfstream jets like 'kings of torts'.

A percentage fee regime would avoid most, if not all, of the problems currently experienced with costs.

Clients would have simplicity and certainty. They do not need to know about the differences between ordinary costs and indemnity costs. They would understand that the lower the damages recovered, the lower the lawyer fees. They would understand that their own success is tied to the interests of the lawyers. There would be an incentive on the part of the lawyers to do their best for the client because they would then be maximising their own return. The current conflict between a client's interest and the lawyers' interests in their fees would be removed.

As the system would be on a 'user pays' basis, court time would not be wasted on interlocutory costs spats. Gone would be the letters filled with vitriol and the threats of personal costs orders and indemnity costs.

The threat of the losing party paying costs may be thought of as a device to reduce the amount of litigation. If so, it is not a device that is working.

Percentage fees were recently considered by the Victorian Law Reform Commission in its Civil Justice Review. It concluded that the absolute prohibition on percentage contingent fees should be reconsidered. It suggested that the manner in which percentage fees should be introduced and regulated and the nature of any safeguards should be something for a costs council. The commission did not think percentage fees should be limited to speculative personal injury matters. It saw no reason why a plaintiff or defendant should not be able to agree to a percentage fee arrangement rather than the traditional method. The New South Wales Bar should embrace the recommendations. At the very least, it should be willing to explore the merits of the introduction of a percentage fee regime, and the abolition of the 'user and loser pays' system we inherited from Britain. Given that litigation funders are allowed to charge a percentage of the damages recovered, there seems no sensible reason why lawyers should not be permitted to do the same, particularly in high-risk litigation and where the lawyers are the ones actually doing the work and bearing the risk.

When I have discussed these issues with other barristers, the main complaint I have received is that a percentage fee structure will lead to lawyers doing little work on a matter so as to maximise the profit. I cannot see this happening. First, by making lawyers' fees proportionate to the damages, the incentive is to work harder and maximise the outcome. More importantly, there will never be a positive outcome unless significant work is undertaken. The days of 'rolling your arm over' hoping for a successful outcome are long gone.

Standard of disclosure in professional indemnity insurance

Arthur Moses and Yaseen Shariff examine *CGU Insurance Ltd v Porthouse* [2008] HCA 30; (2008) 82 ALJR 1135, 248 ALR 240 and the standard of disclosure required of barristers in professional indemnity insurance.

Prior to completing their proposal forms for professional indemnity insurance, barristers should carefully take note of the standard of disclosure which the High Court has recently set in *CGU Insurance Ltd v Porthouse.* The NSW Court of Appeal judgment which was overturned by the High Court was the subject of an article in *Bar News* Winter 2007.

Background

A barrister was instructed to advise a client who had suffered an injury whilst performing work pursuant to a community service order. In a memorandum of advice dated 12 June 2001, the barrister wrongly advised the client that the Workers Compensation Act did not apply to his potential claim for compensation against the State of New South Wales. At or about that time, the New South Wales government had foreshadowed proposals to restrict common law claims for injuries governed by the Workers Compensation Act. It became well known that the reforms were due to commence on 27 November 2001.

Immediately before the reforms commenced, the client would have been entitled to compensation under the Workers Compensation Act on the basis that he had suffered a serious injury. However, upon the commencement of the reforms the client was not entitled to any compensation because, although his injury was serious, he had not suffered a degree of permanent impairment of at least 15 per cent.

The barrister drafted a statement of claim, which was filed in the District Court of New South Wales on 11 December 2001 (after the reforms had commenced). At an arbitration of the proceedings, the client obtained an award of $120,687.15 plus costs. The state applied for a re-hearing on the basis that it intended to argue that by reason of the amendments to the Workers Compensation Act, there was an insurmountable bar to the compensation claim. The matter was heard and decided in favour of the barrister's client. The state applied for a stay of the proceedings pending an appeal to the Court of Appeal. During the stay application, the barrister conceded that the state had an arguable appeal point.

On 20 May 2004, the barrister completed a 'Barcover Professional Indemnity Proposal Form' for the period 30 June 2004 to 30 June 2005 (the proposal form). A question in the proposal form asked, 'Are you aware of any circumstances which could result in any claim or disciplinary proceedings being made against you?' The barrister answered 'No'.

At the time at which the barrister completed the proposal form, the state's appeal to the Court of Appeal had been lodged and submissions had been filed. The appeal was heard on 19 July 2004. On 27 August 2004, the Court of Appeal allowed the state's appeal and set aside the verdict in favour of the client.

On 3 March 2005, the client commenced proceedings in the District Court against his former solicitors and the barrister, alleging negligence. The client alleged that if the solicitors and the barrister, acted with reasonable diligence, his claim would not have been barred by reason of the reforms to the Workers Compensation Act. The barrister's insurer was notified of the claim, but it declined the barrister's claim for indemnity. The barrister cross-claimed against the insurer.

Every year practising barristers will be asked not dissimilar questions about facts and circumstances which might give rise to claims being made against them. The appropriate answer to this question does not lie in one's own opinion of those facts and circumstances...
If in doubt, it would be advisable to discuss any concerns with colleagues.

The relevant question on the cross-claim was whether the insurer was entitled to rely on an exclusion clause within the insurance policy. Section 6 of the insurance policy provided that it did not cover, amongst other things, 'known circumstances'. The term 'known circumstances' was defined in section 11.12 of the insurance policy to mean:

> Any fact, situation or circumstance in which:
>
> (a) an insured knew before this policy began [the first limb]; or
>
> (b) a reasonable person in the insured's professional position would have thought, before this policy began, might result in someone making an allegation against an insured in respect of a liability, that might be covered by this policy [the second limb].

The District Court found in favour of the barrister and ordered the insurer to indemnify the barrister. As to the first limb, the trial judge was satisfied on the evidence that the barrister had no knowledge that the client would allege that he had acted negligently. The trial judge also found in favour of the barrister in relation to the second limb. The trial judge reasoned that the second limb did not impose a strictly objective test because it involved consideration of what would have been done by a reasonable person in the barrister's position.

The insurer's appeal to the Court of Appeal in relation to the trial judge's interpretation and application of the second limb was unsuccessful: *CGU Insurance Ltd v Porthouse* [2007] NSWCA 80 (Hodgson JA, Young CJ in Eq, Hunt AJA dissenting). The insured obtained leave to appeal to the High Court.

The High Court

There were two main issues of construction before the High Court in relation to the second limb. The first issue was whether, upon a proper construction of the words 'a reasonable person in the insured's

professional position', consideration was confined only to the barrister's experience and knowledge (a limited degree of subjectivity), or whether it was permissible to take into account the barrister's actual state of mind (a more expansive degree of subjectivity). The second issue concerned the interpretation of the words of qualification within the second limb, 'would have thought' and 'might result in'.

The insurer argued that 'a reasonable person in the insured's professional position' meant the hypothetical reasonable person was confined to having the same experience as the barrister, the same knowledge and the same opportunity to react to facts and circumstances. The barrister argued that the hypothetical reasonable person 'stood in the shoes' of the insured. In resolving the competing submissions, the High Court considered the history of similar exclusions within the Insurance Contracts Act (s21) and concluded that a test of disclosure which operates by reference to both the insured's actual knowledge and the knowledge of a reasonable person in the same circumstances is 'calculated to balance the insured's duty to disclose and the insurer's right to information.'

The High Court unanimously held that the words 'a reasonable person in the insured's professional position' posits an objective standard, with a modification allowing consideration of professional, not personal, matters. That is, the hypothetical reasonable person is to have the same professional experience and knowledge as the barrister, together with a capacity to draw conclusions as to the possibility of someone making a claim. The High Court held that there was nothing within the language of the second limb to impute to the hypothetical reasonable person the insured's personal idiosyncrasies or the insured's state of mind. It was further held that there was no warrant to read down the text of the second limb so as to limit the hypothetical reasonable person's capacity to draw conclusions to those which were 'plain and obvious'.

In relation to the second issue, the High Court held that the conditional words 'would have thought' were a reference to a supposed conclusion reached by a hypothetical reasonable person. Likewise, the words 'might result in' referred to a conclusion drawn by the hypothetical person about a 'real possibility' of a claim being made; it did not require an enquiry about fanciful or remote possibilities, nor certainties.

In applying the second limb to the facts of the case, the High Court held that the inferences to be drawn from the undisputed facts and circumstances known to the insured were such that a reasonable barrister who knew of the reforms to the Workers Compensation Act, who knew of their potential impact on his client's case, who knew that there was an appeal pending in the Court of Appeal and who knew of his role in creating his client's problem, would have thought that there was real possibility that an allegation might be made in respect of a liability covered by the insurance policy.

The appeal was allowed.

Conclusions

Although not all insurance policies are identical to each other, they will invariably contain exclusionary clauses similar to those considered by the High Court in this case. Every year practising barristers will be asked not dissimilar questions about facts and circumstances which might give rise to claims being made against them. The appropriate answer to this question does not lie in one's own opinion of those facts and circumstances. In light of the High Court's decision in *Porthouse*, it is critical that barristers err on the side of caution. If in doubt, it would be advisable to discuss any concerns with colleagues. After all, it is by reference to the standards of those colleagues that each barrister's conduct will be measured.

The return of fairness in determining implied waiver of legal professional privilege: Osland v Secretary to the Department of Justice [2008] HCA 37; (2008) 249 ALR 1, 82 ALJR 1288

In *Osland,* the High Court considered the common law principle of implied waiver of legal professional privilege.[1] It has been said that the authorities on the common law privilege are 'not consistent in approach, legal principle or result'.[2] The recent examination of relevant principles by the High Court therefore warrants close consideration.

One of the key issues in *Osland* was whether the Department of Justice of the Government of Victoria could maintain a claim for privilege in respect of a joint memorandum of advice of Susan Crennan QC (as she then was), Jack Rush QC and Paul Holdenson QC to the attorney-general dated 3 September 2001 (the joint advice). The circumstances surrounding the creation and subsequent use of the joint advice are important in understanding the High Court's decision.

The circumstances

In 1996, Mrs Osland was convicted of murdering her husband. She had been subjected to violence by her husband and relied unsuccessfully upon defences of self-defence and provocation. An application to the Court of Appeal for leave to appeal against conviction and sentence failed. A further appeal to the High Court failed. One of the grounds of appeal to the High Court sought to introduce into the Australian law of provocation and self-defence the recognition of 'battered wife syndrome' or 'battered woman syndrome'.[3]

Having exhausted her appeal rights, Mrs Osland invoked the power of the governor of Victoria to grant a pardon. This involved a petition for the exercise of the prerogative of mercy. The conventional practices in relation to the consideration of such a petition were not in dispute.[4] By convention, the premier tenders advice to the governor in relation to the exercise of the powers and functions of the governor. Prior to doing so, the premier seeks the advice of the attorney-general in relation to whether the prerogative should be exercised. In turn, it is the practice of the attorney-general to ask his or her department to consider and make recommendations in relation to the petition. In doing so, the department may seek the views of external lawyers.

Mrs Osland's petition was considered in circumstances where her case had generated a significant level of public concern about the state of the law and whether justice had been done in her case. This had included a call by the then chief justice of the Supreme Court of Victoria for law reform relating to 'battered woman syndrome' after Mrs Osland had failed in her appeal to the High Court.[5]

Mrs Osland's petition was considered by lawyers within the Department of Justice and external lawyers. After extensive consideration, the attorney-general requested his department to obtain further advice from three senior counsel. The panel of eminent counsel was appointed following consultation with the state Opposition. The joint advice was then prepared.

Following receipt of the joint advice, the attorney-general advised the premier that the petition be denied. The premier, in turn, gave this advice to the governor.

The issue of waiver arose from a press release issued by the attorney-general. The press release announced that the governor had denied Mrs Osland's petition. The press release also included the following sentence:

> The joint advice recommends on every ground that the petition should be denied.

Mrs Osland applied under the *Freedom of Information Act 1982* (Vic) (the Act) for access to the joint advice. The Department of Justice contended that the joint advice was exempt from disclosure by reason of s32 of the Act, which related to legal professional privilege.

Was the joint advice privileged when received by the attorney-general?

Consideration of the petition was not limited to questions of strict law. The petition raised legal argument, wider questions of justice and public policy, including possible law reform, and compassionate grounds personal to Mrs Osland and arising from the particular circumstances of her case. The fact that privilege subsisted in the joint advice when it was received by the Department of Justice was not contested in the Court of Appeal of the Supreme Court of Victoria or in the High Court.[6]

Gleeson CJ, Gummow, Heydon and Kiefel JJ observed in their joint reasons[7] (the joint reasons) that legal professional privilege may attach to advice given by lawyers, even though it includes advice on matters of policy as well as law. Kirby J, on the other hand, observed that had advice on the matters raised by the petition been obtained from a social scientist, a legal academic or a law reform body (as might have been done) it would not have attracted legal professional privilege.[8] This raised the question of why advice of such a nature should be protected from disclosure when it had been obtained from lawyers. This issue was not taken further in either the joint reasons or by Kirby J. While this necessarily flowed from the way in which the appeal was structured, it is regrettable that greater guidance has not been forthcoming on the extent to which privilege can protect advice which deals with matters of policy as well as law.

Implied waiver of privilege

As to the issue of waiver, it was not in dispute that the principles to be applied were those stated in the joint reasons in *Mann v Carnell*.[9] There it was stated:

> What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.[10]

The 'principle of fairness operating at large' has been seen as a reference to the fairness test which had been described by the High Court in *Attorney-General (NT) v Maurice*[11] and applied by it in *Goldberg v Ng*.[12] It is, however, clear from the passage cited above that the High Court in *Mann v Carnell* intended to preserve a role for fairness in determining questions of implied waiver of privilege. Since the decision in *Mann v Carnell,* courts have experienced some difficulty in delineating the precise role of fairness in making such determinations. It has been suggested that there will be cases in which considerations of fairness have little or no role to play.[13] It has also been suggested that the inconsistency test is the primary test to be applied and that fairness need only be resorted to where the inconsistency test is inconclusive, or to reinforce a finding in respect of waiver based on the inconsistency test.[14] Conversely, it has been doubted whether the language used in the joint reasons in *Mann v Carnell* worked any real change in the governing principle.[15]

The joint reasons in *Osland* clarify that the concepts of inconsistency and fairness are closely intertwined. Inconsistency and fairness should not be seen as separate tests. Rather a judgment as to whether there is inconsistency (between the conduct of the privilege-holder and the confidentiality which the privilege is intended to protect) 'is to be made in the context and circumstances of the case, and in the light of any considerations of fairness arising from that context or those circumstances'.[16] Questions of waiver are matters of fact and degree.[17]

Accordingly, the conduct of the attorney-general in issuing the press release had to be considered in context. The relevant context included the nature of the matter in respect of which the joint advice was received, the evident purpose of the attorney-general in making the disclosure that was made, and the legal and practical consequences of limited rather than complete disclosure.

The joint reasons observed that the petition was based, not upon a claim of legal right, but on an appeal to an executive discretion originating in the royal prerogative. The practice is not to give reasons for such a decision. It was against this background that the question to be considered was whether the attorney-general, being otherwise entitled to maintain the confidentiality of the joint advice, waived that entitlement by his conduct. Gleeson CJ, Gummow, Heydon and Kiefel JJ concluded that there had been no waiver. They said:

> The attorney-general was seeking to give the fullest information as to the process that had been followed, no doubt in order to deflect any criticism, while at the same time following the long-standing practice of not giving the reasons for the decision. This did not

> involve inconsistency; and it involved no unfairness to the appellant. If she had a legal right to reasons for the decision, then she still has it. If she had no such right, the press release did not deprive her of anything to which she was entitled.[18]

Kirby J gave separate reasons in which he agreed that there had been no waiver of privilege. As in the joint reasons, his Honour considered that waiver had to be determined 'in the context of all the relevant circumstances' and this normally involved 'a question of fact and degree'.[19] The question posed by his Honour was whether publication of the press release was incompatible with a continued insistence on legal professional privilege, and 'made such insistence unwarranted and unfair in the circumstances'.[20]

Kirby J accepted that Mrs Osland's contentions had merit. The press release 'necessarily opened a window into the contents of the advice'.[21] Ultimately, however, his Honour agreed with the joint reasons that there had been no waiver. He placed considerable significance on the purpose of issuing the press release. This was to demonstrate that the state had taken a proper course in obtaining and considering advice from appropriate persons. This was in circumstances of considerable public controversy surrounding Mrs Osland's case. The attorney-general had endeavoured to fulfil obligations to interested members of the public and not to secure some advantage for the state in legal proceedings affecting Mrs Osland. Maintenance by the attorney-general of a claim to legal professional privilege was neither unwarranted nor unfair in the circumstances.[22]

Hayne J agreed with the joint reasons that there had been no waiver of legal professional privilege in respect of the joint advice.

Potential impact on the development of the law

Both the joint reasons and Kirby J's reasons focus on the purpose in publishing the press release. They reveal a reluctance to impute waiver where a disclosure has been made for the purpose of demonstrating that public officers have acted responsibly in accordance with legal advice. This resonates with the reasoning in *Mann v Carnell* which concerned the disclosure of legal advice by the chief minister of the Australian Capital Territory to a member of the Legislative Assembly of the territory.[23] The decision in *Osland* needs to be understood in this context. It is likely that different considerations of fairness will apply where a disclosure is made in the expectation of gaining some commercial benefit; or where, in the context of parties who are in dispute, the disclosure is made to secure some strategic or forensic advantage in legal proceedings.

Following the High Court's decision in *Mann v Carnell*, it is arguable that the concept of inconsistency was seen as paramount and separate to considerations of fairness in determining questions of implied waiver of privilege. This may well be attributable to concerns that the concept of fairness can be in many circumstances an uncertain and indeterminate concept.[24]

The decision in *Osland* demonstrates that considerations of fairness are not to play some subsidiary or isolated part in assessing whether there has been an implied waiver of privilege. They are central to the broad, contextual inquiry which the court needs to undertake. It may be said that this approach is not conducive to certainty of outcome where it is asserted that there has been an implied waiver of privilege. The reality, however, is that a degree of uncertainty will be inherent in determining questions of implied waiver of privilege. Such assessments involve competing public interests. On the one hand, the law recognises that it is for the client to decide whether any privilege to which the client is entitled should be waived. On the other hand, a fair trial requires that all relevant documentary evidence be available. Both are compelling public interests and difficult to reconcile.[25] Given this, it is not surprising that a relatively simple test has not been formulated for determining when waiver is to be imputed by operation of law.

By Danny Moujali

Endnotes

1. The court also considered the operation of s50(4) of the *Freedom of Information Act 1982* (Vic) which provides for access to be granted to an exempt document where the public interest requires this. This aspect of the decision is not considered in this case-note.
2. *Cadbury Schweppes Pty Ltd v Amcor Ltd* [2008] FCA 88; (2008) 246 ALR 137 at [6] per Gordon J.
3. Kirby J at [67].
4. Gleeson CJ, Gummow, Heydon and Kiefel JJ at [8].
5. Kirby J at [94].
6. Gleeson CJ, Gummow, Heydon and Kiefel JJ at [13].
7. At [12].
8. At [87].
9. (1999) 201 CLR 1.
10. At [29] per Gleeson CJ, Gaudron, Gummow and Callinan JJ.
11. (1986) 161 CLR 475 at 481, 488, 493, 497–8.
12. (1995) 185 CLR 83 at 96-97.
13. See the observations of Young J in *AWB Ltd v Cole (No 5)* [2006] FCA 1234; (2006) 155 FCR 30; (2006) 234 ALR 651 at [131] – [134].
14. See the observations by Sunberg J in *Rio Tinto Ltd v Commissioner of Taxation* [2005] FCA 1336; (2005) 224 ALR 299 at [19] – [20].
15. *Commissioner of Taxation v Rio Tinto Ltd* [2006] FCAFC 86; (2006) 151 FCR 341; (2006) 229 ALR 304 at [44] per Kenny, Stone and Edmonds JJ.
16. At [45].
17. At [49], citing Tamberlin J in *Nine Films and Television Pty Ltd v Ninox Television Ltd* (2005) 65 IPR 442 at 447 [26].
18. At [48].
19. At [93].
20. At [91].
21. At [94].
22. At [97] and [98].
23. See, for example, 201 CLR 1 at [14] and [34].
24. See the powerful critique of the concept of fairness in McHugh J's dissenting judgment in *Mann v Carnell* (1999) 201 CLR 1 at [129] – [133].
25. See the comments of Kirby J at [85] and Hayne J at [141]. See also the comments by Hugh Stowe in 'Experts reports and waiver of privilege', *Bar News* Summer 2006/2007 at 71-72.

Other recent cases

R v Tang [2008] HCA 39; (2008) 82 ALJR 1334; 249 ALR 200

The respondent, Tang, owned a licensed brothel in Fitzroy, a suburb of Melbourne. She was charged with five counts of intentionally possessing a slave and five counts of intentionally using a slave (i.e. intentionally exercising over a slave a power attaching to a right of ownership, namely the power to use) contrary to s270.3(1)(a) of the Criminal Code (Cth) ('the Code').

The charges arose out of the conditions five Thai women who worked as prostitutes at the brothel ('the complainants') were subjected to. The complainants, all of whom had previously worked in the sex industry, came to Australia voluntarily on illegally obtained visas and became contract workers at the brothel on agreed conditions that were not set down in writing.

These conditions included a contract 'debt' of between $42,000 and $45,000 which the complainants had to pay off by servicing paying clients at the brothel. Gleeson CJ further summarised the contract conditions as follows [at 14]:

> In summary, then, while under contract, each complainant was to work in the respondent's brothel in Melbourne six days per week, serving up to 900 customers over a period of four to six months. The complainants earned nothing in cash while under contract except that, by working on the seventh, 'free', day each week, they could keep the $50 per customer that would, during the rest of the week, go to offset their contract debts.

The complainants, whilst not kept under lock and key, lived in premises arranged by the respondent in conditions which effectively restricted them to those premises. Their food and medical needs were attended to. They were only allowed out of the premises on rare occasions by consent or under supervision. Their passports and return airfares were retained by the respondent. The complainants worked long hours. They were also subjected to control through fear of detection by immigration authorities and visa offences and were advised of false stories to tell such authorities and advised not to leave their accommodation if apprehended without the respondent or her associates.

In her first two grounds of cross-appeal the respondent argued: (1) s270.3 of the Criminal Code is beyond the legislative power of the Commonwealth; and (2) s270.3 of the Criminal Code is confined to situations akin to 'chattel' slavery or notional ownership, and did not extend to the behaviour alleged to constitute the respondent's commission of the offences.

In the main ground of appeal the Crown appealed against the Court of Appeal's decision to quash the respondent's convictions and order a new trial on the ground that the trial judge misdirected the jury about the elements of the offences under s270.3(1)(a) of the Code.

Section 270.3(1)(a) of the Code makes it an offence for a person to intentionally possess a slave or exercise over a slave any of the other powers attaching to the right of ownership. Section 270.2 provides that slavery remains unlawful and maintains its abolition. Section 270.1 provides that:

> For the purposes of this Division, slavery is the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.

In dismissing the cross-appeals, Gleeson CJ, with whom Gummow, Hayne, Heydon, Crennan and Kiefel JJ agreed, noted that the word 'slave' in s270.3 is not defined but takes its meaning from the definition of 'slavery' in s270.1 of the Code which, in turn, is based on the similar though not identical definition of 'slavery' in Article 1 of the 1926 International Convention to Suppress the Slave Trade and Slavery. A condition resulting from a debt or contract is not by that reason alone to be excluded from the definition of slavery provided it would otherwise be covered by it: that is, provided the condition is that of a person over whom any or all of the powers attaching to the right of ownership are exercised. The provisions of s270 of the Code were held to be reasonably appropriate and adapted to give effect to Australia's obligations under the 1926 Convention. These provisions were not confined to chattel slavery.

In reaching this conclusion, Gleeson CJ noted the important distinction between slavery, which is criminalised by Division 270, and harsh employment conditions, which are not criminalised by that division [at 32]:

> It is important not to debase the currency of language, or to banalise crimes against humanity, by giving slavery a meaning that extends beyond the limits set by the text, context, and purpose of the 1926 Slavery Convention. In particular it is important to recognise that harsh and exploitative conditions of labour do not of themselves amount to slavery. The term 'slave' is sometimes used in a metaphorical sense to describe victims of such conditions, but that sense is not of present relevance. Some of the factors identified as relevant in Kunarac, such as control of movement and control of physical environment, involve questions of degree. An employer normally has some degree of control over the movements, or work environment, of an employee. Furthermore, geographical and other circumstances may limit an employee's freedom of movement. Powers of control, in the context of an issue of slavery, are powers of the kind and degree that would attach to a right of ownership if such a right were legally possible, not powers of a kind that are no more than an incident of harsh employment, either generally or at a particular time or place.

In upholding the appeal, Gleeson CJ, with whom Gummow, Hayne, Heydon, Crennan and Kiefel JJ agreed, held that the Court of Appeal had erred in finding that the trial judge misdirected the jury about the elements of the offences. The trial judge's directions were summarised by Gleeson CJ as follows [at 37]:

> The primary judge had told the jury that, in order to convict, they had to find that the complainants were slaves in accordance with the statutory definition as he explained it to them, that the respondent knew the facts that brought the complainants within that definition (although not that she was aware of the legislation, or the legal definition of slavery) and that she intended to possess or use persons in the condition disclosed by those facts.

The Victorian Court of Appeal had held that these were misdirections, stating that:

> [what] the [trial] judge omitted to state was that the Crown had to prove intention to exercise power over the slave in the knowledge or belief that the power that was being exercised was one attaching to ownership. That is, the power must have been intentionally exercised as an owner of property would exercise power over that property, acting in the knowledge or belief that the victim could be dealt with as no more than a chattel.

The majority of the High Court held that the Court of Appeal erred in reaching this conclusion and that [at 51] 'it was not necessary for the prosecution to establish that the respondent had any knowledge or belief concerning the source of the powers exercised over the complainants'. Those powers as disclosed by the evidence in the case were described by Gleeson CJ as follows [50]:

> In this case, the critical powers the exercise of which was disclosed (or the exercise of which a jury reasonably might find disclosed) by the evidence were the power to make the complainants an object of purchase, the capacity, for the duration of the contracts, to use the complainants and their labour in a substantially unrestricted manner, the power to control and restrict their movements, and the power to use their services without commensurate compensation. As to the last three powers, their extent, as well as their nature, was relevant. As to the first, it was capable of being regarded by a jury as the key to an understanding of the condition of the complainants. The evidence could be understood as showing that they had been bought and paid for, and that their commodification explained the conditions of control and exploitation under which they were living and working.

By Chris O'Donnell

Gassy v The Queen: [2008] HCA 18; (2008) 82 ALJR 838; 245 ALR 613

The vexed question of what should be said to a jury after days of inconclusive deliberation was considered again by the High Court in *Gassy v The Queen:* [2008] HCA 18.

The case involved the highly publicised killing of South Australian Director of Mental Health Dr Margaret Tobin in an Adelaide office building in 2002. There were no eyewitnesses and as luck would have it security cameras shed no light on the identity of the shooter. The applicant, Dr Jean Gassy was convicted of her murder.

In the High Court two issues were argued. One related to legal representation. At the trial (and in the High Court) the applicant appeared for himself. The other involved directions given to the jury after they indicated difficulties had arisen in reaching a verdict. The High Court by majority ordered a new trial.

The case against Dr Gassy was almost entirely circumstantial. Part of what were said to be the 'elements' of the prosecution case against the applicant included: his resentment and anger at his deregistration as a psychiatrist, opportunity to commit the crime established by a 'mosaic' of evidence, familiarity with guns and ammunition of the types used in the shooting and what appears to be an allegation of behaviour akin to stalking.

After a number of days of deliberation the jury indicated that they did not believe they would be able to reach a verdict. The trial judge gave the jury a direction in the terms set out in *Black v The Queen*: [1993] 179 CLR 44. The next day the jury asked the judge to outline in detail '...suggestions as to how they might move forward.' The instructions that followed are set out in full in the joint judgment of Gummow and Hayne JJ at [24]. It is those directions that the applicant successfully argued constituted a miscarriage of justice.

The timing and content of the response by the trial judge to the final jury note proved critical. It came after hours and hours of deliberation following a trial which lasted many weeks. These can be highly charged moments in a courtroom. Often a jury's demeanour and even the phrasing of questions can suggest great internal tension and dissension. The atmosphere is even more exaggerated in a murder case.

The impugned instructions re-stated the so-called essential elements in the Crown case but contained only one reference to the applicant's case. At their conclusion and at the request of the crown prosecutor the trial judge emphasised to the jury that her further directions were only suggestions for their consideration. The applicant was convicted about half an hour later.

Kirby J referred to the instances throughout the trial where her Honour had taken great pains to protect the applicant's rights and had presided carefully over a complex trial with an unrepresented accused. Nevertheless, in agreeing with Gummow and Hayne JJ that a new trial should be ordered, his Honour said at [50] and [51]:

> ...taken as a whole and in context, the supplementary 'way forward' provided by the trial judge to the jury led only to the unanimous guilty verdict that followed shortly thereafter.
>
> [51] The trial judge no doubt assumed that the jury would keep in mind the counter¬balancing directions given earlier regarding the applicant's case, his protestations of innocence and his criticisms of the prosecution evidence. However, contemporaneous reminders of countervailing considerations were needed and should have been given as part of the supplementary direction.

By Keith Chapple SC

Lumbers v Cook Builders Pty Limited (In liq) (2007) 232 CLR 635

Lumbers v W Cook Builders Pty Limited (In Liq) (2007) 232 CLR 635 is an important decision on restitution and quantum meruit.

The case involved the construction of a house on land at North Haven, near Adelaide. The land was owned by the Lumbers. They entered into an oral contract with a company ('Sons') to build the house.

Unknown to the Lumbers, Sons entered into an arrangement with a related company ('Builders'), pursuant to which Builders - through the engagement of sub-contractors - performed the construction work.

The construction of the house was completed. Time passed. Builders went into liquidation. The liquidator determined that Builders had yet to be paid for some of the building work it had carried out. Eventually, more than four years after the building of the house was finished, Builders demanded payment from the Lumbers of the amount which it contended was still outstanding.

The question in the appeal was whether the Lumbers were liable to Builders for this amount, despite the fact that the Lumbers were unaware that Builders, rather than Sons, had carried out the work.

Builders won in the full court of the Supreme Court of South Australia: the majority concluded that the Lumbers had received 'an incontrovertible benefit' which the Lumbers had freely accepted; that the benefit was received at Builders' expense; and that it would be unconscionable for the Lumbers to retain the benefit without paying for it (at [72]).

The High Court was unanimous in allowing the appeal. Gleeson CJ held:

> As to the concept of conferring a benefit, what was involved was the performance of building work on property owned by the Lumbers in circumstances where there was a building contract between the Lumbers and Sons obliging Sons to perform that work and the Lumbers to pay Sons for it, and a sub-contract between Sons and Builders obliging Builders to perform the work and Sons to pay Builders (at [51]).

In the joint judgment, delivered by Gummow, Hayne, Crennan and Kiefel JJ, reference was made to *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 in which Deane J referred (at 256-7) to the concept of unjust enrichment as constituting:

> Pavey & Matthews *identified unjust enrichment as a legal concept, which unified distinct categories of case; it is not a principle for direct application in particular cases*

> …a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case.

In the joint judgment it was pointed out that *Pavey & Matthews* identified unjust enrichment as a legal concept, which unified distinct categories of case; it is not a principle for direct application in particular cases (at [85]). An obligation to make restitution will arise by reference to existing categories of case, not to idiosyncratic notions of what is fair (at [85]).

> Builders had not carried out the work at the request, express or implied, of the Lumbers; indeed, had Builders been claiming reasonable recompense for work carried out at the Lumbers' request the case, as observed in the joint judgment, would have fallen neatly within long established principles (at [90]).

In the joint judgment it was further held that the Lumbers had not received a windfall or benefit, in the sense of obtaining a house for which they had not paid enough:

> If the Lumbers have not fully performed their obligations under their contract with Sons, by not paying all that is due to Sons, it is evident that the Lumbers have not received any benefit, gain or windfall. They would remain liable to Sons (at [120]).

Builders claim in restitution was therefore dismissed.

By Jeremy Stoljar SC

Hearne v Street (2008) 248 ALR 609; [2008] HCA 36; 82 ALJR 1259

In *Hearne v Street,* the High Court (Gleeson CJ, Kirby, Hayne, Heydon and Crennan JJ) had occasion to consider the content and scope of the 'implied undertaking' of a party to not use documents or information generated or produced to the party under compulsion for the purpose of legal proceedings for any extraneous purpose.

The facts in the case were as follows. In April 2005, neighbouring residents of Luna Park (the respondents) commenced proceedings in the Supreme Court of New South Wales against two companies involved in the operation of the amusement park seeking relief for an alleged nuisance created by the noise emitted from the park. Shortly after the commencement of the proceedings, an article was published in the *Daily Telegraph* newspaper, which disclosed the contents of several affidavits filed and served in the proceedings by the respondents. Following a request from the respondents' solicitors, the first defendant (by its solicitors) apologised for having released the affidavits to the newspaper and undertook to not release any further unread affidavits to the media or any other person not properly connected to the proceedings.

While the nuisance proceedings were on foot, the defendants lobbied the New South Wales Government to introduce legislation to protect the operation of Luna Park against complaints in respect of noise emissions. In that period, agents of the defendants, Mr Hearne (the managing director of the first defendant) and Mr Tierney (the appellants), each provided the minister for tourism, sport and recreation or her staff with part of an affidavit and part of an acoustic report, both of which had been filed by the respondents in the proceedings but not yet read or tendered. In October 2005, the New South Wales Parliament enacted retrospective legislation which was favourable to the defendants and which effectively defeated the respondents' claim in nuisance. The respondents subsequently amended their claim, abandoning the action in nuisance. The respondents also brought interlocutory applications against the appellants for contempt of court.

...whilst the obligation is expressed as an 'implied undertaking', there is no voluntary aspect to the undertaking, rather, it is a substantive legal obligation which arises in uniform terms by operation of law by virtue of the circumstances in which the documents or information are generated and received.

The contempt charges were dismissed at first instance, however, that decision was overturned on appeal, with a majority of the NSW Court of Appeal finding the appellants guilty of civil contempt. The appeal to the High Court was dismissed unanimously.

In its reasons for judgment, the court affirmed the principle that when a party to litigation is compelled by an order or rule of the court or otherwise to disclose documents or information, the party receiving the disclosure cannot use it for any purpose other than that for which it was given unless the document is received into evidence or leave of the court is obtained (Gleeson CJ at [1] and Kirby J at [56] – [57] agreeing with Hayne, Heydon and Crennan JJ (the plurality) at [96]). The types of material to which the principle applies include:

- affidavits and witness statements;
- discovered documents;
- answers to interrogatories;
- documents produced on subpoena or for the taxation of costs;
- documents produced pursuant to a direction of an arbitrator;
- documents seized pursuant to an Anton Piller order.

The rationale underlying the principle is to ensure that intrusive litigious processes, such as discovery, do not go beyond the bounds necessary for the purpose of securing that justice is done (the plurality at [107]).

The court held that whilst the obligation is expressed as an 'implied undertaking', there is no voluntary aspect to the undertaking, rather, it is a substantive legal obligation which arises in uniform terms by operation of law by virtue of the circumstances in which the documents or information are generated and received (the plurality at [102] - [108] and [118], Gleeson CJ at [3] and Kirby J at [56] agreeing). As the obligation is owed to the court, not the other party, its breach is treated as contempt (the plurality at [106]).

The court also affirmed the broader principle that the implied undertaking is binding on a party's servants and agents and also third parties, such as court officers and expert witnesses, provided that the person knows that the material was generated or produced in legal proceedings by the other side (or, in the case of a third party, by a party to legal proceedings) (the plurality at [109] – [111], Gleeson CJ at [3] and Kirby J at [57] agreeing). Accordingly, where contempt is alleged for the collateral use of material compulsorily produced or disclosed:

> [only knowledge of] the origins of the material in legal proceedings need be established. In particular, there is no support for the idea that knowledge of the 'implied undertaking' and its consequences should be proved, for that would be to require proof of knowledge of the law, and generally ignorance of the law does not prevent liability arising' (the plurality at [112]).

In the instant case, the court upheld the Court of Appeal's findings of guilt as the appellants had each used material generated and served on interests connected with them for purposes other than the nuisance proceedings in circumstances where they possessed 'the only knowledge which was relevant – knowledge that the affidavit and statement were supplied by the residents in legal proceedings' (the plurality at [129], Gleeson CJ at [5] – [6] and Kirby J at [57] agreeing).

It also fell to the court to determine whether the contempt proceedings were civil or criminal in nature, as no right of appeal lies in NSW against the dismissal of a charge of criminal contempt pursuant to subsections 101 (5) and 101 (6) of the *Supreme Court Act 1970* (NSW). The distinction between civil and criminal contempt turns on whether the proceedings are characterised as remedial and coercive in nature or otherwise punitive. Where the proceedings fall into the former category, the contempt is civil; if the latter category, the contempt is criminal (Kirby J at [22], the plurality at [133], Gleeson CJ agreeing with the plurality at [2]). The court found that the contempt proceedings were remedial and coercive in nature as the respondents were seeking to ensure compliance by the defendants (and their agents and servants) with the implied undertaking. As such, the appellants' 'wilful but not contumacious breach' of the implied undertaking were therefore civil contempts. It followed that the Court of Appeal was competent to hear and determine the appeal against the primary judge's dismissal of the proceedings (the plurality at [134] - [141], with whom Gleeson CJ and Kirby J agreed at [2] – [3] and [24] respectively). The dichotomy between civil and criminal contempt was not in issue before the court, however, both Gleeson CJ and Kirby J expressed the view that the present distinction is in some respects 'unsatisfactory' (at [2] and [20] – [24] respectively).

By Jenny Chambers

Transfield Shipping Inc v Mercator Shipping Inc [2008] UKHL 48

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. (*Hadley v Baxendale*, (1854) 9 Exch 341. per Alderson, P at 351)

The rule in *Hadley v Baxendale* is well known to lawyers and law students alike and has been the subject of many an examination question. Hence it is perhaps not surprising that the facts giving rise to a recent appeal to the House of Lords involving a consideration of the rule were described in the Opinions as capable of giving rise to 'an examination question'.[1]

The facts were brief. A ship owner contracted with a charterer to let out the ship (the '*Achilleas*') for a period of five to seven months to end no later than midnight on 2 May 2004. The charterer notified the ship owner that the ship would be back no later than then. The ship owner therefore contracted to let the ship to a new charterer for a period of about four to six months promising that that the new charterer could have the ship no later than 8 May 2004. The agreed price of the proposed hire was $39,500 a day. In breach of the original contract, the ship was not returned until 11 May 2004. At that stage the market for hire of the vessel had fallen and the new charterer would only take it at a reduced price of $31,500 a day.

The rule in Hadley v Baxendale *is well known to lawyers and law students alike and has been the subject of many an examination question.*

Question: Is the first charterer liable to pay only for the use of the ship for the number of days that the charterer was late in returning the ship at the market rate then prevailing, a mere sum of $158,301.17, or is the charterer liable to pay the difference between what the owner would have got from the new charterer had the ship been returned in time and what the owner in fact got at the later reduced rate, a sum of $1,364,584.37?

At first instance, the court[2] upheld an arbitral award of damages on the more substantial basis. The loss of profit on the proposed charter fell within the 'first rule' in *Hadley v Baxendale* as arising 'naturally, i.e., according to the usual course of things, from such breach of contract itself'. The greater loss was damage 'of a kind which the [charterer], when he made the contract, ought to have realised was not unlikely to result from a breach of contract [by delay in redelivery]'[3]. This also reflected the general intention of the law that in giving damages for breach of contract the party complaining should, so far as it can be done by money, be placed in the same position as the party would have been in if the contract had been performed. If the damages were limited to the few days that the vessel was late such compensation would only be a 'fraction of the true loss caused by the breach'[4]. An appeal to the Court of Appeal was dismissed. The court rejected an argument that in certain circumstances the overall requirements of public policy may require ('although very occasionally') the refusal of damages, even where they may be said to have been in the parties' contemplation, and that the damages for late redelivery should be limited to the overrun period measure unless the owners can show that at the time of the contract, they had given their charterers special information of their follow on fixture. The court recognised that the doctrine of remoteness is ultimately designed to reflect the public policy of the law.[5]

The hirer then successfully appealed to the House of Lords although unusually all five members delivered separate opinions. Two members of the House of Lords, Lord Hope of Craighead and Baroness Hale of Richmond, indicated in their opinions that, at the end of the argument presented by counsel on both sides, they were inclined to agree with the judgments in the courts below but had subsequently changed their minds on reading in draft the opinions of the other three members of the House of Lords, Lord Hoffman, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe, who each reached the conclusion that the judges below had based their decisions on an error of law and that the proper measure of damages was confined to the period that the owners were deprived of the use of their vessel.

Lord Rodger of Earlsferry, focussed on the first limb of the rule in *Hadley v Baxendale* which limits the charter's liability to the amount of injury that would arise 'ordinarily' or 'generally'.[6] It is 'important not to lose sight of the basic point that, in the absence of special knowledge, a party entering into a contract can only be supposed to contemplate the losses which are *likely* to result from the breach in question - in other words, those losses which will generally happen in the ordinary course of things if a breach occurs'.[7] In the circumstances, he was satisfied that neither party to the contract would reasonably have contemplated that an overrun of nine days would in the ordinary course of things have caused the owners to suffer the kind of loss which they claimed damages. The loss was not an ordinary consequence of the breach and it occurred only because of the extremely volatile market conditions which produced the particularly lucrative transaction. Accordingly, the parties would not have had this particular type of loss within their contemplation and they would have expected that the owner would have been able to find use for his ship even if it was returned late.

An alternative and different view was taken by Lord Hoffman and Lord Hope which has the effect of putting a gloss on the rule in *Hadley v Baxendale*. The court was required not only to have regard to whether or not this type of loss was within the parties' contemplation when the contract was made 'but also whether they must be taken to have had *liability for this type of loss* within their contemplation then'[8]. In other words, had the charterer undertaken legal responsibility for the risk of this type of loss? The question as to whether a given type of loss was one for which a party has assumed responsibility involved an interpretation of the contract and this was a question of law. Accordingly, as an error of law was involved the appeal was upheld.

Baroness Hale questioned this latter approach noting that '[q]uestions of assumption of risk depend upon a wider range of factors and value judgments'[9] and, perhaps critically, described this type of reasoning as a '*deus ex machina*'[10], a phrase which literally means 'god from a machine' and is derived from the ancient theatrical device in which a god was brought onto the stage by a mechanical aid to save a seemingly hopeless situation in the play. Its more recent meaning is described by *The Macquarie Dictionary* as 'an improbable, artificial, or unmotivated device for unravelling a plot …'.

Accordingly, whilst agreeing in the result, Baroness Hale joined in the result on the narrower ground adopted by Lord Rodger, namely that the parties would not have had this particular type of loss within their contemplation, or as Lord Rodger had put it, he was 'satisfied' that at the time of making the contract 'this loss could not have been reasonably foreseen as being likely to arise out of the delay in question. It was, accordingly, *too remote* to give rise to a claim for damages for breach of contract'.[11]

In these circumstances notwithstanding that the appeal was confined to an 'error of law'[12] they joined in upholding the appeal. The relevance of the case in Australia where 'remoteness is a question of fact'[13] is uncertain particularly given the differing reasoning by their lordships.

By Malcolm Holmes QC

Endnotes

1. *Transfield Shipping Inc v Mercator Shipping Inc* [2008] UKHL 48, per Baroness Hale of Richmond at [89].
2. [2007] 1 LLRep 19, [2006] EWHC 3030.
3. [2008] UKHL 48 at [6].
4. [2007] 1 LLRep 19, [2006] EWHC 3030 at [102].
5. [2007] EWCA Civ 901 per Rix LJ at [117].
6. Supra, at [58].
7. Supra, at [52].
8. Supra, at [92].
9. Supra, at [93].
10. Supra, at [93].
11. Supra, at [60], underlining added.
12. As it was an appeal from an arbitral award, any appeal was confined to an error of law.
13. *Wenham v Ella* (1972) 127 CLR 454 at 466 and *Castle Constructions Pty Limited v Fekala Pty Limited* (2006) 65 NSWLR 648 per Mason P at 655.

Observations from the Federal Criminal Law Conference

On 5 September 2008 the Law Council of Australia and the New South Wales Bar Association jointly hosted a conference to examine recent developments in federal criminal law. Chris O'Donnell reports.

The predominant topics covered at the Federal Criminal Law Conference were the operation of federal anti-terrorism laws and proposals to criminalise illegal cartel activity. Other topics covered included extradition, war crimes and proceeds of crime legislation.

In her welcome to participants, Bar Association President Anna Katzman SC noted that:

> The inspiration for the conference largely came from some remarks that the minister for home affairs, Bob Debus, made in his maiden speech to the federal parliament. He promised a more consultative approach to law reform than the previous government and foreshadowed a major forum for the discussion of proposals to reform federal criminal justice legislation later this year. That forum will now be held in Canberra on 29 September. This conference is designed in large part to assist and inform that discussion.

After referring to recent controversies arising out of the application of the anti-terrorism laws in the *Haneef* and *Ul-Haque* cases, Katzman SC noted some positive developments emerging since the election of the Rudd Labor government:

> Last month, in a break from the position of its predecessor, the Rudd government agreed to issue a standing invitation to UN human rights experts to come to Australia, to examine, monitor, advise and publicly report on human rights in this country and in this, the 60th year since the Universal Declaration of Human Rights, to show Australia as a leader in international human rights. While the system for mandatory detention of asylum seekers remains intact, the majority of Indigenous Australians live in poverty and legislation permitting preventative detention and arbitrary arrest remains on the statute books, there is much work to be done.
>
> With the change of government and the prospect of a change in Washington, too, and with that the prospect of troop withdrawal from Iraq, now is as good a time as any to examine the wisdom of legislation introduced in the wake of the September 11 terrorist attacks and to help the government get the balance right between protecting our security without sacrificing our civil rights.

... when we address the threat of international terrorism, Australia must ensure that the time and resources dedicated to that objective are managed and deployed by a leadership team that always has, as its number one priority, the security and safety of the Australian people.

Delegates at the criminal law conference, 5 September at the Hilton Sydney

In an address titled 'The Clarke Inquiry in Progress: Tentative Observations for Reform', Stephen Keim SC offered insights into his experience as counsel for Mohamed Haneef. After challenging the extent to which restrictions surrounding the Clarke Inquiry enable it to be full and open, Keim concluded with following remarks:

> I make some very tentative observations.
>
> The test required to be satisfied, to arrest under s3W of the Crimes Act, reasonable satisfaction that the person has committed the offence, is a good test. I do not think it was applied. Nor does the evidence suggest that the requirement in sub-s3W(2) that one must release, if the reasonable satisfaction evaporates, was ever adverted to. Part 1C of the Crimes Act was never intended to result in detention for 12 days without charge. An express upper limit on the period of detention should be inserted into the legislation.
>
> The hearings before Mr Gordon in which orders for increased investigation time and periods of down time were made failed to act as the safeguards they were intended to be. The legislation should make clear that they are not secret hearings; that the detainee is entitled to be told the information on which the application is based; and the hearing should take place in the presence of the detainee, whether he has legal representation or not.
>
> The Migration Act is a vehicle of political expediency. It should be completely rewritten. Australia should work to make sure that its public servants are professional and fearless. Minsters will receive better advice if that is achieved.
>
> Finally, when we address the threat of international terrorism, Australia must ensure that the time and resources dedicated to that objective are managed and deployed by a leadership team that always has, as its number one priority, the security and safety of the Australian people.

Dina Yehia, a NSW public defender, addressed the conference on the operation of federal anti-terror laws and questioned the need for them in the light of pre-existing legislation. After outlining prominent recent cases in the area, such as *Mallah*, *Lodhi*, *Roche, Khazaal* and *Ul-Haque,* Yehia examined: the application of the laws to acts in preparation for a terrorist act; offences where a specific terrorist act is not alleged; the extended geographical jurisdiction governing the provisions; the fact that a specific perpetrator of a contemplated, though not specified, terrorist act need not be specified; and the extension of the definition of 'terrorist act' to action or threat of action.

After proposing some areas for reform, and noting some pre-existing offences such as murder, kidnapping and possessing or making explosives, Yehia concluded:

> There is a question therefore as to whether the anti-terror legislative regime was necessary when the existing law adequately dealt with 'terrorist' offending behaviour. However, assuming there is an argument that a new regime criminalising terrorist related conduct was necessary post September 2001, the question remains as to whether we have struck the right balance between protecting the community against criminal conduct on the one hand, and protecting individuals against human rights abuses, on the other.

Justice Mark Weinberg considered immediate proposals to vest the Federal Court of Australia 'with indictable criminal jurisdiction in relation to what have been described as hard-core cartels' and the more distant possibility of a separate federal criminal court system in Australia along the lines of that which exists in the United States. After surveying the 'autochthonous expedient' – the uniquely pragmatic Australian solution of vesting state courts with federal jurisdiction - Justice Weinberg outlined developments leading to the expansion of the Federal Court's jurisdiction, notably s39B(1A) of the *Judicary Act 1901*, but noted with respect to criminal jurisdiction that:

> As a result of the limitation contained within s39B(1A)(c), the Federal Court's criminal jurisdiction stands in marked contrast to that of its civil jurisdiction. It is only where a particular federal statute specifically confers criminal jurisdiction upon the Federal Court that it can deal with the matter.

... practical difficulties associated with the Federal Court becoming a court of more general criminal jurisdiction and hearing indictable matters include questions concerning bail, committals and court design.

Copyright is an example of such statutory criminal jurisdiction. The proposed cartel reforms are another. However, practical difficulties associated with the Federal Court becoming a court of more general criminal jurisdiction and hearing indictable matters include questions concerning bail, committals and court design. Justice Weinberg concluded:

> As matters presently stand, the idea of establishing a separate federal criminal court system in Australia is simply not viable. There is, however, a case for conferring upon the Federal Court a limited indictable jurisdiction extending beyond cartel cases, and into other areas where that court has particular expertise. I include in that category tax fraud and serious offences under the Corporations Act. If such a jurisdiction is conferred upon the Court, it would make sense to make it concurrent rather than exclusive. That allows for the possibility of a joint trial of state and federal offences where that is appropriate. The Federal Court could not, as matters stand, conduct such a trial. I should add, however, that it would be unlikely, in the sorts of cases that I am discussing, that state charges would be brought in conjunction with federal charges.
>
> Ultimately, there will be pressure upon the Commonwealth to develop its own court system to deal with federal crimes, just as there will be pressure, eventually, upon the Commonwealth to construct and manage its own prisons. In that regard, we will almost certainly emulate what the United States has long done. It will not happen soon, it may not happen in my lifetime, but happen it will.

Other speakers at the conference included Brent Fisse (on the proposed cartel offences under the Trade Practices Act), Tim Game SC, Stephen Odgers SC (on injustices arising out of the operation of federal proceeds of crime legislation), Ned Aughterson (on extradition) and Mark Ierace SC (on war crimes). Copies of the conference papers are available on request from the NSW Bar Association.

The criminal jurisdiction of the Federal Court

A paper presented at the Federal Criminal Law Conference, Sydney, Friday 5 September 2008, Justice Mark Weinberg, Victorian Court of Appeal

Introduction

This conference is timely. The federal government is currently in the process of investing the Federal Court of Australia with indictable criminal jurisdiction in relation to what have been described as hard-core cartels. This expansion of the court's jurisdiction represents something of a landmark in its history and development. It gives rise to a number of difficult issues, both theoretical and practical. My purpose in preparing this paper is to set out something of the background to the court's past involvement in criminal matters, and to consider some of the obstacles which must be overcome if it is to function, in the future, as court or more general criminal jurisdiction.

Background

In the early years of federation, the Commonwealth Government had almost nothing to say on the subject of criminal law. The *Crimes Act 1914* (Cth) created a number of new offences, some of them of a general character. However, these were modest in scope and largely confined to the protection of Commonwealth interests.

It was not until the 1980s that federal criminal law came into its own. Heroin, in particular, was being brought into this country on an unprecedented scale. In addition the discovery of the 'bottom of the harbour' tax schemes, and other forms of revenue fraud, led to the creation of new Commonwealth agencies, including the Office of the Commonwealth Director of Public Prosecutions and the National Crime Authority.

By the end of the 1980s, it was clear that federal criminal law had become a discrete and important branch of the criminal law more generally. It operated alongside state and territory criminal law. It raised complex issues involving federal jurisdiction and constitutional and administrative law. Those who practised in the field soon learned that they had to familiarise themselves with a host of statutes involving different rules of procedure, evidence, and principles of substantive law. The introduction of the new sentencing provisions into the *Crimes Act 1914* at about that time brought about its own difficulties.

The past decade has seen the federalisation of aspects of the criminal law continue unabated. The enactment of the Commonwealth Criminal Code in 1995, and its gradual evolution, has already had a profound impact upon conceptual thinking in the field of general principles of criminal responsibility. It has also criminalised a range of conduct never previously encountered in this country; for example, people smuggling, terrorism, crimes against humanity and related offences, sexual slavery and trafficking in persons.

The expansion of federal criminal law into new areas of human activity is likely to continue.

The expansion of federal criminal law into new areas of human activity is likely to continue. Yet, since federation, almost all federal offences have been, and continue to be, prosecuted in state and territory courts. Unlike the position in the United States, there are no federal criminal courts in this country. The Federal Court itself has had some exposure to the criminal law, but usually only as an incidental feature of some civil proceeding. Whether that limited role should continue is a question to which I shall return.

The autochthonous expedient – vesting federal jurisdiction in state courts

First, a short excursus into constitutional law. Section 71 of the Constitution vests the judicial power of the Commonwealth in the High Court of Australia, such other federal courts as the parliament creates, and such other courts as the parliament invests with federal jurisdiction. The section does not expressly designate state courts as the potential repositories of federal jurisdiction. However, the prevailing view has always been that it confers upon the parliament two options, namely the creation of a federal court system, or the investment of state courts with federal jurisdiction.

For the greater part of the twentieth century, the Commonwealth elected to utilise state courts to exercise federal jurisdiction rather than creating a federal court system to do so. That decision was taken largely for financial reasons. It was thought that establishing a separate layer of federal tribunals represented an unnecessary economic burden for a country with such a small population.

The use of state courts to exercise federal jurisdiction was famously described by the High Court in *Boilermakers* as an 'autochthonous expedient'; that is, something that was indigenous or native to this country and not to be found elsewhere. For example, no similar arrangement exists in the United States despite its almost identical federal structure.

There are of course limits on the power of the parliament to invest state courts with federal jurisdiction. These are set out in s77 of the Constitution, such that a grant of power to a state court will not be valid unless it is with respect to one of the, albeit wide, list of matters enumerated in ss75 and 76.

Prior to the decision of the High Court in *Re Wakim*, both the federal and state courts could exercise each others' jurisdiction and regularly did so through cross-vesting. Regrettably, it is now clear that the Constitution does not enable any federal court to exercise state judicial power, as such.

The establishment of the Federal Court

The Federal Court was established by the *Federal Court of Australia Act 1976* (Cth). As a creature of statute, the court has no inherent jurisdiction. However, this is of little consequence since it has implied powers that are of similar amplitude.

The Federal Court is a superior court of record, and is a court of law and equity. Its original jurisdiction is set out in s19(1), which provides that the court: 'has such original jurisdiction as is vested in it by laws made by the parliament.' Its appellate jurisdiction is set out in s24.

It is apparent that the court's jurisdiction is that given to it by statute. In the early days of its existence, that jurisdiction was somewhat narrowly confined, consisting largely of industrial matters and bankruptcy together with a general jurisdiction under the *Trade Practices Act 1974* (Cth). It was also given jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and original jurisdiction to review decisions of the Administrative Appeals Tribunal pursuant to s44 of the *Administrative Appeals Tribunal Act 1975* (Cth).

The enlargement of the Federal Court's civil jurisdiction

While the Federal Court started out as a court whose limited jurisdiction was conferred by a short list of individually named statutes, this is no longer the case. In broad terms, the court has a wide, almost exclusively, civil jurisdiction now given to it by over 150 federal statutes. The jurisdiction of the court has expanded greatly over the years as parliament began to use the powers available to it under ss75 and 76 of the Constitution.

One of the first and most important stages in this process was the enactment in 1983 of s39B(1) of the *Judiciary Act 1903* (Cth). That section conferred upon the court the same powers of judicial review as the High Court exercised under s75(v) of the Constitution. In 1988, the court's jurisdiction was expanded by the enactment of the *Admiralty Act 1988* (Cth), which conferred upon it wide-ranging powers in relation to admiralty and maritime matters.

However, the most important step towards transforming the Federal Court into a court of general federal jurisdiction came in 1997 with the enactment of s39B(1A) of the Judiciary Act. That section provides:

> *The court has jurisdiction to deal with a number of offences under federal law, most notably under the Trade Practices Act and the Copyright Act 1968 (Cth).*

The first sitting of the Federal Court.

> The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:
>
> (a) in which the Commonwealth is seeking an injunction or a declaration; or
>
> (b) arising under the Constitution, or involving its interpretation; or
>
> (c) arising under any laws made by the parliament, *other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.* (Emphasis added.)

As a result of the enactment of s39B(1A)(c), the Federal Court now has virtually unlimited jurisdiction in all non-criminal matters arising under any federal statute. If a Commonwealth Act is involved at any stage of a dispute, the Federal Court will have jurisdiction to resolve the whole of that dispute.

As a result of the limitation contained within s39B(1A)(c), the Federal Court's criminal jurisdiction stands in marked contrast to that of its civil jurisdiction. It is only where a particular federal statute specifically confers criminal jurisdiction upon the Federal Court that it can deal with the matter.

That is not to say that the Federal Court has had nothing to do with the criminal law or determining criminal matters. The court has jurisdiction to deal with a number of offences under federal law, most notably under the Trade Practices Act and the *Copyright Act 1968* (Cth). In addition, the court has long had a criminal jurisdiction in relation to industrial matters. It must be said, however, that these offences are all summary offences. They are not indictable; they do not ordinarily carry the possibility of terms of imprisonment.

Limited criminal and quasi-criminal jurisdiction of the Federal Court

Most federal statutes are silent as to the court, which has jurisdiction to deal with proceedings for offences which they create. In such cases, s68(2) of the Judiciary Act confers on state courts 'like jurisdiction' with respect to federal offences. Reference is then generally made to state

law to determine whether the matter is to be treated as summary or indictable. The process is very complex.

The Federal Court, though rarely the repository of criminal prosecutions as such, has had a considerable involvement with the criminal law in other ways. The court has wide powers to deal with contempt. It also encounters the criminal law through judicial review of a wide range of administrative powers exercised as part of the criminal process. For example, there is a substantial jurisprudence within the court regarding challenges to the validity of various warrants, the exercise of coercive powers as part of the process of information gathering, the decision to prosecute, and the decision to commit for trial. It is fair to say, however, that the court's role in judicial review of such decisions has diminished greatly in recent years in line with the High Court's strong admonition against fragmentation of the criminal process.

The Federal Court also comes into contact with the criminal law through its oversight of the process of extradition, which often entails detailed consideration being given to substantive aspects of the criminal law. In addition, the criminal law comes into play at various points of the *Migration Act 1958* (Cth) when questions arise as to whether a permanent residency visa has been lawfully cancelled.

Appellate jurisdiction of the Federal Court

The Federal Court's criminal jurisdiction is enlivened in its purest sense when the court hears criminal appeals from the Supreme Court of Norfolk Island. This occurs infrequently, but as part of the Federal Court's general appellate jurisdiction in civil and criminal matters over that court. Earlier this year, this resulted in the Federal Court hearing an appeal against the conviction of Glen McNeill for the murder of Janelle Patton.

Previously, the court exercised general appellate jurisdiction in both criminal and civil matters for the Australian Capital Territory and the Northern Territory. However, this jurisdiction was abolished when those territories established their own appellate structures.

Proposal to criminalise cartel offences

In a landmark development, the Federal Court is about to be given, for the first time, indictable criminal jurisdiction. This arises out of the proposal, now in the process of being implemented, to criminalise what is generally known as cartel conduct. As one commentator notes, it is well recognised that if, instead of competing with one another, enterprises manipulate their dealings with one another through agreements that divide up the market, society as a whole is not well served.

Section 45 of the Trade Practices Act prohibits anti-competitive agreements, contracts, arrangements or understandings that have an anti-competitive purpose or likely effect. Such arrangements are regarded as a form of 'cheating', but have never attracted possible imprisonment as a sanction. That position is changing. Australia is about to come into line with many other countries in which such behaviour is regarded not only as reprehensible but as warranting criminal liability.

Section 45 of the Trade Practices Act prohibits a corporation from making a contract or arrangement or arriving at an understanding if the proposed contract, arrangement or understanding contains what is described as an exclusionary provision, or one of its terms would have, or is likely to have, the effect of substantially lessening competition. Section 75B extends liability from corporations to individuals. Section 78 expressly provides that any breach of s45 does not attract criminal sanctions. As already indicated, this is about to change.

I do not propose to go into the history of the current proposal to criminalise cartel conduct. Others will speak on that subject. It is sufficient simply to note that, in May 2002, the former government appointed a committee, headed by Sir Daryl Dawson, to conduct a review into the competition provisions of the Trade Practices Act. The committee recommended, inter alia, that the civil penalties regime under the Act be maintained but the maximum penalties for corporations be significantly increased. It also recommended that criminal penalties, including imprisonment of up to seven years for individuals, be introduced for what it termed 'hard-core cartel behaviour', subject only to the resolution of an appropriate definition for that conduct.

On 24 June 2004, the Howard government introduced into parliament legislation amending s76 of the Trade Practices Act to raise the maximum pecuniary penalty against corporations to bring it into line with the recommendations of the Dawson Committee. That legislation did not, however, render cartel conduct criminal.

In a landmark development, the Federal Court is about to be given, for the first time, indictable criminal jurisdiction. This arises out of the proposal, now in the process of being implemented, to criminalise what is generally known as cartel conduct.

In August 2007, the Australian Government's website listed a Bill dealing with the criminalisation of serious cartel conduct, and another providing for an expansion of the Federal Court's limited criminal jurisdiction, as Bills it intended to introduce in the Spring sitting of parliament. However, the federal election intervened, and these Bills were never introduced.

However, the criminalisation of serious cartel conduct has had bipartisan support. The Australian Labor Party pledged during the election campaign to introduce laws to criminalise serious cartel behaviour within the first 12 months of office. On 11 January 2008, an exposure draft of the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* (Cth), along with a discussion paper and draft memorandum of understanding between the Australian Competition and Consumer Commission and the Office of the Commonwealth Director of Public Prosecutions, was released.

The exposure draft of the Bill foreshadowed two criminal offences under Part IV of the Trade Practices Act, and equivalent offences in the Competition Codes enacted in each state and territory. It would be an offence to:

- make a contract, arrangement or understanding containing a cartel provision with the intention of dishonestly obtaining a benefit; or
- give effect to a cartel provision with the intention of dishonestly obtaining a benefit.

The Bill contained two pecuniary penalty provisions, which are substantively the same as those currently in the Trade Practices Act. Critically, a proceeding with respect to a criminal cartel offence could be instituted in either the Federal Court, or in a state or territory Supreme Court.

It was recently suggested that the government has toughened its stance against cartel conduct by no longer insisting that the behaviour be dishonest in order to give rise to a criminal offence. There had been a great deal of criticism of this requirement from a wide range of sources, and the government appears to have accepted the force of that criticism. This means that there is likely to be a significant re-working of the key offence provision. Accordingly, the entire process of criminalisation of cartel conduct appears to be still a work in progress.

Why vest criminal jurisdiction in cartel cases in the Federal Court?

A recently retired judge of the High Court has publicly questioned the wisdom of a dual system of courts in this country, arguing that a single judicial hierarchy would operate more effectively and efficiently. His remarks have been read by some as a call for the abolition of the Federal Court, though that is perhaps a simplistic view of his thesis. It is no secret that there was considerable opposition to the establishment of the Federal Court at the time of its creation, not always prompted by the purest of motives.

As a former Federal Court judge, and current Supreme Court judge, it is not appropriate that I engage in debate on this subject. However, I can say with confidence that, by any objective measure, the Federal Court has achieved great success as a court of general civil jurisdiction. I know that it is held in high regard, not just in this country, but also overseas.

Still, the question remains. Should the Federal Court's jurisdiction be expanded so that it takes on not merely those somewhat incidental criminal matters earlier outlined but also crime in the truer sense?

In the context of cartel offences, there are arguments both ways.

In principle, those charged with offences against federal law should all be accorded the same rights and protections when they come to trial. This does not happen at the moment. Federal charges are dealt with in state courts, under state rules of procedure which vary greatly from place to place. The rules of evidence which apply to criminal trials for such offences also vary, sometimes in significant ways.

My former colleagues on the Federal Court will not thank me for saying so but the court is well-resourced. It has effective case management procedures which can be adapted to criminal trials, and which will facilitate the management of what are likely to be long, costly and extremely hard-fought cases.

A number of Federal Court judges have previously served as state Supreme Court judges, and have significant experience in the conduct of jury trials. Many judges have a particular interest in competition law, and are familiar with the difficult concepts so elaborately developed in

Pt IV of the Trade Practices Act. They also have a particular expertise in dealing with economic experts of the kind whose evidence is likely to be adduced in trials of this nature.

There is another advantage in conferring cartel jurisdiction upon the Federal Court. There is a greater likelihood of consistency of interpretation if the new offence provisions are dealt with predominantly within the one court, rather than working their way through a series of different courts with different appellate structures.

These are all powerful considerations in support of the current proposal to confer this new indictable criminal jurisdiction upon the Federal Court.

There are, of course, arguments to the contrary. State and territory judges are, as a general rule, likely to be more experienced than their federal counterparts when it comes to conducting jury trials. That is an important consideration.

Moreover there is an established apparatus within the structure of state and territory courts for the conduct of all criminal trials. This includes matters leading up to the commencement of the trial, such as bail, committal (though not in all states), and pre-trial hearings. States and territories also have developed rules of criminal procedure and detailed provisions governing jury empanelment and supervision, and the entire post-conviction appellate process. The Commonwealth must either adopt state practices in these areas or develop its own procedures.

It should also be said that state and territory judges regularly deal with Commonwealth offences. They have experience, not always happy, with coping with the labyrinth of federal sentencing law.

Twenty years ago, when I held the position of Commonwealth director of public prosecutions, it was extremely difficult in some states to have Commonwealth matters listed. Even summary prosecutions were given low priority. As for indictable matters, it was almost impossible, in Victoria, to have a Commonwealth case tried in the Supreme Court. That court confined its trial work to cases of murder and the like. Cases raising immensely difficult issues were left to the County Court. All this was entirely unsatisfactory.

It is pleasing to note the position has since changed. Commonwealth matters are now far more frequently tried in the Supreme courts of

New South Wales and Victoria than they once were. Nonetheless, given a chronic shortage of judges in those courts, there are still delays in getting trials on in both those states. There are also delays in having appeals heard despite the strenuous efforts currently being made to alleviate this problem. A modest incursion by the Federal Court into indictable criminal work would no doubt assist in easing some of the pressure currently resting on state courts.

Current state of play regarding cartel prosecutions

It is proposed that criminal cartel trials take place in either the Federal Court or the state and territory Supreme courts. It is not altogether clear to me how the choice will be made. Presumably, it will be at the election of the director of public prosecutions. I expect that most, if not all, cartel trials will be conducted in the Federal Court.

As part of its cartels legislative package, the former government had previously put forward the *Federal Court Amendment (Criminal Jurisdiction) Bill 2006* (Cth). That Bill proposed to introduce into the Federal Court of Australia Act provisions relating to pre-trial issues of a procedural nature and the empanelment and keeping of juries. The Bill also contained provisions designed to enable the court to conduct jury trials and to hear subsequent appeals in relation to them. It proposed consequential amendments to a host of other federal statutes including for example, the *Proceeds of Crime Act 2002*, the *Transfer of Prisoners Act 1983*, the *Director of Public Prosecutions Act 1983* and the *Mutual Assistance in Criminal Matters Act 1987*.

Of fundamental importance are the changes that will have to be made to enable the Federal Court to conduct jury trials, in accordance with the requirements of s80 of the Constitution.

The status of that Bill is not clear to me. What is apparent, however, is that a similar bill will be required if the government is to proceed with its proposed cartel legislation.

The changes contemplated are complex and varied. It is not simply a matter of enacting new laws, or amending old ones. Numerous administrative changes will also have to be effected.

For example, decisions will have to be made as to whether the Commonwealth should enact its own bail provisions. The vexed question of committals will have to be addressed. If they are to be retained, will they be conducted by state courts? It would be difficult to vest this function in the Federal Magistrates' Court, even assuming that that court survives as a separate body. A committal proceeding involves the exercise of administrative, and not judicial, power. There would be questions as to whether the exercise of administrative power of that kind, vested in a Chapter III court, is compatible with its exercise of federal judicial power. It should also be remembered that federal magistrates tend to be experienced in family law matters. They are unlikely to have any great familiarity with, or deep understanding of, the criminal law.

It is also important to remember that any expansion of the role of the Federal Court into indictable jurisdiction will necessitate a close examination by that court of the rules of criminal procedure which will govern such trials. Presently, each state and territory has its own detailed laws governing these matters. Terminology varies. The rules governing issues such as joinder and severance of counts, separate trials, pre-trial disclosure of defences, and a host of other issues are by no means the same. Indeed, in some ways these differences are becoming more pronounced. Of course, the Federal Court could simply apply those rules which operate in the relevant state or territory in which the trial is to be conducted. However, even if that were to be done, the co-operation of the states and territories would need to be obtained, both in relation to the drafting of their own legislation and in relation to the interplay between their own courts, Local or Magistrates', and the Federal Court.

In addition, picking up state and territory laws could provoke constitutional issues. For instance, an accused charged before the Federal Court with a particular federal offence may have different substantive and procedural rights depending upon the state or territory in which the offence is alleged to have been committed. Most notably, in Victoria and the Australian Capital Territory, the accused might be able to benefit from a host of human rights provisions not operating at a federal level. Similarly, inconsistencies could arise in relation to the prosecution's rights and obligations, depending upon the procedural legislation of the state or territory in which the prosecution originates.

It is possible to illustrate some of the practical difficulties that will need to be addressed by taking the apparently simple example of bail. For instance, in federal prosecutions of criminal cartel offences:

- should bail applications continue to be heard in state or territory Magistrates and Local courts or should the Federal Court, or Federal Magistrates Court, play a role in this process?
- If the state and territory courts continue to deal with bail, are there any issues in relation to the power of such courts to bail and order an accused to appear before the Federal Court? Which court should review such bail orders: the Federal Court or the relevant Supreme Court?
- In either case, what arrangements might need to be made with state and territory authorities regarding the transportation of accused persons from remand centres to the court? In some states and territories this has been outsourced to private firms. Will the Commonwealth need to make its own contractual arrangements with these providers? Or could those arrangements currently made by relevant states or territories be applied?
- How should repeated bail applications be managed? Should the legislation leave it to the discretion of the court or should the accused be required to show special or exceptional circumstances to seek bail once an application for bail has been refused?

In addition, as it was not envisaged that the Federal Court would hear indictable offences when the current court buildings were designed, significant changes will need to be made to court rooms to allow for jury trials to take place. Associated changes will also have to be made to existing staffing arrangements. New case-management systems will

Commonwealth matters are now far more frequently tried in the Supreme courts of New South Wales and Victoria than they once were.

have to be adopted to respond to the different demands that dealing with criminal defendants and juries will introduce to a court whose trial experience to date has been strictly civil.

Steps being taken by the Federal Court to address these difficulties

Since the cartel proposal was first seriously mooted, the Federal Court has been actively making arrangements to allow for as smooth a transition as possible. The court has established a Criminal Procedure Committee comprising a number of judges with criminal experience, which has met on a number of occasions since May 2006.

The committee was established to oversee the implementation of the criminal jurisdiction within the court, and to provide advice to those engaged in drafting the relevant provisions pertaining to the court. To this end, the committee has considered and provided comments to the Attorney-General's Department on the proposed legislation. It has also provided comments on related issues.

As I understand it, the court intends to develop new Rules of Court and procedures for the conduct of criminal proceedings. It also intends to promote further judicial education, acquire additional library and electronic resources, improve registry facilities and administrative arrangements, and implement changes to the court's electronic case management system.

The future of federal criminal jurisdiction – the United States experience

The conferral of indictable jurisdiction on the Federal Court in relation to cartel offences might potentially lead to an expansion of its criminal jurisdiction in other areas. Some examples readily suggest themselves. Tax fraud is a prime example. So too are the various Corporations Act offences.

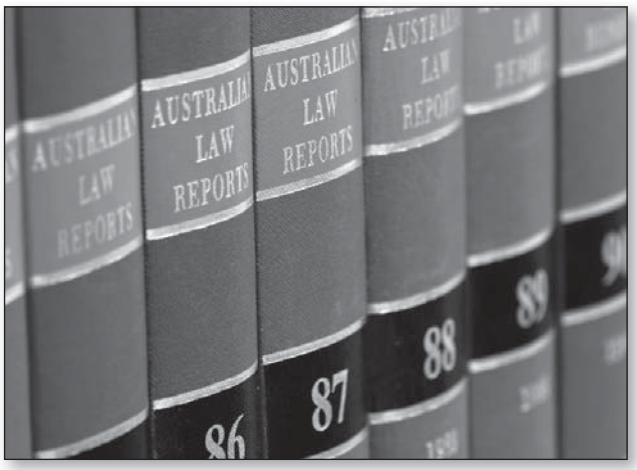
As matters stand, there is little prospect that the Federal Court will, in the short term, assume a major role in the conduct of federal criminal trials. The vast bulk of such trials involve either drugs or fraud upon the Commonwealth. These are routinely dealt with by state and territory courts, and there is not the slightest possibility that the Federal Court, as presently constituted, would have the capacity to take them on.

The position might be different in relation to crimes under Commonwealth law that have a particular national significance. I refer to terrorism, and crimes against humanity as just two examples.

If the Federal Court were, at some point in the future, to be given broader criminal jurisdiction beyond that of cartel offences, consideration would have to be given to problems associated with the duality of criminal courts. In that event, lessons could be drawn from the experience in the United States.

Just as in Australia, criminal offences in the United States exist under both federal and state law. Federal offences are tried in the federal district courts, and state offences in the state courts. Some criminal offences in the United States are exclusively federal, however, the vast majority are 'dual jurisdiction' crimes; in the sense that the same conduct can be characterised as criminal under both federal and state law.

As in Australia, the number of federal offences has been increasing rapidly in the United States. Congress has passed a number of federal laws that seemingly overlap with state laws, such as the *Anti-Car*



Theft Act 1992 and the *Child Support Recovery Act 1992*. It has also enacted new laws on arson, narcotics and dangerous drugs, guns, money laundering and reporting, domestic violence, environmental transgressions, career criminals and repeat offenders. As a result, the number of criminal prosecutions in federal courts increased by 15 per cent in 1998 alone.

Under what is known as the 'dual sovereignty doctrine', a crime under both federal and state law is not considered to be the same offence 'no matter how identical the conduct' is that those laws proscribe. This doctrine has long permitted the federal and state governments in the United States to initiate separate prosecutions in relation to what would otherwise be the same offence. The principle of double jeopardy does not apply in these circumstances.

The effect of the dual sovereignty principle is that an accused can receive two separate jail terms in state and federal prisons if convicted in both systems. However, the court in imposing sentence after the second of the two convictions, must take into consideration and give credit for the time served or being served by the accused in another system for the same underlying conduct. A famous example of the dual sovereignty principle is the Rodney King case, in which an African-American motorist was stopped and repeatedly bashed by Los Angeles Police officers after being chased for speeding. The assaults were filmed by a passer-by and broadcast to the world. Four police officers were acquitted of Mr King's assault in a California state court. However, two of them were subsequently convicted of violating his civil rights in a federal court in California.

There are often tensions between the state and federal systems as to which jurisdiction will prosecute an individual. There are also 'turf wars' between prosecutors. Generally, a defendant will only be prosecuted once even where the conduct offends both state and federal law. The decision as to whether the state and federal authorities both prosecute an offender, and, if there are to be both federal and state prosecutions, who goes first, is left to the discretion of the prosecutors. Ultimately, the decision turns on the nature and importance of the crime, the relative advantages and disadvantages of each forum (for instance, a state might have a particular rule that would allow certain evidence that might be inadmissible in a federal court), and the type of punishment available in the forum. Often, the better-resourced federal authorities

are able to bring their prosecutions in advance of, if not instead of, the states.

It seems that defendants generally fear federal prosecutions more than state prosecutions. Federal sentences tend to be significantly longer, though this is balanced by the fact that federal prisons are regarded as vastly better than their state equivalents.

It seems that defendants [in the United States] generally fear federal prosecutions more than state prosecutions. Federal sentences tend to be significantly longer, though this is balanced by the fact that federal prisons are regarded as vastly better than their state equivalents.

That said, enforcement of criminal laws has traditionally been a matter handled by the states. The increasing federalisation of the United States criminal justice system has been criticised. A former chief justice, William Rehnquist, said: 'Federal courts were not created to adjudicate local crimes … The trend to federalize crimes that traditionally have been handled in state courts not only is taxing the judiciary's resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system.'

However, the increasing federalisation of criminal law enforcement also has its supporters. Professor Rory Little, of the University of California, Hastings College of Law, argues that the trend protects against the incapacity of states to catch and prosecute all criminals. If the quality of justice is better in the federal courts, as it almost invariably is, 'then problems of crime cannot be ignored federally while state criminal justice slowly sinks and justice fails'.

Conclusion

As matters presently stand, the idea of establishing a separate federal criminal court system in Australia is simply not viable. There is, however, a case for conferring upon the Federal Court a limited indictable jurisdiction extending beyond cartel cases, and into other areas where that court has particular expertise. I include in that category tax fraud and serious offences under the Corporations Act.

If such a jurisdiction is conferred upon the court, it would make sense to make it concurrent rather than exclusive. That allows for the possibility of a joint trial of state and federal offences where that is appropriate. The Federal Court could not, as matters stand, conduct such a trial. I should add, however, that it would be unlikely, in the sorts of cases that I am discussing, that state charges would be brought in conjunction with federal charges.

The Australian Law Reform Commission in its recent report, *Same Crime, Same Time: Sentencing of Federal Offenders* (2006), recommended that the original jurisdiction of the Federal Court be expanded to hear and determine proceedings in relation to nominated federal offences where the subject matter of the offences was closely allied to the existing civil jurisdiction of the court. It also foreshadowed the possibility of an exclusively appellate jurisdiction for the Federal Court in relation to federal offenders. This would have the advantage of promoting greater consistency in sentencing practice, but it would create its own difficulties.

This ALRC report repays careful consideration. Its recommendations posit a modest retreat from the autochthonous expedient, but these are hardly revolutionary in scope.

It is always difficult to predict what governments may do in relation to matters involving the Commonwealth and the states. One thing, however, is certain. Federal criminal law will continue to grow. It will increasingly cover the same ground as state offences, as has already been demonstrated in relation to the field of drugs. It will also expand into areas that the founders of our Constitution never for one moment contemplated. Ultimately, there will be pressure upon the Commonwealth to develop its own court system to deal with federal crimes, just as there will be pressure, eventually, upon the Commonwealth to construct and manage its own prisons. In that regard, we will almost certainly emulate what the United States has long done. It will not happen soon, it may not happen in my lifetime, but happen it will.

The Court of Bosnia and Herzegovina

David Re, of Frederick Jordan Chambers, is one of 15 international judges on the Court of Bosnia and Herzegovina. He reports for *Bar News* on that court's war crimes jurisdiction.

Bosnia and Herzegovina (BiH), perhaps not unsurprisingly, has the world's largest and busiest war crimes court. In some respects the system is surprisingly similar to Australia's; in other ways it is markedly different.

But why Bosnia, of all the numerous other post-conflict societies? The best explanation probably relates to the massive international presence in the country after the war's end in 1995 and the overlapping role of the International Criminal Tribunal for the Former Yugoslavia in The Hague, The Netherlands (ICTY).

First though, a little historical context: a brief diversion into post-war (WWII) history, then a selective descriptive, not analytical, overview of the Court of BiH.

Yugoslavia before the war

The Socialist Federal Republic of Yugoslavia (SFRY) – formed at the end of World War II – had six constituent socialist republics: Serbia, Croatia, Bosnia and Herzegovina, Macedonia, Slovenia and Montenegro. The Serbian autonomous region of Kosovo had a 90 per cent Albanian majority. From 1945 onwards Josip Broz Tito held the various ethnicities and republics together. In 1963 he was proclaimed 'president for life', which he indeed was until his death in 1980. He is buried in a large mausoleum on a hill in Belgrade.

The break-up of Yugoslavia

The SFRY began to break apart in 1989/1990. In June 1991, Slovenia and Croatia declared their independence from the SFRY. Slovenia managed to secede after a brief ten-day war against the SFRY military; it is now the only former Yugoslav republic in the European Union. Macedonia seceded peacefully in September 1991.

Unlike the other republics, the situation in Bosnia and Herzegovina was complicated by its having three 'nationalities' or ethnic groupings; Bosnian Serbs (Orthodox), Bosnian Croats (Catholic) and Bosnian Muslims (now Bosniaks). The constitution of the former SFRY guaranteed the rights of the constituent 'nations'.

In 1991 the Federal Republic of Yugoslavia (FRY) and Croatia went to war over territory bordering the two countries in which mixed Serbian-Croatian populations lived. ... Military leaders from both sides have been tried in the ICTY in The Hague for war crimes committed in the Krajina region.

The Court of Bosnia and Herzegovina.

Unlike Macedonia and Slovenia with their distinct boundaries, languages and ethnicities, the Bosnian Serbs were mixed throughout the Republic of Bosnia and Herzegovina; no neat geographical boundaries could be drawn based upon nationality. To illustrate, the (self-declared) ethnic composition in 2000 was Bosniak 48 per cent, Serb 37.1 per cent, Croat 14.3 per cent, and 'other' 0.6 per cent.

In 1991 the Federal Republic of Yugoslavia (FRY) and Croatia went to war over territory bordering the two countries in which mixed Serbian-Croatian populations lived. The FRY took control of the territory known as the Krajina in 1991 and held it until Croatia retook it in a military operation known as 'Operation Storm' in 1995. Military leaders from both sides have been tried in the ICTY in The Hague for war crimes committed in the Krajina region. Notable events in the conflict between the FRY and Croatia included the siege of Dubrovnik in late 1991, resulting in the prolonged shelling of the UNESCO World Heritage listed old town of Dubrovnik, and the FRY army's siege of Vukovar, marked by the massacre of 200 prisoners who were taken from a hospital, and by the prolonged shelling which reduced the town to ruins.

In October 1991 the Parliament of the Socialist Republic of Bosnia and Herzegovina declared its sovereignty. In January 1992 Bosnian Serb leaders declared the formation of the Serb Republic of Bosnia and Herzegovina. The Bosnian presidency declared Bosnia's independence from the FRY in March 1992 after a referendum boycotted by the Bosnian Serbs. Its independence was recognised by the United States

and the European Community in April 1992. In May 1992, it was admitted to the United Nations.

In April 1992 war broke out between forces loyal to the Bosnian Government and the FRY army. The FRY army left Bosnia in May 1992 after a UN resolution called for its withdrawal. The Bosnian Serbs led by their President Radovan Karadzic formed their own army, the Bosnian Serb army (the VRS) using FRY army equipment, and laid siege to the capital Sarajevo until late 1995. The successive commanders in charge of the VRS Corp besieging Sarajevo were found guilty after trial by the ICTY of conducting a campaign of terror on the civilian population of Sarajevo in a sustained campaign of shelling and sniping of civilians and civilian property.

In 1992 Bosnian Croats in Herzegovina in an area bordering Croatia declared a break away Republic of Herzeg-Bosna with its own government and army (the HVO). Hostilities broke out between the HVO and the Bosnian Army (ABiH) in Central Bosnia and continued until the two sides brokered a cease-fire in January 1994.

In March 1994 the Bosnian Government and the Bosnian Croats signed an agreement to create a joint Bosniak-Croat Federation.

In November 1995 the warring parties initialed a peace agreement in Dayton Ohio to end the war. The president of Serbia, Slobodan Milosevic, represented the Bosnian Serb President, Radovan Karadzic, who by then had been jointly indicted in the ICTY with VRS commander General Ratko Mladic for genocide. The agreement was signed in Paris in December 1995.

The Dayton Peace Accords retained BiH's international boundaries. It recognised two 'entities' the borders of which coincided with the territory held by the two warring parties at the date of the cease-fire, namely, the Republika Srspka (called the Bosnian Serb Republic or RS) and the Bosniak-Croat Federation. The two entities are roughly equal in size – the RS wraps around the federation. A third northern 'district' not attached to either entity, Brcko has a population around 100,000.

One result of the population displacements during the war is that the ethnic composition of Sarajevo has increased from being about 60 per cent Bosniak before the war to 90 per cent Bosniak today. The International Commission for Missing Persons estimates that some 13,500 people are still unaccounted for some 13 years after the war´s end. Mass graves are regularly being discovered and exhumed.

Dayton created a weak but multi-ethnic state level government charged with conducting foreign, diplomatic, and fiscal policy.

The federation and RS governments were given responsibility for most government functions. The Office of the High Representative (OHR) was established to oversee the implementation of the civilian aspects of the agreement. The deputy HR administers Brcko. The former British Liberal Democrats leader, Lord Paddy Ashdown, was the HR between 2002 and 2006. The current HR is a Slovakian diplomat, Miroslav Lacjak.

The OHR has wide-ranging powers to implement the Dayton Peace Agreement. These powers have been used to dismiss elected and government officials, including police and military members alleged to have been involved in committing war crimes, and merging the two armies into a national Bosnian military.

The old Bridge in Moster, Bosnia
Photo: iStockPhoto.com

The country – with an estimated population of maybe 4.5 million – and a size of 51,000 sq km (bordering Croatia, Serbia and Montenegro and with a 20 km long coast line) also has 13 cantonal governments, each with their own prime ministers and full complement of ministries and responsibilities.

A NATO led peacekeeping force of 60,000 soldiers served in Bosnia after the war to implement and monitor the military aspects of the peace agreement. An EU peacekeeping mission replaced the NATO led mission in 2004, and from October 2007, the EU mission changed to civil policing, with about 2,500 members of the mission.

The language spoken in Serbia, Croatia and Bosnia, until the war, was known as Serbo-Croat. In Serbia it is now known as Serbian; in Croatia as Croatian. Bosnia has three official languages, Serbian, Croatian and Bosnian. The ICTY calls the language 'BCS' (for Bosnian, Croatian, Serbian). The Court of BiH calls it BHS (or Bosanski, Hrvatski, Srspki).

The Court of BiH

The Bosnian national or state-level institutions are far weaker than those of federal systems such as Australia's. Bosnia has one national court but no Supreme Court. The entities and the state each have their own Constitutional Court. Six judges of the Constitutional Court of Bosnia and Herzegovina are appointed by the entity parliaments and three judges are appointed by the president of the European Court.

The Constitution of BiH is actually an annex (4) to the Dayton Accords. Issues relating to its interpretation and implementation are decided by the Constitutional Court of BiH. As a signatory to the European Convention on Rights and Freedoms and a member of the Council of Europe, appeals may be taken from decisions of the Constitutional Court of BiH to the European Court in Strasbourg.

The Court of Bosnia and Herzegovina is the only national court. It was established in 2002 as the first national court for the State of Bosnia and

Herzegovina. The high representative promulgated a decree in 2000 for its establishment. The national parliament then passed legislation establishing the court.

As a permanent national court it differs significantly from the ICTY in The Hague, although it could theoretically try any Bosnian case heard in The Hague. The ICTY is an ad hoc tribunal with a limited existence and jurisdiction to try serious violations of international humanitarian law committed in the former Yugoslavia since 1991. The ICTY referred six cases to the court under Rule 11 bis of the ICTY's Rules of Procedure and Evidence. The conduct of the cases was monitored by the OSCE.

Between 1996 and 2004 the Office of the Prosecutor at the ICTY referred approximately 550 cases to Bosnian prosecuting authorities under a process known as 'Rules of the Road' in which the ICTY advised on the sufficiency of evidence for prosecution before Bosnian authorities laid charges in Bosnian courts. At the conclusion of the programme in November 2004, the remaining cases were transferred to the Prosecutor's Office of BiH.

The court is divided into a criminal division comprised of a war crimes section, an organised and economic crimes section and a general crimes section, an administrative division and an appellate division.

The war crimes section can try cases of war crimes committed anywhere in Bosnia. The court has 43 national judges and 15 international judges. Proceedings of the war crimes section are simultaneously translated into English and BCS; the international judges and prosecutors may use English.

The international judges sit in the war crimes section, the organised crime section and the appellate division. Three judge panels hear war crimes and organised crime cases. Until recently the panels were comprised of two international judges and one national judge with the national judge presiding. Now one international judge sits with two national judges.

Judges and prosecutors are appointed by the High Judicial and Prosecutor Council after a competitive and transparent advertised selection process. National judges must have at least eight years of experience as judges, prosecutors, attorneys or other relevant legal post bar-exam experience, and are appointed for life (i.e., 70 years of age).

The president of the court is appointed by the High Judicial and Prosecutorial Council for a six year renewable appointment. The president represents the court, assigns judges to divisions, appoints replacement judges in cases of disqualifications, schedules plenum sessions of the court and manages the staff of the court.

International judges and international prosecutors are now appointed after an interview.

The crimes - war crimes jurisdiction

The court has jurisdiction to hear war crimes including genocide, crimes against humanity, and war crimes committed against the civilian population. Specific breaches of international humanitarian law taken from treaty and customary international law are also prescribed in the Criminal Code.

Cantonal courts in the entities have concurrent jurisdiction to hear similar cases, but the Court of BiH has primacy in that it may take over a case pending before another court or prosecutor´s office. The adoption of a national war crimes strategy is currently under discussion.

The court rendered its first instance (trial) war crimes verdict in July 2005 and by the end of October 2008 had rendered another 35. Since the first appeal decision in November 2005 it has rendered 22 war crimes second instance (appeal) verdicts.

Chapter 17 of the Criminal Code of BiH, 'Crimes Against Humanity and Values Protected by International Law', contains a very thorough prescription of breaches of international humanitarian law, human rights and other international treaties.

As a permanent national court it differs significantly from the ICTY in The Hague, although it could theoretically try any Bosnian case heard in The Hague.

Article 171 prohibits genocide as enunciated in the 1948 Genocide Convention. Article 172 prohibits crimes against humanity committed against a civilian population as part of a widespread and systematic attack directed against any civilian population. The listed crimes include extermination, enslavement, deportation or forcible transfer, torture, imprisonment in violation of the fundamental rules of international law, rape, persecution, inhumane acts and enforced disappearance.

The definition mirrors Article 8 of the Rome Statute of the International Criminal Court, in requiring that the attack be 'pursuant to or in furtherance of a state or organisational policy to commit such attack'. This differs from Articles of the ICTY Statute and Article 3 of the ICTR Statute, neither of which require this.

Articles 173, 174 and 175 prohibit war crimes against civilians, the sick and wounded and prisoners of war, mirroring provisions in the Geneva Conventions of 1949.

The penalty for committing any of these offences is between a minimum of 10 years and 'long term imprisonment' (20 to 45 years). The same penalty applies for organising a group to commit any of these offences.

Other offences within the court's jurisdiction in Chapter 17 include:

- unlawful killing or wounding of the enemy;
- marauding the killed and wounded on the battlefield;
- violating the laws and practices of war;
- violating the rights granted to bearers of flags of truce;

- unjustified delays in the repatriation of prisoners of war;
- destruction of cultural, historical and religious monuments;
- misuse of international emblems;
- slavery, trafficking in persons;
- international procuring of prostitution;
- unlawful withholding of identity papers;
- people smuggling;
- torture and other cruel, inhuman or degrading treatment;
- taking of hostages;
- endangering internationally protected persons;
- illicit trafficking in arms and military equipment;
- unauthorised trafficking in chemicals;
- illicit procurement and disposal of nuclear material;
- narcotics trafficking;
- piracy;
- hijacking; and
- 'terrorism'.

The differences between these prohibitions and those in the more familiar Crimes Acts in Australia are obvious.

Panel

A single judge presides in offences carrying a penalty of up to ten years; otherwise a panel of three judges hears cases in the first instance. Appeals are to a panel of three judges of the appellate division in the second instance with further appeals in defined circumstances to a third instance panel.

Human rights guarantees

The Criminal Procedure Code contains legislative human rights guarantees such as:

- the principle of legality;
- the right to a paid lawyer (in stipulated cases);
- the right to quick and fair trial;
- the right to impartial trial;
- the right to adequate time and place for preparation of defence;
- equality of arms;
- the right to cross-examine witnesses; and
- presumption of innocence.

These rights accord with Bosnia's obligation under the ECHR and other international instruments. The Constitutional Court has determined only one appeal from an appellate decision of the Court of BiH. One issue was legality under Article 7 of the European Convention and whether the Criminal Code in force in 1993 prescribed a lesser penalty than the 2003 Code under which the accused was convicted. The Constitutional Court held that the accused had been validly convicted and sentenced under the later code.

Bullet holes in a house in Sarajevo. Photo: iStockphoto.com

The procedures

In 2003 a new Criminal Procedure Code was introduced. A major feature of the code is the introduction of adversarial procedures in trials, in a move away from the inquisitorial system used in the former Yugoslavia and in other courts in Bosnia. The 2003 Code applies only in the Court of BiH while the two entities and Brcko have their own (near identical) criminal codes. Harmonisation of the criminal law and courts within Bosnia is an ongoing debate and is the subject of active discussion with the European Union in accession negotiations.

The investigative and preliminary trial process differs from that in Australia. One major difference is the exercise of prosecutorial discretion in Australia. The Bosnian state prosecutor, however, is obliged to file an indictment if, during an investigation, he or she finds that enough evidence for a grounded suspicion that an offence has been committed exists.

As in Australia, the questioning of suspects is strictly regulated by the Criminal Procedure Code, including the exclusion of records not conducted in accordance with those provisions.

The procedure after investigation mixes the common law and civil law processes. The indictment and supporting evidence go to the preliminary hearing judge who decides, within eight days of receiving it, to confirm or discharge all or some of the counts in the indictment. Upon a discharge the prosecutor may then bring a new or amended indictment.

Upon confirmation of an indictment the suspect becomes an accused and has 15 days to plead guilty or not guilty. The preliminary hearing judge then refers the case to the trial judge or panel. The trial must commence within 60 days of the referral, or, in exceptional cases, it may be extended by another 30 days.

The court must sentence the accused within three days of receiving a guilty plea.

The preliminary hearing judge also decides upon 'prohibiting measures' (i.e., bail) which may include house arrest, travel bans, restrictions

upon movement and deposits and sureties. Pre-trial custody may only be ordered in specified circumstances. A person taken into custody may appeal within 24 hours. The preliminary proceedings judge may impose custody for one month, after which the trial panel of three judges, on the prosecutor's request, may extend it at two month intervals.

Apart from the introduction of the concept of a 'guilty plea', another new feature of the Criminal Procedure Code is the introduction of legislative 'plea bargaining'. This allows the prosecution and defence to negotiate the conditions for admitting guilt by which the prosecutor may propose a sentence less than the minimum prescribed. The agreement must be in writing and the court may accept or reject the agreement. No appeal is allowed from a verdict under a plea agreement.

A practice has developed, similar to that in the ICTY, of the plea agreement containing a recommended sentencing range, of say, 5 to 10 years in a case in which a minimum sentence of 10 years is prescribed. 'Plea bargaining' as defined is probably closer to 'charge bargaining' in that negotiations between the parties allow the prosecutor to file an amended indictment to a lesser charge with the agreement of the accused.

Trials are public but the public may be excluded if the court decides – after hearing the parties – that closed session is necessary to preserve national security, official secrets, public peace, the personal life of an accused or the interest of a minor or witness.

Because of the nature of much of the work of the court in hearing testimony from victims of war crimes, it may order closed session testimony to protect from public disclosure the identity of a witness determined to be under threat and vulnerable. A major difference with Australian criminal procedure is that the court may hear, in strictly defined circumstances, a witness whose identity is concealed from the accused and defence counsel. The court, however, may not base a conviction 'solely or to a decisive effect on evidence provided through such a witness'.

Evidence at trial is taken in a manner similar to common law proceedings, namely, prosecution followed by defence. Several differences exist though, in that the code then goes on to list: prosecution rebuttal; defence rejoinder; and evidence ordered by the court. The court may, in the interests of justice, change this order. It may also hear witnesses it has determined are 'under threat and vulnerable' out of the prescribed order.

Inevitable overlap will exist between cases determined to finality by the ICTY and co-accused or others charged with complicity in the same offence at the Court of BiH. Recognising this, another unique feature of the Bosnian criminal process is a special law allowing the court to accept as established facts (as evidence against an accused), facts proven in ICTY judgments. The court may also admit ICTY documentary evidence. It may receive testimony given in ICTY hearings and allow an accused to cross-examine such a witness.

Public policy reasons exist for this procedure. These include the significant time lapses between the events in question and the court proceedings, the traumatic nature of the crimes charged and reducing the possibility of witnesses having to testify in multiple proceedings. It also recognises that some matters requiring proof - and not going to the direct acts or conduct of an accused - may have already been established in other proceedings. An example could be the background evidence necessary to satisfy the chapeau elements of a crime against humanity.

The court cannot, however, base a conviction 'solely or to a decisive effect on the prior statements of witnesses who did not give oral evidence at trial'.

At trial or in a sentencing hearing, witnesses are examined in a similar order to common law proceeding of direct examination (examination in chief), cross-examination and additional examination. Cross-examination is far more restrictive than in the common law.

The accused, however, has a much greater participation in the main trial than in common law proceedings and sits at the bar table next to defence counsel and is permitted to ask his or her questions of witnesses (after defence counsel) and to make submissions and statements. At the close of the case the prosecutor, defence counsel and accused make their closing arguments with the last word always reserved for the accused.

An oral verdict must be rendered within three days of the close of a trial. The reasoned written verdict, which must follow the oral verdict, must be delivered within 15 days, or 30 days in complicated matters.

Criminal intention

Some differences exist between the Australian formulation of mens rea and that in Bosnia. The Criminal Code has an equivalent provision to the common law 'honest and reasonable mistake of fact', but extends the common law defence to provide that 'a person is not criminally responsible if at the time of the perpetration of a criminal offence he or she was not aware of one of its elements defined by law'.

A provision without Australian legislative equivalent, entitled 'mistake of law' provides 'that a perpetrator of a criminal offence, who had

justifiable reason for not knowing that his conduct was prohibited, may be released from punishment'. The offender may be found guilty but released from punishment.

Punishment

Imprisonment may not be shorter than one month or longer than 20 years unless 'long term imprisonment' is prescribed.

Article 42 (2) Criminal Code provides: 'For the gravest forms of serious criminal offences perpetrated with intent, imprisonment for a term of twenty to forty-five years may be exceptionally prescribed (long-term imprisonment).'

A prisoner may be released on parole after serving half of his or her sentence, or in exceptional circumstances, after serving a third.

The objectives of punishment are set out in the Criminal Code. These include mitigating and aggravating circumstances but listing in particular: the degree of criminal liability, the motives for perpetrating the offence, the degree of danger or injury to the protected object, the circumstances in which the offence was perpetrated, the past conduct of the perpetrator, his or her personal situation and conduct after the perpetration of the criminal offence, as well as other circumstances related to the personality of the perpetrator.

In 'highly extenuating circumstances' the court may reduce a sentence to five years where a minimum of ten or more years is prescribed, from three to one, from two years to six months and from one year to three months.

The State of Bosnia, like the federal government in Australia, has no prison facility of its own. Sentenced prisoners must serve their sentences in the entity prisons. This situation has been unsatisfactory for a number of reasons.

The need for a state level prison was shown by the case of Radovan Stankovic, the first accused transferred from the ICTY under Rule 11 bis. On appeal in March 2007 he received 20 years for enslavement, torture, imprisonment and rape as committing crimes against humanity. He was transferred to serve his sentence in a prison in the Republika Srspka, in Foca, the location of his crimes. He escaped in May 2007.

Rehabilitation and deletion of criminal records

The Criminal Code also contains provisions designed to assist rehabilitation. One, without mirror in New South Wales, is the deletion of sentences from criminal records within a relatively short period of time.

The court, on appeal by a convicted person, may delete a sentence of between one and three years from an offender's criminal record if five years from the date of release the offender has not perpetrated new criminal offences. If a person has been 'released from punishment' the court may delete the offence from the criminal record a year later, so long as he or she has committed no criminal offence.

Appeal

The parties have 15 days to appeal the verdict.

An appeal lies by either the prosecution or accused to the appellate division. Unlike in Australia and common law jurisdictions the appeal from a three judge panel is to another three judge panel which decides both the appeal and conducts any retrial itself. Limited appeals lie to the Constitutional Court of Bosnia and Herzegovina, and potentially, to the European Court.

A major difference between the Bosnian and the common law systems – common to civil law systems – is the absence of a doctrine of precedent. Appellate decisions are binding only in the proceedings subject to appeal.

The grounds for appeal are thoroughly listed and, in summary, are (a) an essential violation of the provisions of criminal procedure; (b) a violation of the Criminal Code; (c) the state of facts being erroneously or incompletely established; (d) errors relating to sanctions, costs, criminal forfeiture and property claims.

The role of the appellate panel differs from, say, that of the Court of Criminal Appeal in New South Wales. The second instance appellate panel may revise the first instance judgement (in effect to correct it), or may revoke the decision and conduct a retrial itself. Or it may revoke parts of the verdict and hold a limited retrial. The procedure is analogous to an appeal de novo, but only after first revoking the original verdict.

A retrial is held by examining the first instance trial record and receiving it into evidence, but the procedures of the main trial apply. The court cannot modify a verdict to the detriment of an accused in the absence of a prosecution appeal.

An appeal against an appellate second instance verdict to a 'panel in the third instance composed of three judges' is permitted where the second instance panel has reversed a first instance trial acquittal.

Another feature differing from the common law traditions, and those applied in international criminal courts and tribunals such as the ICTY, ICTR, ICC and the Special Court for Sierra Leone is whether dissenting judgments can be published. The Criminal Procedure Code contains no explicit provision allowing a judge in a minority to publish his or her reasoned dissent and a legal debate exists as to whether it is possible to do so under the current provisions without infringing the secrecy of the panel deliberations.

A major difference with Australian criminal procedure is that the court may hear, in strictly defined circumstances, a witness whose identity is concealed from the accused and defence counsel. The court, however, may not base a conviction 'solely or to a decisive effect on evidence provided through such a witness'.

The future

Bosnia is poor – the GDP per head of population in 2007 was only an estimated US $6,700. Numerous problems remain in developing permanent functioning state institutions. Transparency International's 2007 report rated Bosnia in equal 84th position in its corruption perception index.

Another feature differing from the common law traditions, and those applied in international criminal courts and tribunals such as the ICTY, ICTR, ICC and the Special Court for Sierra Leone is whether dissenting judgments can be published.

Approximately 45 million euros of international donor money has flowed into the court and Bosnian justice sector since 2002. The major donors are the United States, the European Union and individual member states. The Court is located in a former Bosnian army military barracks in Sarajevo, situated near the front-line in the war, and it suffered heavy damage in the war. A primary task was to reconstruct and renovate the premises: the UNDP and the EU jointly financed the rebuilding. Japan contributed to building several high technology courtrooms. The government of Belgium donated the fixtures in the high-security courtroom. Countries including Japan, Canada and the United States have provided technical assistance including educational and training programme.

Australia is yet to provide any such assistance to the court. In October 2008 the first Australian parliamentary delegation to visit Bosnia, led by the president of the Senate, Senator John Hogg, visited the court. The president of the court presented to the delegation a proposal seeking Australian technical assistance in financing Bosnian court lawyers to travel to Australia for several months to work in New South Wales legal institutions such as the Legal Aid Commission of New South Wales and the Office of the Director of Public Prosecutions. Another part of the proposal is for judges to observe the work of the New South Wales Supreme and District courts for four to six weeks. The proposal – including nine judges and lawyers – is costed at approximately $205,000 for a year.

The international presence on the court - judges and prosecutors - may end at beginning of 2010. As in any country experiencing its transitional post-conflict phase, developing all state and justice institutions to acceptable international standards will take some time.

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BN11/08

Rediscovering rhetoric[1]

The Hon JJ Spigelman AC delivered the following address at the launch of *Rediscovering Rhetoric,* in the Banco Court on 14 November 2008.

For several centuries the Inns of Court were called 'The Third University' on the basis that they were as significant a centre of learning as Oxford and Cambridge. Although the centrality and quality of that function declined after the civil war, it never disappeared. This was not, however, one of the functions of the Inns which their epigoni in the Australian bar associations chose to imitate.

This has changed over recent years, most notably in the intensity and quality of the Readers' Courses organised by the New South Wales Bar Association. However, the series of lectures on rhetoric, which are now published, is, so far as I am aware, the most innovative and intellectually challenging education project that the New South Wales Bar Association has ever attempted.

I congratulate Michael Slattery SC for instigating the project and Justin Gleeson SC and Ruth Higgins for both organising a series of the highest intellectual quality and producing this book as a permanent record.

One of the most distinctive characteristics of contemporary legal practice is the degree of specialisation in legal practice. It is at the heart of the continued virility, indeed the continued existence, of a separate and independent bar that advocacy should be understood to be a form of specialisation.

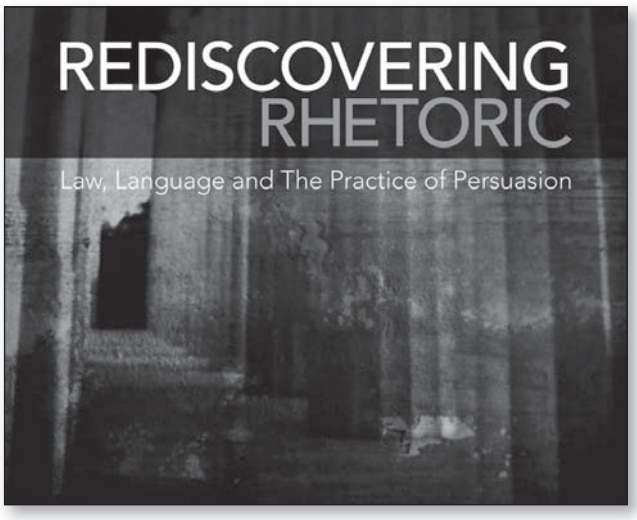
The great classical tradition of learning on the subject of rhetoric, as a distinct body of knowledge and technique, is a powerful affirmation of the existence of such a specialisation. For that reason, the whole bar is indebted to the organisers of this project.

The first part of the book contains papers of great learning about the classical tradition. This part expanded my knowledge to a significant degree. Rhetoric was a subject upon which I collected one or two books over the years but, save for dipping into Cicero both in his collected works and biography, this was a field into which I never had the time to delve in depth.

I am very grateful to the authors of these chapters for making their learning available. I am particularly grateful to the editors for inviting me to launch this book so that I actually had to set aside the time to do the reading. My speaking engagements are not always as fruitful as this.

Part two of the book focuses on the practice of advocacy at the bar. Michael McHugh mourns the passing of a golden age, whereas Michael Kirby, as is his wont, finds the promised land still ahead of us. Between them, these two great products of the New South Wales Bar, tell us much about where we came from and illuminate the issues ahead of us. Dyson Heydon, who never takes any shortcuts, is thorough and insightful in the manner to which we have all become accustomed. There is much practical wisdom in his chapter, which any barrister can read to advantage.

The declining role of orality in legal advocacy has been identified, notably by the late Bryan Beaumont and by Arthur Emmett.[2] Contemporary case management practices have considerably expanded the extent to which evidence and submissions are in written form. This was originally designed to save time and therefore costs. As the preparation of statements has become more refined, and written submissions have become more elaborate, I doubt that there is any cost saving today.



There is no doubt that the ability to test propositions in face to face debate improves the quality of the decision-making process. There are very real costs in the decline of orality.

The change of practice in this respect, particularly the greater involvement of judges in procedural matters and in testing submissions on substantive law, are manifestations of a process of convergence between common law and civil law systems. Just as common law systems have adopted what might be regarded as investigatory elements, so civil law systems have adopted adversarial elements. Nevertheless, a significant difference of emphasis exists between the two.

At the heart of this difference, reflecting many centuries of political and legal development, lies a fundamental difference of approach to the relationship between a citizen and the state. Our institutional tradition in this respect is deeply rooted in our social history and which, for over two centuries, has been reflected in the distinctive role of advocacy in an adversarial trial.

In our tradition, each autonomous individual is permitted a considerable degree of control over the judicial decision-making process that affects their lives, in a manner which is in no sense subordinate to the representatives of the state. Not only does this inform every aspect of our procedure, it is reflected in the very physical structure of our courtrooms.

By contrast, in civil law nations, the tradition of the architecture of a courtroom has been distinctly different. The prosecutor in a criminal trial, who is part of the same career structure as the judge, often entered the courtroom from the same door as the judge and wore the same kind of robes. In the courtroom itself the prosecutor was not located on a basis of equality with the advocate for the accused, but sat on an elevated platform in a distinct part of the court rather than, as in our tradition, at the same bar table as the accused's counsel. This is changing as part of the convergence to which I have referred.

There is a long standing debate about the virtues of the two systems in terms of which is best designed to reveal the truth. This is not a matter about which I can elaborate on this occasion. There is very real issue

as to whether truth best emerges by a process of Socratic dialogue, on the one hand, or by inquiry expressly directed to ascertaining the truth, on the other hand. Absolute truth is not the only value to be served by the administration of justice. Procedural truth has its own value. That is where advocacy performs a critical social function.

A contemporary philosopher, the late Stuart Hampshire, to whom Gleeson and Higgins refer, has placed the value of fairness in procedure at the heart of his political philosophy. Hampshire was no stranger to the frustrations of advocacy, particularly that sense of dejection one has upon thinking of one's best point after the case is over. Hampshire worked in intelligence during the war and, many years later, came to regret that he had never shared with anyone the view he frequently expressed to himself in the privacy of his own room at Bletchley Park: 'There is something the matter with that chap Philby'.

Hampshire adopted a dictum of Heracleitus that 'justice is conflict'. He said:

> 'Fairness and justice in procedures are the only virtues that can reasonably be considered as setting norms to be universally respected.'

And:

> '… no procedure is considered fair and just, anywhere and at any time, unless the particular procedure employed is chosen to be, or to become, the regular one … Human beings are habituated to recognise the rules and conventions of the institutions within which they have been brought up, including the conventions of their family life. Institutions are needed as settings for just procedures of conflict resolution, and institutions are formed by recognised customs and habits, which harden into specific rules of procedure within the various institutions – law courts, parliaments, councils, political parties and others.'[3]

Advocacy lies at the heart of this institutional contribution. This was what the classic rhetoric scholars understood. It is no less significant today.

The third part of the book focuses on political rhetoric. It contains an insightful contribution by Graham Freudenberg, my old comrade, as E G Whitlam used to call us – and still does.

This is in many respects the most topical part of the book because of the election last week of Barack Obama as President of the United States of America. The chapter entitled 'The Political Rhetoric of American Aspiration' by Susan Thomas correctly assesses the rhetorical skills of President-elect Obama in terms of the transformative possibility of his oratory. That prospect has now come to pass.

The author highlights the contrast between Abraham Lincoln's address at Gettysburg, and the florid official orator on that occasion, whose words are lost to memory. The 272 words of the Gettysburg Address have appropriately been described by Garry Wills as 'the words that remade America'[4]. The chapter assesses the eloquence of Obama's announcement of his candidacy in Abraham Lincoln's home town of Springfield, Illinois.

The speeches in this volume were delivered in the period up to October 2007. Later, in March 2008, Barack Obama had to deliver a speech on the subject of race, in the immediate wake of the revelations of some potentially devastating comments by Reverend Jeremiah Wright, Obama's preacher at his Church. No doubt, in confronting the race issue directly, Obama drew on John F Kennedy's address to a conference of Protestant ministers during the 1960 campaign, in which there was a widespread belief that the American people would never vote for a Catholic. There is an even more telling comparison.

Garry Wills has published a detailed analysis comparing Obama's speech on race to Lincoln's address at the Cooper Union[5], when Lincoln also had to face the explosive issue of race and to confront a charge of extremism.

Obama and Lincoln both had limited political experience: briefly in the Illinois legislature and then, two years in the House of Representatives for Lincoln, and four years in the Senate for Obama. In each case the leading candidate for their party's nomination was a Senator from New York of greater reputation and experience. Each had taken a stand against what had been initially a very popular war: in Lincoln's case, the invasion of Mexico on the false pretext that American territory had been attacked; in Obama's case, the invasion of Iraq on the false pretext that that nation was accumulating weapons of mass destruction. It was the way in which they faced their greatest challenge – the charge of being soft on extremism – that created the foundation for their success. In each case, oratory was how that was done.

Lincoln spoke in the wake of the execution of the radical abolitionist, John Brown, who had attempted to incite a slave rebellion. Lincoln successfully distanced himself from the radical abolitionist, without expressly rejecting all his opinions.

The speech at Cooper Union was widely reprinted and led the powerful editor of the *New York Tribune* to say:

> 'Mr Lincoln is one of nature's orators, using his rare power solely and effectively to elucidate and to convince, though the inevitable effect is to delight and to electrify as well.'[6]

These words could equally have been written about Obama's speech on race in March of this year. He effectively, and eloquently, distanced himself from Reverend Wright's ravings and, like Lincoln in the wake of the Cooper Union speech comments about John Brown, Obama was accused of not sufficiently distancing himself from his preacher. Later he had to, but on this occasion his refusal to completely disown the man, who had been so influential in his life, displayed a strength of character and of conviction.

It was a supporter of John Brown, Ralph Waldo Emerson, who, a century and a half ago, had divided the political landscape into the Party of Memory and the Party of Hope. From the title of his autobiography – 'The Audacity of Hope' – and throughout his campaign, hope was a central theme of Obama's rhetoric, down to the victory speech that moved so many of us last week.

Many commentators have emphasised the extraordinary rhetorical capacity of President-elect Obama and his power to persuade: his cadences, his rhythm, his conversational tone, the subliminal

implications of his repetitions – hope, change, something happening – and the invocation of the words of the founders and of Lincoln. The rhetorical techniques of logos, pathos and ethos – invoking logic, appealing to emotion and relying on personal credibility – are all on full display. The contrast with eight years of malapropisms from George W Bush is clear.

America's cottage industry of advice on how to become a leader has already produced a volume entitled Say it Like Obama. Obama's inauguration speech promises to be a classic. For those of us who regard politics as a spectator sport, we have had a wonderful two years, with more to come. Political oratory is back.

I conclude on a less contemporary note. The Australian contribution to international rhetoric is not as well regarded as our contribution to world sport. However, in terms of the power of conveying information and, on many occasions, of persuasion, perhaps the most significant contribution Australians have made over recent decades is in the form of the tabloid headline. Primarily because of the expansion of the News Corporation internationally, but not only because of that, Australian sub-editors have made a disproportionate contribution to the punch of tabloid newspapers, particularly in London and New York.

In international politics, we have seen this skill on full display in phrases like 'war on terrorism' or 'axis of evil' or 'mission accomplished'.

Let me share with you my favourite set of newspaper headlines which appeared in *Le Moniteur Universel,* the principal French newspaper during the French Revolution and for many years thereafter. It was virtually the official journal of the French government, including during Napoleon's rule.

During the 100 days – the Cent-jours – between Napoleon's escape from Elba and the restoration of the Bourbons, *Le Moniteur* remained loyal to the government. On the day of his escape *Le Moniteur* led with the following headline, as compiled by John Julius Norwich:[7]

'The Cannibal has left his Lair.'

Thereafter there appeared the following sequence:

'The Corsican Ogre has just landed at the Juan Gulf.'

'The Tiger has arrived at Gap.'

'The Monster slept at Grenoble.'

'The Tyrant has crossed Lyons.'

'The Usurper was seen 60 leagues from the Capital.'

'Bonaparte has advanced with great strides – But he will never enter Paris.'

'Tomorrow, Napoleon will be under our ramparts.'

And then:

'The Emperor has arrived at Fontainbleau.'

And finally:

'His Imperial Royal Majesty entered his palace at the Tuileries last night in the midst of his faithful subjects.'

Perhaps the most important aspect of all advocacy is the ability to adapt to changing circumstances. Le Moniteur is an example to us all.

I conclude with the last sentence of Aristotle's Rhetoric:

> 'I have spoken, you have listened, you have (the facts), you judge.'[8]

I have much pleasure in launching this excellent book.

Endnotes

1. Justin T Gleeson and Ruth C A Higgins (eds) *Rediscovering Rhetoric: Law, Language, and the Practice of Persuasion* Federation Press, Sydney, 2008.
2. See Bryan Beaumont 'Written and Oral Procedures: The Common Law Experience' (2001) 21 *Australian Bar Review* 275; Arthur R Emmett 'Towards the Civil Law?: The Loss of 'Orality' in Civil Litigation in Australia'' (2003) 26 *University of New South Wales Law Journal* 447.
3. Stuart Hampshire *Justice is Conflict* Princeton University Press, Princeton NJ, 2000 at 53-54.
4. See Garry Wills *Lincoln at Gettysburg: The Words that Remade America* Simon & Shuster, New York, 1992.
5. Garry Wills 'Two Speeches on Race' *The New York Review of Books* Vol LV May 1 2008 at 4.
6. David Donald *Lincoln* Jonathan Cape, London, 1995 at 239-240.
7. See John Julius Norwich *Still More Christmas Crackers* Viking, London, 2000 at 329.
8. George Kennedy (ed) *Aristotle on Rhetoric: A Theory of Civic Discourse* Oxford University Press, Oxford, 1991 at 282.

The current state of the profession

On 18 September 2008 the Hon Justice Ruth McColl AO[1] delivered the following address to the New South Wales Young Lawyers

The title to this address, 'The Current State of the Profession', conceals more than it reveals. It assumes the 'state' of the profession is susceptible to general exposition. That, assuming that to be so, there is a 'current' state fixed in time, as it may be in an episode of *Dr Who*, readily susceptible to that exposition. And last, but I am sure by no means least, that the 'current state of the profession' can be understood in isolation from the past.

The NSW Young Lawyers' Civil Litigation Committee will no doubt be relieved to know that I made the first assumption. I am not about to act as if this were an application for leave to appeal, say there is no arguable point and let's get onto the drinks and canapés!

I am also prepared to approach the topic on the basis that 'current' is not confined to the 18 September 2008, but refers to a band of time, primarily but not limited to 2008.

Next, because, in my view, you cannot understand the present without understanding the past I have chosen a point with which to compare that 'current state', a matter to which I will return.

Finally, and in the interests of full disclosure, it is best to acknowledge that topic necessarily lends itself to subjective treatment. No doubt there are a myriad of issues which could be shoe-horned into the topic. The ones I have chosen strike me as matters of significance to your generation.

So this is what I am going to talk about by reference to those issues:

- Contextualising the profession.
- Then and now: where has it come from?
- Where is it at?
- And, doing some crystal - ball gazing, where is it going?

Contextualising the profession

Members of the legal profession operate at the coalface of the most important aspect of society: the rule of law, the concept that 'all authority is subject to, and constrained by, law',[2] or, as it has also been described, 'the supremacy of law, over naked power and unbridled discretion'.[3] As Sir Gerard Brennan said when chief justice of Australia:

'Lawyers are the engineers who operate the legal machinery that maintains social relationships and orders social activity.'[4]

It is the role of members of the legal profession to ensure that their clients' rights are exercised in a manner consistent with core principles of the rule of law. Now is not the time to elaborate on the discharge of that function. It is the time, however, to recall that the professional rules which govern members of the legal profession are designed to ensure those who operate within the legal system recognise they owe 'their paramount duty to the administration of justice'[5] which in itself is at the heart of the rule of law.[6]

Sometimes adherence to these principles means you may have to do something your client may not readily comprehend. A simple example is having to explain to a client why a document which appears to, or does, strike at the heart of their case has to be discovered. Another is the advocate's obligation not to allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless, inter alia, the advocate believes on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it. [7]

I appreciate that these concepts may seem remote for some young lawyers who may have just emerged from, or possibly are still immersed in, that part of your legal career which involves the preparation of vast lists of documents for discovery or other apparently mindless tasks, but keeping this core principle in view will help, in my view, provide the framework for all you do as a member of the legal profession.

The key point to absorb is that the legal profession works within a continuum. Everything you do, particularly in the litigious context, has immediate relevance to the parties, and, for example in the criminal context to the community. But the outcome may also have wider ramifications. Did Ms Donoghue, or her legal representatives, ever contemplate that a case brought to recover damages for injuries she suffered as a result of consuming part of the contents of a bottle of ginger-beer which contained the decomposed remains of a snail, would transform the law of tort? I think not!

The evolution of the current legal profession

As I said, a question about the 'current state' of something needs a comparator.

A comparator should provide a reasonably sharp contrast between the past and the present. The comparator I have selected is 1981. There were good reasons for that selection, necessarily inter-twined.

1981 was the year I decided to stand for election to the Bar Council. It was my second year at the bar. I made that decision because it was tolerably apparent in 1981 that the winds of change were blowing through the corridors of the legal profession. The New South Wales

Law Reform Commission was considering a reference from Attorney General Frank Walker, to enquire into, and review, the law and practice relating to the legal profession. It was tasked to consider whether any and, if so, what changes were desirable in relation to a number of matters which went to the heart of the structure, organisation and regulation of the profession as well as the functions, rights, privileges and obligations of all legal practitioners.

I wanted to become involved in the processes of change. Little did I know that I would remain on the Bar Council for 20 years!

The reference the Law Reform Commission was charged to examine included a long list of sub-issues relating to the reference. Among them were:

(a) the right of senior counsel to appear without junior counsel;

(b) the making, investigation and adjudication of complaints concerning the professional competence or conduct of legal practitioners and the effectiveness of the investigation and adjudication of such complaints by professional organisations;

(c) the making, investigation and adjudication of complaints concerning charges made for work done by legal practitioners;

(d) the fixing and recovery of charges for work done by legal practitioners, including the charging by junior counsel of two-thirds of his senior's fee and the fixing of barristers' fees in advance for work to be done;

(e) the liability of legal practitioners for professional negligence and compulsory insurance in respect thereof;

(f) advertising;

(g) the certification of legal practitioners as specialists in particular fields;

(h) the necessity for participation by legal practitioners in courses of continuing legal education.

As I ran through that list I am sure many of you thought 'what was the problem?' Virtually none of these structural matters are in issue now, nor have they been since successive Legal Profession Acts gave effect to the many recommendations which emerged from the commission. The *Legal Profession Act 1987* (NSW) and the substantial amendments effected to it in 1994 heralded the modern profession in which:

- all who wish to practise are required to hold a practising certificate;
- a practising certificate cannot be obtained unless the applicant holds a policy of indemnity insurance;
- clients have to be given an estimate of the legal costs involved in their matters;
- barristers as well as solicitors can enter into contractual relations with their clients;
- barristers can be briefed directly by clients.[8]

An independent disciplinary system was established, conducted by the legal services commissioner, which replaced the internal disciplinary systems conducted by the professional associations; lay members were to be invited to join the professional conduct committees which the associations maintained to conduct the investigations into complaints the Legal Profession Act permitted the legal services commissioner to delegate to the relevant association. As far as I am aware, certainly from the bar's point of view, this was an unmitigated success with members of the community from diverse walks of life volunteering to spend the hours perusing large tracts of documents the investigation of complaints could entail, and attending the lengthy meetings debating the outcomes. Their contributions were by and large insightful. Interestingly on many occasions they would have been far more benevolent to the subject of a complaint than the person's peers.

These reforms went a long way towards making the profession more accountable to its clients and the community. It made it more transparent too.

Perhaps as significantly, the winds of change blowing through the corridors led the profession itself to make structural changes.

Thus the bar itself abandoned the requirement that senior counsel could only appear with a junior, as well as the fact that juniors could charge two-thirds of whatever senior counsel did. Another practice which vanished was that which demanded that junior counsel carry the silk's red bag – these were pre-trolley days. That practice was 'abolished', it was said, when Michael McHugh QC shuddered at the sight of his slightly built female junior struggling under the burden!

One of the ironies of the 1980s reforms was the fate of those concerning advertising. The Law Reform Commission's third report on the legal profession was devoted to advertising and specialisation in the legal

profession.[9] In 1982 neither barristers or solicitors were permitted to advertise, or otherwise communicate publicly, any information or assertions about their fields of practice. This applied to communications about specialisation or willingness to accept work in particular fields. It also applied to publicising one's membership of a special interest association. The prohibition applied not only to advertisements in the mass media but even to entries in publications circulating mainly within the profession.[10]

The Law Reform Commission recommended that that rule prohibitions be abolished, a move vehemently opposed, as I recall, by both the Bar Association and the Law Society. Advertising was seen as an affront to the classic model of the profession.

However the Law Reform Commission's recommendations prevailed. Advertising was permitted, and once permitted was embraced with apparent glee by many practitioners.

This enthusiastic response came under fire, however, when the government decided there was too much advertising, or perhaps too much what I will call puffery than was good for the consumer. And too much too-clever positioning! Solicitors advertising their personal injury services on the ceiling of a hospital lift were seen as a bridge too far! The government cracked down on advertising a few years ago, on this occasion over the protests of the Bar Association concerned that such restrictions impeded their freedom of speech.

It is a rich irony now, in my view, that the *Legal Profession Act 2004* (NSW) contains a prohibition on lawyers' advertisements if they are, or might reasonably be regarded as either (a) false, misleading or deceptive, or (b) in contravention of the *Trade Practices Act 1974* (Cth), the *Fair Trading Act 1987* (NSW) or any similar legislation. Publishing an advertisement of that nature is capable of being professional misconduct or unsatisfactory professional conduct, whether or not the barrister or solicitor is convicted of an offence in relation to the contravention.[11] Why, it might be asked, do lawyers have to be told to obey the law!

One gets a sense from both these publications of a profession which is more outwardly focussed, which engages with the legal implications of political issues, indeed, that there are far more political issues with legal implications. In short, a profession which is engaging with the community far more closely than it did in the early 1980s.

The 1981 world

But back to the 1981 world briefly, at what I'll call a more domestic level. What did the professional journals of that year reveal about the state of the profession?

The 1981 *Law Society Journal* is a stolid tome in monochromatic black print on shiny paper. It is replete with messages from the president, a very serious looking Michael Gill, articles reporting the goings on of LawCover, the Solicitors Statutory Committee (the then solicitors' disciplinary body), costs rulings, practice notes, letters to the editor, book reviews and a couple of desultory articles tending to focus on black letter law subjects, usually conveyancing or wills, with the occasional tentative musings about entering the brave new world of computers.

An interesting note was an article about the Women Lawyers Association of NSW, setting out its history, some matters about the struggle women had had to enter the profession, including the necessity to have the *Women's Legal Status Act 1918* (NSW) passed to enable them to practise, and, significantly, advising that while hitherto the number of women entering the profession had been so small it was possible to rely on word of mouth to contact prospective new members, that task had become more difficult because of the increasing numbers.[12] You won't be surprised to know I'll be returning to that topic.

Another section dealing with Continuing Legal Education described a popular course to be given on 'Stress and the professional practice',[13] another topic to which I will return.

Perhaps most telling, given the Law Reform Commission's inquiry into the profession, was an address reproduced in the *Journal*, which had been given by Mr Jonathon Clarke, the president of the English Law Society at that society's national conference.[14] The speech discussed how the English legal profession had survived a Royal Commission on Legal Services established in the 1970s by the Labour prime minister, Harold Wilson, undoubtedly, I would infer, a precursor of the Walker reference.

The speech highlights the response of the profession to the close scrutiny to which it was being subjected. The speech is written as if the profession had been subjected to the most ferocious attack. Perhaps it was reproduced to give the solicitors of New South Wales a sense that their perception that the Law Reform Commission reference amounted to an assault on their tightly held professional enclave was misplaced. As an aside, I recall the bar at times thinking it was under attack, although that was most often by solicitors seeking to fuse the profession.

However you can gauge the extent to which the English profession felt it had been under attack when Mr Clarke says the profession had been 'exonerated'. Nevertheless the English profession was not going to rest on its laurels. Mr Clarke said, in words which resonate 27 years later:

> We must be seen as a profession to be willing to be even more self-critical, willing to examine ourselves even more closely and willing to adapt to the ever-changing demands of society which we exist to serve…we must always remember that we do serve society and that society is not there to support us.[15]

No matter how defensive Mr Clarke was being, this was sensible advice which should be taken to heart by all in the profession.

Bar News

I turn then to the state of the profession in the 1980s from the bar's point of view.

It's not possible to do a retrospective look at *Bar News* for 1981, because it did not exist then. I know because I was the first editor of that journal when it came into existence in winter 1985, at the instigation of the then bar president, Murray Gleeson QC.

The first edition, a collector's item dare I suggest, reproduced a speech by the then Roddy Meagher QC, which may be the first reported occasion our recently retired chief justice of Australia was described as 'The Smiler' in print. There was an article by Ian Callinan QC, then president of the Queensland Bar, entitled 'The view across the Dingo Fence', defending the refusal of the Queensland Bar to permit outsiders to practise in that state, a report of a speech given by Justice Kirby, only recently appointed the president of the Court of Appeal, outlining the 'Seven Deadly Sins of the bar', most of which I am grateful to observe are rarely committed and last, but clearly by no means least, a note that among those who had had their names removed at their own request from the Roll of Barristers to the Roll of Solicitors, was one Malcolm Bligh Turnbull!

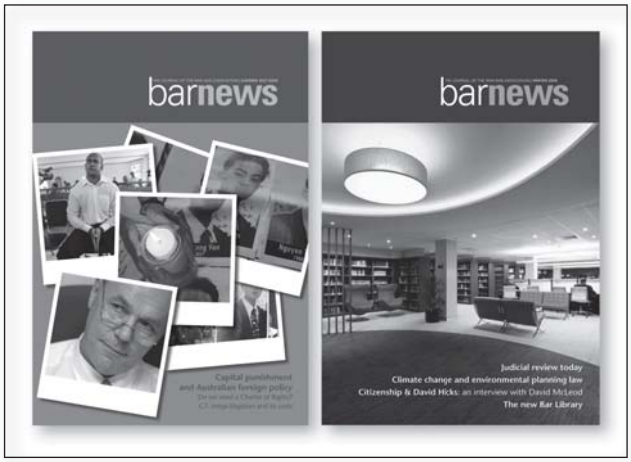
The journals of 2007-2008

Compare the picture of the legal profession conveyed by these 1980s journals with their contemporary, but far glossier and more colourful counterparts.

Take the *Law Society Journal* first. Sure, the president's message is still there, albeit now illustrated by a picture of a grinning incumbent. And so too are the core black letter practice articles. But, in 2007 for example, other articles looked at issues such as charters of rights, judicial independence, law and order campaigns, the release of David Hicks from Guantanamo Bay, international child abduction, counter-terrorism, the need for more flexible work practices, class actions and beating depression.

The *Bar News* of 2008 shows too that much has changed – and not just the editor. First, somehow the adjective 'Bar' and the noun 'News' have merged into one entirely lower case word – 'barnews'! Clearly the stylists have been at work. Articles deal with such issues as capital punishment and Australian foreign policy, Lex Lasry on the death penalty, the Northern Territory intervention and the ubiquitous Charter of Rights.

One gets a sense from both these publications of a profession which is more outwardly focussed, which engages with the legal implications of political issues, indeed, that there are far more political issues with legal implications. In short, a profession which is engaging with the community far more closely than it did in the early 1980s.



Covers from BarNews.

The twenty-first century practitioner

The topics I have referred to from the recent *Law Society Journal* and *Bar News* also give a telling insight into the different milieu in which law is now practised. The solicitor or barrister of the early 1980s was most likely to devote his or her practice to either conveyancing, estate or personal injury work. There were virtually no tribunals. Arbitrations were principally undertaken in relation to large contractual disputes. Otherwise litigation ended up in court, where, as I shall shortly explain, it often languished.

Today's legal profession is far more likely to have to cope with the plethora of administrative tribunals which have sprung up in part to make the law more accessible and affordable. Practice may also take the contemporary lawyer as often to a mediation, as to a court.

And areas of practice are likely to have substantially shifted. As we know personal injury work has been substantially affected by legislative reforms such as the *Motor Accidents Act 1999* (NSW), reforms to employees' rights through the *Workers Compensation Act 1987* (NSW) and the *Civil Liability Act 2002* (NSW). I do not pretend to know what, if anything, has taken that work's place. I know these reforms have had a substantial effect on the bar and it is difficult to see why it would not have had the same effect on the solicitors' branch.

One area where it is gratifying to see an increase in work is in the pro bono movement, which has achieved much prominence in the last decade or so. Organisations like the Public Interest Advocacy Centre and the Public Interest Law Clearing House perform invaluable work. As many of you may be aware, the Public Interest Law Clearing House relies, in part, on solicitors being seconded from legal firms for periods of 3-6 months to work on pro bono matters. Firms provide substantial pro bono services, many on referral from PIAC or PILCH as, too, does the bar. And the Supreme and Federal courts have both adopted rules giving effect to schemes designed to provide pro bono legal assistance to litigants.[16] The opportunity to work on a pro bono basis is an invaluable way of serving the community.

Trying to predict the practice of the future is difficult. In a small exercise of crystal-ball gazing, I do suspect that the profession will be concerned with climate change litigation,[17] and, depending on the success of the charter of rights movement, with matters concerning human rights.

Lawyers, particularly solicitors, have greatly increased opportunities to work overseas. Those opportunities used to be confined to the common law world, but are increasingly opening up in our immediate neighbourhood. Law firms have offices in China, Singapore, Cambodia, Indonesia, Papua New Guinea and Vietnam, to name a few sites. I would encourage all to embrace those opportunities if possible to broaden their perspective on legal practice and, it might be hoped, infuse the Australian profession with the good parts of that knowledge.

Some things have changed – the pace of practice

The pace of practice has increased exponentially since the somewhat languid days of the 1980s.

Chief Justice Gleeson ascertained just before his appointment as chief justice of the New South Wales Supreme Court in 1988, that by the end of 1990, two years into his term of office, 'in the absence of radical change, the average time from commencement to finalisation of cases in the Common Law Division of the court would be 10 years'. As his Honour later observed, '[s]uch news, received in such circumstances, concentrates the mind'.[18] The immediate response on his appointment was a wholesale assault on the backlog. Acting judges were used to an unprecedented extent to cope with the delays.[19]

At the same time, the 1980s saw the courts begin to manage closely the time and events involved in the movement of cases from commencement to disposition.[20]

In January 2000 'just, quick and cheap' became the catchcry of the Supreme Court. Chief Justice Spigelman announced amendments to the *Supreme Court Rules* intended to inaugurate a new standard for civil procedure.[21] He described the emergence of case management in place of the traditional hands-off approach to the conduct of litigation, as the judicial response to public expectations with regard to accountability for public funds, the restrictions on the availability of resources and the necessity that courts perform in a manner, which avoids imposing costs on litigants and third parties.

In 2005 New South Wales adopted the *Civil Procedure Act 2005* (NSW), Part 6 of which deals with case management. Section 56(1) explains that:

> (1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

The court is obliged to give effect to that overriding purpose, parties are under a duty to assist the court to further it and legal practitioners must not, by their conduct, cause their client to be put in breach of that duty. Breach of that obligation can, at the minimum, expose the practitioner to the risk of an adverse personal costs order.[22]

These measures also undoubtedly have a profound effect on the way law is practised. Litigation lawyers of the twenty-first century operate in a high pressure environment, greatly different from the balmier days of the 1980s. I don't want you to think we just lolled around then, but the pressures were not as great.

That brings me to my next topic.

Work/life balance

I undertook some empirical research for this speech apart from reading volumes of the *Law Society Journal* and *Bar News*. I asked the president of the Law Society, Hugh Macken, and the executive director of the Bar Association, Philip Selth, what the biggest issue(s) confronting the profession were. Their responses were instant. 'Work/life balance' said Hugh. 'Depression' said Philip. Indeed a competing event this evening is the Tristan Jepson Memorial Lecture, a lecture commemorating the tragic death of a young lawyer who took his own life in 2004. You may have seen a report about it in this morning's *Sydney Morning Herald*.

This evening's lecture reports on the largest ever survey of legal practitioners and students in Australia, which found that almost a third of solicitors and one in five barristers suffer levels of depression associated with disability. It also discovered that more than 40 per cent of students reported psychological distress severe enough to justify clinical or medical assessment. The incidence of depression in the legal profession is four times higher than in the general population.

I earlier mentioned the small paragraph about a lecture on stress which appeared in the 1981 *Law Society Journal*. In the intervening period both the Law Society and the Bar Association developed schemes, LawCare and BarCare respectively, to afford practitioners confidential access to psychiatric counselling. A similar scheme exists for judges which I call JudgeCare, not, I am sure, its official title.

I do not pretend in any way to be an expert on these issues. The Black Dog Institute and beyondblue are two organisations I have heard mentioned which offer ready advice to those in need.

However, I think I can say with a degree of confidence that LawCare and BarCare depend on those involved (a) acknowledging they have a problem, and (b) being prepared to do something about it. One of the first and, in my view important, steps in this process is for the profession as a whole to acknowledge this is a problem. This has been and is being done.

Some years ago Paul Menzies QC, who is referred to in this morning's article, disclosed he had suffered from profound depression for a lengthy period and described the process by which he went about recovering. This was at the time I am sure an incredibly brave step on his part. But it was an important acknowledgment of the problems which can afflict the profession.

At last year's Tristan Jepson Memorial Lecture it was announced that four of Australia's largest law firms were uniting to tackle depression in the legal profession. Interestingly, and consistently with the theme I touched upon at the outset of this address, John Atkin, the managing partner of Blake Dawson Waldron, attributed the problem in part to law firms losing their sense of 'professional purpose', a trend his firm was seeking to counter by emphasising 'the professional values of the law… and the concomitant social obligation which took precedence over the obligation to the client.' Professor Gallop, the former West Australian premier who retired to deal with his own depression, tellingly asked why 'lawyers could be in the forefront of changing and improving society' but had so much difficulty dealing with depression.[23] These are eminently sensible questions.

The billable hours which drive law firms are recognised as both a cause of the pressure which brings on depression, and also an impediment to flexible work practices.

Some sense of the context in which this debate is occurring can be gleaned from a recent statement by Professor Larry Kramer, the dean of Stanford Law School who wrote last year:[24]

> Certainly our profession has changed profoundly in the past generation. The basic structure still looks the same: Most lawyers practise in firms, most firms are partnerships with cadres of associates, most work is performed for hourly fees, and so on. Yet it's the traditional model on steroids: Big firms employ thousands rather than hundreds of lawyers, with offices around the world. Partner/associate ratios have changed dramatically, particularly if we focus on equity partners, while legal work has become increasingly specialised and expectations or billable hours have soared.

Echoing Mr Atkin, he noted:

> Twenty years ago, most lawyers would have scoffed at the idea that profitability, much less profits-per-partner, should be the measure of success and prestige. Yet that is where we are. Law firms are run like businesses by managing partners and committees whose time is almost wholly occupied with, well, managing.

He added tellingly:

> Students say they want a better work/life balance, yet invariably choose the firm that ranks highest in *The American Lawyer's* list of the top 100 law firms. Having spent their lives learning to collect gold stars, they apparently find it impossible to stop…

This brings me to Hugh Macken's point: work/life balance. The billable hours which drive law firms are recognised as both a cause of the pressure which brings on depression, and also an impediment to flexible work practices. According to Federal Sex Discrimination Commissioner Elizabeth Broderick, a former partner at Blakes, 'the challenge [is] to mainstream flexibility and make it a real job, like being a full-time lawyer – to move away from the stereotype of the ideal worker being an unencumbered man, available 24/7'.[25] She described flexible work arrangements as not being part-time work, but arrangements whereby full-time workers could take work home and leave work early. Moreover, as she said:

> [T]ime-billing does not reward someone who's efficient and able to do it in half the time. Billable hours works for the lowest common denominator – but the knowledge business is about a high-performance work culture, and it shouldn't be all about hours. It's an outdated notion ... it should be about the quality of that time and outputs.

The cost of legal services has been an issue for time immemorial. For many of the reasons Ms Broderick described, time billing is a particularly vexing issue. It is apparent that operating in an environment where every minute must be accounted for, or, at least, a quota achieved to demonstrate performance, is another likely trigger of stress.

The profile of the profession

It is appropriate next to say something about the profile of the profession. I don't want to bore you with too many statistics, but I'll just rattle through a few. These figures tell us much about where the profession has come from, where it is today and where it might be in the future and what it might be doing – so bear with me.

According to a report prepared by Urbis Keys Young for the Law Society of NSW seeking to identify the profile of solicitors in practice in 2015,[26] between 1988 and 2003 solicitor numbers grew from 9,808 to 18,092, representing an average annual growth rate of 4.2 per cent. The report forecast the number of solicitors in NSW to grow at a faster rate than the NSW population over the coming decade.

Over the same period, there had also been a growth in women solicitors as a proportion of the whole profession. In 1988, 20.2 per cent of solicitors in New South Wales were female; by 2003 this figure had risen to 38.6 per cent, an increase of an average of 4.4 per cent per year since 1988.

The proportion of women in the profession was projected to increase so that by 2015 women would constitute 52.2 per cent of solicitors compared to 47.8 per cent men.

Where do people work now?

The report noted that between 1996 and 2003, the proportion of all solicitors working in private practice had dropped from 77.5 per cent to 72.7 per cent. Over the same period, the corporate sector had increased, from 10.1 per cent of all solicitors to 13.2 per cent. The government sector remained steady at around 10.4 per cent.

On this basis the report forecast over the period 2004 - 2015, the proportion of all solicitors working in private practice will drop to 68.4 per cent of the profession in 2015. The proportion of solicitors in the corporate sector was projected to rise to 19.9 per cent in 2015 while the government sector was assumed to remain steady.

If you were a woman solicitor in 2003, it seemed you were more likely to work in the corporate or government sector.

By 2015, the report suggested that women would dominate both the government and corporate sectors, although a majority of private practitioners in 2015 would still be men. It predicted that the gender breakdown in private practice in 2015 would be 52.3 per cent male and 47.7 per cent female. In the corporate sector, the split would be 39.5 per cent male and 60.5 per cent female. Among government solicitors, 36.0 per cent would be male and 64.0 per cent female in 2015.

The authors inferred, hardly surprisingly perhaps, that the preference for the corporate and private sectors lay in the fact that since 1998, corporate solicitors had reported higher incomes than private practitioners, while private practitioners had reported higher incomes than government solicitors.

Income

Female practitioners have apparently consistently reported lower incomes than males, a trend the report forecast would continue. Because, it was concluded, some of the differences between male and female incomes were attributable to the different rates of full-time and part-time work as well as to different lengths of time since admission, the authors of the report used data on full time solicitors only to calculate projections of average incomes by gender. Even on this basis women solicitors were behind. The report projected that in 2015 the average nominal income for full-time male solicitors would be $130,300, while that of full-time female solicitors would be $106,900.

So what does this tell us? Hearteningly, legal practice is going to continue to grow. Less encouragingly, even though women are projected to outnumber men by 2015, their incomes will still be lower. Something more must be done to determine why this is so and redress it. Last, but by no means least, the corporate and government sectors are more appealing workplaces for women. This suggests those two sectors offer more compatible work practices – a matter private firms may wish to address.

Solicitors - comings and goings

What about people leaving the profession? The Law Society kindly provided the following information.

As at 30 June 2008 there were 22,738 solicitors holding practising certificates. On average the Law Society receives about 300 new applications for practising certificates each month.

- 92.4 per cent of solicitors renewed their practising certificate this year. 1,737 did not renew. Of these, 45.8 per cent were male and 54.2 per cent were female.

Of the 548 who advised why they were not renewing, the following reasons were given:

- moving interstate - 15 per cent
- non-legal position - 13.5 per cent
- retired - 13 per cent
- no specific reason - 12.8 per cent
- overseas - 12.6 per cent
- family - 11.3 per cent (of which 98 per cent were female)
- transferred to the bar - 5.3 per cent
- ill health - 3.1 per cent
- study leave - 2.6 per cent
- travel - 2.2 per cent
- dissatisfaction - 1.5 per cent
- unemployed - 1.1 per cent
- financial - 0.7 per cent
- other - 5.3 per cent

Of these figures, the one that sticks out is the large number of women leaving the solicitors' ranks for family reasons – another indicator that work practices need examination.

Barristers – comings and goings

As far as I am aware, the bar does not have a comparable 2015 study. However I obtained some statistics from the Bar Association. They reveal that over the period 2003 - 2007, on average 90 new barristers went to the bar of whom approximately 24 per cent were women. By 2007, 17 per cent of the New South Wales Bar were women, up from 13 per cent in 2000.[27]

Over the four practising certificate years, 2005 - 2008, on average 48 people left the bar, the majority of whom were men, a proportion no doubt reflecting their proportion at the bar. Of these 48, approximately a third took out a solicitor's practising certificate, another third or so retired, a few left for maternity reasons, a few went overseas and a few were unexplained.

Some observations on the figures

I do not pretend to understand why full-time women solicitors earn less than men. One explanation may be the fact that, according to *The Australian's* 2007 partnership survey, the number of women attaining partnership was about 20, only 16 of whom were equity partners.[28] If a higher proportion of the solicitors surveyed in the Urbis Keys Young Report were reporting partnership income that might have skewed the figures. However, it is dispiriting to note the prediction that the differential will continue notwithstanding the forecast increase in the number of women in the profession.

Perhaps even more dispiriting is a report, with echoes of wartime pressures, that Western Australia's 'boom times' are helping shatter glass ceilings for women in professions.[29] What will happen to those 'last on' when the boom fizzles or fades? Will they be 'first off'?

Over the four practising certificate years, 2005-2008, on average 48, people left the bar, the majority of whom were men...[o]f these 48, approximately a third took out a solicitor's practising certificate, another third or so retired, a few left for maternity reasons, a few went overseas and a few were unexplained.

Michael Slattery QC, when president of the bar, wrote reassuringly that that upward trend of the proportion of women at the bar had increased in the period 2001 - 2007.[30] Yet, soberingly, as Professor Ross Buckley has noted, of the 29 counsel engaged in the recent C7 litigation, only two were female, (*Seven Network Limited v News Limited* [2007] FCA 1062), both being on the team for Channel Seven.[31] As Professor Buckley commented, '[i]f the gender of barristers on C7 had reflected the representation in the profession, there would have been five female counsel involved, not two.'

An Australian Women Lawyers Gender Appearance Survey of Australian Courts for late 2004 and 2005 revealed the following:[32]

> In the Federal Court only 5.8 per cent of appearances by senior counsel were by women, the average length of hearing for male senior counsel was 119.7 hours, compared to 2.7 hours for female senior counsel.
>
> In the Federal Court the average length of hearing for male counsel appearing as junior to senior counsel was 223.6, whereas for female junior counsel in the same role it was only 1.4 hours.
>
> In the NSW Supreme Court, 15.6 per cent of appearances were by women, compared to 84.4 per cent by men; women had a high briefing rate in criminal matters, 57.1 per cent compared to 16.3 per cent in civil matters.

These figures bear out my observations. In the five and a half years I have been on the Court of Appeal the disproportion between the numbers of female to male counsel appearing is staggering. Part of the explanation clearly lies in the fact that most appearances in the Court of Appeal are by silk, and women silk are few and far between. Nevertheless it is difficult to avoid the uncomfortable conclusion that despite firms ostensibly embracing the Law Council of Australia's Model Equal Opportunity Briefing Policy for Female Barristers and Advocates,[33] many are only paying it lip-service.

The same is true of the High Court. In 2006 Justice Kirby observed that of the 161 counsel who appeared before the High Court in 2004 in appeal hearings, seven were women, less than five per cent. On special leave applications, the figure was a little better, but still lamentable: eight per cent of counsel were female. As Kirby J said:

> One hundred years after the first woman was admitted to legal practice in Australia it is difficult to understand why there is still such a gap between the numbers of men and women appearing as advocates before the highest court. The reasons would seem to lie deep in legal cultural and professional attitudes and practice. [34]

It is difficult to disagree with his Honour.

Indigenous lawyers

It remains only to refer to one issue which has not really emerged on the radar yet, that of Indigenous lawyers. Last week I attended the National Indigenous Lawyers Conference in Melbourne, an inspiring event organised by Tarwirri, the Indigenous Law Students & Lawyers

Association of Victoria. The Victorian attorney-general, the Hon Rob Hulls, commented on the unequal representation of Indigenous people in the legal profession, a situation he observed would continue to hinder Indigenous legal appointments.

There are already many fine Indigenous lawyers. But there clearly should be more.

I am aware that many law societies and bar associations are working hard to support the Indigenous community, both those who are already members of the legal profession, and Indigenous law students.

When I went to the bar in 1980 there was no real consciousness of the need to support and encourage women to enter the profession. As recently as 1995 it was a struggle to persuade the Bar Council to adopt a rule discouraging discrimination against women barristers. Those days are long behind us. I do not suggest those attitudes exist now in relation to Indigenous lawyers. Yet in the light of our experience with women lawyers, it would be naïve to think we could ever lose sight of the importance of the support the legal profession is currently providing, nor the necessity to review such support programmes constantly to ensure their efficacy.

Intergenerational equity

You will recall my earlier reference to Mr Clarke, the president of the English Law Society. There is something else he said which has a contemporary resonance – of sorts.

He concluded his address by calling on his audience to pursue their practice 'with a determination that we shall hand on to those who follow an inheritance no less rich and no less worthwhile than that which we received from those who have gone before us'.[35] This was a prescient invocation of the concept of intergenerational equity.

I, too, encourage you to conduct your practices in a way you would be proud to pass on to those who will succeed you in the profession. However, in an era which places great weight on an egalitarian profession, what I have said should, I hope, encourage you that you cannot be as apparently complacent about the legal profession's heritage as could Mr Clarke.

There is much that is excellent about today's profession. The standards of professionalism I see every day in court are to be applauded. The standards of advocacy are almost without exception excellent. The amount of pro bono work the profession undertakes is inspiring.

The structural issues addressed by the NSW Law Reform Commission in the early 1980s have been largely redressed. But, as I hope I have explained, there are more difficult cultural issues which need to be addressed. Some such as depression affect the profession across the board. Others affect sectors of the profession: women and the Indigenous community.

I have touched on but a few of these issues. I have no doubt others could compile a long list of important matters which need to be addressed. But these are the matters which I discern presently trouble many in the profession, and I share their concern. As young lawyers, you are, or have the opportunity to be, the torchbearers of change, to be vigilant in ensuring the legal profession is open to all equally, to be alert to issues which may lead to discrimination. I encourage you not to squander that opportunity.

Endnotes

1. Judge of appeal, NSW Court of Appeal.
2. The Hon Murray Gleeson, 'Courts and the rule of law', 7 November 2001, http://www.hcourt.gov.au/speeches/cj/cj_ruleoflaw.htm#_edn1
3. K Mason, 'The rule of law' in P D Finn (ed), *Essays on Law and Government* (1995) Vol 1 at 114.
4. The Hon Sir Gerard Brennan AC KBE, former chief justice of Australia, 'Profession or service industry: the choice', 18 August 1996, http://www.hcourt.gov.au/speeches/brennanj/brennanj_aba.htm
5. See cl 1, Preamble to *The New South Wales Barristers' Rules*, http://www.nswbar.asn.au/docs/professional/rules/Rules_april2001_2.pdf
6. Mason, op cit, at 116.
7. Clause 37, *The New South Wales Barristers' Rules*.
8. Subject to the provisions of the *New South Wales Barristers' Rules*.
9. New South Wales, Law Reform Commission, *Third Report on the Legal Profession: Advertising and Specialisation* (1982).
10. Ibid., [3.17].
11. *Legal Profession Act 2004* (NSW), s84.
12. (1981) 19(5) *Law Society Journal* 349.
13. Ibid., 341.
14. J Clarke, 'The Royal Commission on Legal Services' (1981) 19 *Law Society Journal* 59.
15. Ibid., 60.
16. Part 66A, Supreme Court Rules 1970 (NSW); Order 80, Federal Court Rules (Cth).
17. See, for example, the Hon Brian J Preston, chief judge of the Land and Environment Court, 'The role of courts in relation to climate change', 19-20 June 2008, http://infolink/lawlink/lec/ll_lec.nsf/vwFiles/Paper_20June08_Preston_Adaptation_ANU.doc/$file/Paper_20June08_Preston_Adaptation_ANU.doc
18. The Hon Murray Gleeson AC, former chief justice of Australia, 'Outcome, process and the rule of law', 2 August 2006 at 7, http://www.hcourt.gov.au/speeches/cj/cj_2aug06.pdf
19. The Hon Murray Gleeson AC, former chief justice of Australia, 'Managing justice in the Australian context', 19 May 2000, http://www.hcourt.gov.au/speeches/cj/cj_alrc19may.htm; a similar blitz took place in October and November 1992 when judges of the Supreme Court of Victoria conducted

'the spring offensive' to get rid of as many simple cases as they possibly could in the space of two months: see *Sali v SPC Ltd* [1993] HCA 47; (1993) 67 ALJR 841.

20. Commonwealth, Australian Law Reform Commission, *Adversarial Background Paper 3: Judicial and case management* (1996), http://www.austlii.edu.au/au/other/alrc/publications/bp/3/management.html
21. The Hon J J Spigelman AC, chief justice of New South Wales, 'Just, quick and cheap – a standard for civil justice', 31 January 2000, http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_310100
22. *Civil Procedure Act 2005* (NSW), s56(5).
23. J Lewis, 'Firms join forces to fight depression' (2007) 45(9) *Law Society Journal* 14.
24. 'From the Dean' (2007) 77 Fall *Stanford Lawyer.*
25. 'Billable hours at odds with flexible work practices' (2008) 46 *Law Society Journal* 20.
26. Urbis Key Young, *The Solicitors of New South Wales in 2015 - Final Report J79-04*. I have not itemised each page of the report from which the following information was taken, but it should be acknowledged as the source of all this information about solicitors.
27. Michael Slattery QC, 'President's column' *Bar News* (2007) Winter 4, http://www.nswbar.asn.au/docs/resources/publications/bn/bn_winter07.pdf
28. S Moran, 'Tackling the system's inequalities' *The Australian*, 14 December 2007.
29. A O'Brien, 'Boom times fuel shift to more women leaders' *The Australian*, 19 December 2007.
30. Slattery, op cit at 5.
31. Professor Ross Buckley, 'Women at the Bar' *Bar News* (2007-2008) Summer 10, http://www.nswbar.asn.au/docs/resources/publications/bn/bn_summer0708/summer0708.pdf
32. See http://www.womenlawyers.org.au/documents/Final_Gender_Appearance_Survey-August_2006.pdf
33. See http://www.lawcouncil.asn.au/policy/2443254835.html
34. The Hon Michael Kirby AC CMG, 'Appellate advocacy – new challenges', 21 February 2006, http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_21feb06.pdf
35. Clarke, op cit at 66.

Verbatim

Perram J on his tutors

From Mr Pembroke I learnt the benefits of calm and order, from Mr Rares I learnt the benefits of off-piste advocacy and from Mr Higgs I learnt the value of the strategic deployment of drama.

Walker SC on corporate personality (from *Friend v Brooker* [2008] HCATrans 344)

GUMMOW J:
They did not have to read *Salomon v Salomon* to work that out.

MR WALKER:
Yes, but may I say *Salomon v Salomon* was neither tattooed on any part of their anatomy nor in their mentality.

Gageler SC on the generosity of the Commonwealth (from *Minister for Immigration and Citizenship v Kumar* [2008] HCATrans 341)

FRENCH CJ:
Mr Gageler, I note that the minister is prepared to submit to a condition of the grant of special leave to appeal that the minister pay Mr Kumar's costs of the appeal, regardless of the outcome.

MR GAGELER:
Yes, your Honour.

FRENCH CJ:
There is an extra condition 'at Commonwealth rates'. Why should we impose that limitation?

MR GAGELER:
It is a level playing field point.

FRENCH CJ:
I think we might dispense with that particular limitation.

Reflections on the Federal Court

On 13 October 2008 the Hon Justice Catherine Branson was farewelled at a ceremonial sitting of the Federal Court.

As this sitting recognises, I will lose the capacity to exercise the judicial power of the Commonwealth at midnight tonight. I will probably never again sit in this position in a courtroom. I therefore beg your indulgence in allowing me to say a few words on the topic of the administration of civil justice. It seems better for me to talk today on this topic rather than to talk in anticipation of my new role as president of the Australian Human Rights Commission – but recognising, of course, the close connection between access to justice, including access to the courts, and the protection of human rights. What I have to say will surprise none of my colleagues and probably very few legal practitioners who have appeared before me. But let me put it in some form of context.

I was sworn in as a judge of this court in Adelaide on 20 May 1994. I held a commission that entitled me to serve for 24 years on a court then only 18 years old. It was a court conscious that its youth was one of its differentiating features. I walked unwittingly into two controversies. The first, whether the judges of the court should wear wigs – that is, either or both of short wigs for trials and long wigs for ceremonial occasions. The second controversy, whether all male members of the court should be required to drop the 'Mr' ahead of their title 'Justice'.

The chief justice's skilful ability to move the court steadily forward, if occasionally by mildly idiosyncratic steps, was demonstrated by my being sworn in, at a lovely ceremonial sitting of the court (I think one of the first, if not the first, at which television cameras were allowed) wearing a trial wig balanced, as the record of the occasion shows, rather crookedly on my head. The wearing of short wigs at a ceremonial sitting was a plain signal that the days of the long wig were numbered. The demise of the short wig followed shortly thereafter – and then, as you see, traditional robes, court jackets and jabots gave way to the Australian designed open robe manufactured from Australian wool that the court is wearing today. No loss of judicial dignity has resulted from these changes; no diminution in the respect accorded to the court. Simply, I think, recognition that what was seen to be right for common law courts generally in times past, was not necessarily the best option for this court today.

Turning to judicial titles, a colleague, whose identity I don't now recall, on the very first occasion that I attended a judges' meeting, suggested to me that I might move that, rather than those male judges who continued to use the title 'Mr Justice' being asked to drop the 'Mr', the female judges should assume the title 'Madame Justice'. This colleague, assuming that his intent was not just to tease, which it might have been, showed a lesser aptitude for managing change than the chief justice. It was not just that he misread me and the mood of the times;

Modern legal practitioners tend to identify much more closely today than once they did with their client's commercial objectives and interests.

his suggestion showed a failure to appreciate that what worked well in one place (in this instance Canada) might not work well in another. It also showed, I think, a failure to understand something about Australians. That is, as it seems to me, that while Australians generally are willing to offer respect where respect is due – they are likely to make a joke of those who leave themselves open to accusation of pomposity.

Of course, the issues of court dress and judicial titles can be seen to be relatively unimportant in the greater scheme of things. But they illustrate a more fundamental question that the court was then facing, and which it continues to face. That is, how a relatively young court, created by the federal parliament as part of an innovative program of law reforms, should imagine itself and manage its relationship with the public. In particular, what is, for this court, the right balance between respecting the traditions of the common law and the need to embrace change to serve the present day needs of the Australian people? The answer must lie in the identification of the values reflected in the traditions. The mere fact that something has been done for a long time is no reason to continue doing it, should it seem incompatible with otherwise desirable change. It is important to recognise the values reflected in a particular tradition. If those values have enduring importance it is sensible for the court to ask whether continued observance of the tradition remains the most appropriate way for the Federal Court to demonstrate respect for them.

The Federal Court has been asking questions like this throughout my time on the court. It is critical that it continue to do so.

The Federal Court was one of the first in Australia, if not the first, to break with the tradition that common law judges should simply umpire disputes managed by the parties to litigation. The tradition of judicial non-intervention reflected the value attributed to judicial impartiality, to efficient use of judicial time and to demonstrating respect for the knowledge and skills of legal practitioners. The downside of the tradition was parodied by Dickens with great effect when he wrote in *Bleak House* of the imaginary case of *Jarndyce v Jarndyce.*

Those courts which, like the Federal Court, have abandoned the tradition of judicial non-intervention, have been persuaded that the values reflected by the tradition, which are all good values, are not incompatible with a system of case management more likely to meet the needs of present day Australia. Those needs are for a system of case management calculated to lead to the just resolution of disputes as quickly, inexpensively and efficiently as possible. In particular, as the former Justice Sackville has recently stressed, it is critical that legal costs are proportionate to the significance of the dispute in question.

The present financial troubles facing this country, and others, make this even more important than it has been before. Civil law courts and their legal practitioners will play a diminishing role in the life of the nation if means of constraining legal costs cannot be identified.

The extent to which barristers and solicitors in this state, and Australia generally, are willing to work for no fee or limited fees to advance social justice and assist the administration of justice reflects extremely well on the legal profession.

This court recognises that its methods of case management must be kept under review and to this end it consults with representatives of the practising professions, and more widely.

However, and this is the point that I wish particularly to stress today; there is a limit to what the court alone can do. Litigation can only be conducted efficiently and cost effectively where there is real co-operation between legal practitioners and the court. While changes to the legislation governing the court, and amendment of the court's rules, are likely to be helpful at the margins they cannot alter this reality.

Legal practitioners and the court must be partners in case management. Unless this becomes much more uniformly the case, legal costs will continue to be unacceptably high and litigants will increasingly question whether resort to litigation is the way to resolve their disputes.

Critical to the efficient management of litigation is identification of the real issues in dispute. Practitioners are much better placed than the judge to know what the real issues in dispute in any case are. The judge has little option but to accept assurances given by legal practitioners.

Moreover, the court is always dependent on legal practitioners to ensure that its orders and directions are complied with. The making of orders and directions that cannot be, or simply are not, complied with is an unnecessary waste of both time and money. So is the making of orders at the request of practitioners for, for example, extensive (which necessarily means expensive) discovery when the chance that it will enhance the just and efficient resolution of the dispute is small.

In short, efficient and effective case management is dependent in significant ways on the co-operation and frankness of legal practitioners with the court. It is in this context that I would like to reflect briefly on the content of a legal practitioner's duty to act in the best interests of his or her client.

Modern legal practitioners tend to identify much more closely today than once they did with their client's commercial objectives and interests. This tendency, although it might be thought to carry the risk of compromise of professional independence, will probably not be reversed. Attention to a client's commercial interests may cause some legal practitioners to misunderstand what is involved in their duty to act in the best interests of that client in legal proceedings. It cannot, in my view, be stressed too highly that their duty is a duty to act in the best interest of their client in achieving a just and efficient resolution of the client's dispute according to law. It is not a duty to act in the client's best commercial interest should the client's commercial interests not be advanced by efficient resolution of the dispute. The duty of a legal practitioner to his or her client is thus entirely consistent with the practitioner's parallel duty to co-operate with the court's endeavours to resolve all proceedings as quickly, inexpensively and efficiently as possible.

A change in litigation culture will require courage in legal practitioners and trial judges alike. It will also require a sensitive appreciation in appellate courts of the need for change if we are to achieve a system of case management better calculated to lead to the just resolution of disputes as quickly, inexpensively and efficiently as possible.

I should say immediately that I have had many happy experiences as a member of the court receiving assistance from barristers and solicitors throughout Australia who well understood the nature of their duty both to the court and to their client. Since we are sitting today in Sydney may I comment particularly on the courtesy and high level of assistance I have received from members of the New South Wales Bar – quite often in cases in which they have appeared *pro bono* to protect the interests of litigants who would otherwise have been without legal assistance. The extent to which barristers and solicitors in this state, and Australia generally, are willing to work for no fee or limited fees to advance social justice and assist the administration of justice reflects extremely well on the legal profession.

I have found recent days much more emotional that I expected to do. It has been a great privilege to serve as a judge of this court for more than 14 years. I leave it with considerable regret although I am convinced that the time is right for me to make a change. It is also a great honour and privilege to have been asked to serve as president of the Australian Human Rights Commission. I look am looking forward with considerable excitement to the challenges that this new chapter in my professional life will bring.

Moot camp or boot camp: The Keble Advocacy Course

Paul Menzies QC, Philippa Ryan and Penny Thew report on their participation in the Keble Course, perhaps the world's most challenging advocacy course.

In August 2008, Paul Menzies QC, Pip Ryan and Penny Thew survived the Keble Course. The Keble Course is a five-day advanced advocacy course run by the South Eastern Circuit of the Bar of England and Wales, held each year at Keble College, Oxford.

The course is delivered very professionally and strictly to schedule by way of demonstrations and then participation in break-out groups. The groups are divided into civil and criminal practice areas and the learning modules are based on detailed hypotheticals from which everyone prepares to open, examine-in-chief, cross-examine and then make final submissions. By the end of the fourth day, the case has been analysed, prepared, practised and video-reviewed. All performances are repeated in the light of feedback by faculty. It is gruelling and sometimes brutal.

Between seminars, there are presentations on ethics and examination of vulnerable witnesses and experts. Three meals a day (save for a mid-week barbecue) are served in the longest dining hall in Oxford. The week culminates in a banquet dinner on Friday night and then a mock trial on the Saturday. It is arguably the most demanding advocacy course in the world.

Paul attended as a member of the faculty; Pip and Penny were participants. This is their story.

Paul: Teach in Oxford? My academic record? Offers like that don't come often; others were killed in the rush.

Pip: Before I received an email from the New South Wales Bar Association offering me one of two spots allocated to Australian participants, I had not heard of the Keble Course. But it took only seconds to realise that this was an opportunity too good to refuse. With just two weeks notice, I re-jigged a couple of commitments and booked my flight to London.

Penny: The offer to participate in the Keble Course represented an invaluable and unique opportunity to work with and learn from silks, judges and expert witnesses with immeasurable experience from the bars of the common law world. I therefore did everything I could to clear the diary to attend the Keble Course, leaving court in Sydney on a Monday afternoon to jump on a plane to London and arrive in Oxford on the Tuesday morning to commence the course that morning. It was all worth it!

Paul: I hadn't been to Oxford for many years and I thought that the opportunity to be more than a gawker, if only for a week, would be reward in itself. That turned out to be correct. I had some reservations, perhaps my cultural cringe, that I would be viewed with some reserve; the opposite was the case as I was immediately welcomed as part of the rather grandly named "International Faculty." The other foreigners, as well as Robert Wensley QC from Queensland, included three from South Africa and one from Pakistan. The participants, apart from members of the English Bar, included barristers from Ireland, various parts of the Caribbean, Florida and Western Europe, with prosecutors from the various international criminal tribunals.

Pip: I lived in England as a child and worked there in my 20s (as did Penny), so it is all very familiar and I love London. However, my experience of Oxford prior to attending Keble was only as a tourist and I was not a fan. This time, instead of driving to Oxford (which is never advisable), I took the train from Paddington. As soon as I walked through the Porter's Lodge at Keble, I knew this was going to be different.

Keble College, Oxford.

Oscar Wilde said that 'in spite of Keble College ... Oxford still remains the most beautiful thing in England'. He was not alone in hating all that brick. Even today, Keble has its detractors. I am not one of them. Perhaps my appreciation of the polychromatic brickwork stems from my deep affection for UTS and its Edwardian functionalist market campus, where I did my law degree.

Penny: Both the participants and faculty were extremely welcoming and friendly (and somewhat in awe of the Australians flying in from the other side of the world!), making the course enjoyable from the outset. Set in spectacularly beautiful Keble College (apologies Oscar Wilde), the intensive days were made easier by the truly lovely surrounds and the seemingly back to back social events attended by faculty and participants in the evenings.

It was only a five-day course; however, by virtue of its 10 to 12 hour intensive days, the vast experience and teaching skills of the faculty and the preparation required in advance, a wealth of information was conveyed in just a short time. The central theme of the course was preparation in lecture and interactive tutorial form for the moot at the conclusion of the course, interspersed with further lectures and tutorials relating to additional discrete cases. The participants and faculty members also shared each meal together in the very ornate, 1870s Keble College dining hall, which itself was by no means an unimportant part of the course!

Paul: It was obviously less demanding for we teachers, however, like all good educational experiences, I believe I learnt as much as many of the participants.

Being put on the spot in front of a group of frighteningly intelligent young barristers and being asked to examine in chief, Jill, on the experience of she and Jack in *Re: Fetching a Pail of Water* was challenging indeed. The more so when I realised that one of the results of the Woolf reforms is that no member of the English Bar, less than 10 years out, has the faintest idea how to do it and they were looking to me for guidance!

Pip: The Keble Course was demanding, challenging and fun. In our group, it was affectionately known as 'Moot Camp'.

The Lamb & Flag, where CS Lewis and Tolkein met and drank.

Last drinks and war stories.

My foreign ways were a source of amusement to my local colleagues, who introduce their opponents when mentioning their appearance! On more than one occasion, I inadvertently addressed the bench as 'your Honour'. But, when asked to be play judge, I was happily 'your ladyship'. During one cross-examination exercise, I leapt to my feet and objected to my opponent's question. This was a cause for much laughter and was apparently very 'American TV'. English barristers do not object (and where is the fun in that?).

The hardest part was saying no (most of the time) to drinks at The Lamb & Flag, which by all accounts continued each night long after I had retired to my room.

Penny: Thankfully for the Australians the similarities between the styles and procedural formalities of the UK and Australian bars seemed overall to outweigh the differences; although, like Pip, I did notice the absence of objections and it was of course unique referring to the bench as 'your Lordship' and 'your Ladyship'. Importantly for future Australian participants, the skills and techniques imparted are readily transferable to the Australian jurisdictions and the course is truly international, with participants from The Hague and the bars of South Africa, Pakistan, India and Scotland also attending.

Overall, the course most certainly was very demanding and a lot of fun, with some time left over for socialising notwithstanding the lectures running until or after dinner each night. Between The Lamb & Flag, a mid-week indoor barbecue (it was too cold to have it outside) and a formal dinner concluding with a memorable violin recital by Geraldine Andrews QC (an eminent silk and faculty member I was lucky enough to have tutoring my break-out group) we got to know the other members of our break-out groups well in what was a very full week. Having other Australians such as Pip and Paul there made it especially enjoyable!

Paul: The ABA is running a course in January in an identical format. It is similarly challenging. It is of an equal standard. What it lacks in location and international flavour it gains in having the local nuance. It should not be missed.

Pip: The Keble Course will have an immediate impact on my practising as a barrister and as a tutor on the NSW Bar Practice Course. The highlight for me was getting to know the incredibly smart and entertaining bunch of barristers in Group 8 and our tutor Rebecca Stubbs, from Maitland Chambers (Lincoln's Inn). It was an amazing experience that I will never forget. And now I love Oxford.

Penny: The Keble Course was a truly worthwhile experience and I highly commend it to anyone considering attending in the coming years. The opportunity to participate in the 'most demanding and intensive advocacy course in the world' at beautiful Keble College is simply too good to miss!

Paul, Pip and Penny would like to thank the SE Circuit and the New South Wales Bar Association for the opportunity to attend the Keble Course. We highly recommend it to any future faculty and participants. If you are offered a spot, drop everything, book a flight and do it.

I leapt to my feet and objected to my opponent's question. This was a cause for much laughter and was apparently very 'American TV'. English barristers do not object (and where is the fun in that?).

Before the duty judge in Equity

The Hon Justice P L G Brereton RFD

This paper is concerned with practice and procedure before the duty judge in the Equity Division. There is also a duty judge in the Common Law Division, who deals amongst other things with applications for listening devices, stays of execution, writs of possession (although occasionally misconceived applications for injunctions to restrain the sheriff from taking possession are incorrectly brought in Equity), and applications for injunctions to restrain publication of defamations. However, this paper is exclusively concerned with practice and procedure before the duty judge in the Equity Division. Although I will touch on some aspects of the law pertaining to applications that feature in the business of the Equity duty judge - such as Mareva injunctions, Anton Piller orders, and extensions of caveats – a detailed discussion of the law applicable to various types of interlocutory applications is beyond its scope.

Fundamentally, the role of the Equity duty judge is to deal with urgent applications in Equity proceedings, other than Corporations List matters (which should be brought before the Corporations List judge) and Commercial List matters (which are allocated to the Commercial List judge). Duty judges are rostered on fortnightly from those who sit in the Equity General List. They are available 24 hours a day, seven days a week if really required - but approach us out of hours and on weekends at your peril unless it is a truly urgent matter that cannot wait until the next sitting day. The duty judge always robes when sitting in court.

The Duty Judge List

The Duty Judge List is for matters requiring urgent or short judicial attention. Matters get into the Duty Judge List essentially in three ways. The *first* is by referral from the Registrar's List; the *second* is by adjournment from a previous Duty Judge List; and the *third* is as a fresh application.

Referrals are of matters that are returnable in the Registrar's List, or that have been adjourned to the Registrar's List, which now require urgent and/or short judicial attention. The registrar calls for matters for referral to the duty judge at the beginning of the registrar's 9.15am General Equity List. Counsel who intend to ask for a matter to be referred should attend before the registrar at 9.15am, so that it can be mentioned at the beginning of the Registrar's List and referred. The registrar will have the court file conveyed to the duty judge.

Other matters will already be in the duty judge's list for the day, having been adjourned from a previous occasion – for example, the first return date of a matter in which an abridgement of time for service, or an ex parte injunction, has been granted; or an adjourned date on which it is anticipated there might be an interlocutory hearing.

At the beginning of the duty judge's list each day he or she will want to organise the day's business as best as it can be, which will require that the list be called over. At this point, what is required is a short succinct statement of what is involved in the application that day. As I repeatedly try to remind those who appear before me, this requires three sentences: *Is it contested or unopposed? What is the nature of the application? How long will it take and what is the degree of urgency?* For example:

Contested application for an injunction to restrain a mortgagee sale. Two hours, must be heard before midday because the sale is at 1.00pm.

And that is all that is needed at the outset - not a five minute explanation of what the case is all about.

Armed with that information for each of the matters in the list, the judge will then arrange the day's business, having regard to the estimates of time and the degree of urgency. Most will take into account that you will have other things to do, and give markings for various times during the day once it is possible to assess how long matters are going to take. Often, the duty judge will receive an offer of assistance from another judge who has become available – although it seems never to happen on the busiest days – and when there is an offer of assistance, typically a longer matter that will require some hearing time will be referred.

Fresh applications that bring matters before the duty judge for the first time are made under *UCPR* r25.2, which provides for relief to be granted before the institution of proceedings. Proceedings are not commenced by the application before the duty judge; they are commenced when the initiating process is subsequently filed in the registry. This is relevant to the point I make below about the unnecessary multiplicity of documentation that is now commonly presented on such applications. On such an application for relief before institution of proceedings - which virtually every initial application to a duty judge is - the plaintiff gives an undertaking to the court to file proceedings within the time directed by the court, or within 48 hours if no direction is made.[1] Generally speaking, proceedings are instituted almost immediately after the matter is before the duty judge, when the file is conveyed to the registry and the initiating process – a draft of which will have been initialled by the duty judge – is filed.

The two most common types of application that come before the duty judge are applications for abridgements of time for service (sometimes called applications for leave to serve short notice) of initiating process, and applications for ex parte interim relief such as an injunction or appointment of a receiver (almost invariably coupled with an application for leave to serve short notice).

Applications for ex parte relief and/or abridgement of time for service

On an application for an abridgement of time for service, the duty judge will want to be satisfied that there is a legitimate claim for urgency, and that the time frame proposed for service and return of the summons is appropriate, having regard to the degree of urgency and the interests of the defendant – which usually involves allowing sufficient time for the defendant to obtain legal advice and representation. Generally speaking, the court will usually act on the assurance of responsible counsel as to these matters.

An abridgement of time for service is required only if the summons must be returnable in less than five clear days from the date of filing (or, in the case of a notice of motion, less than three clear days). There is no formal requirement for an abridgement of time for service outside five days for a summons and three days for a motion. Sometimes, for listing reasons, the registry may not allocate an early return date outside those time frames, in which case the duty deputy registrar should be approached with an insistence on an earlier date, coupled with an explanation as to why it is necessary. Only trouble the duty judge in those circumstances if that course fails.

On an application for ex parte interim relief, the judge will want to be satisfied, in addition to what is required on an application for leave to serve short notice, that the urgency of the situation is such that it warrants the grant of relief without notice to the other party, and of the basic elements required for an interlocutory injunction – essentially, that there is a seriously arguable case for final relief, and that the balance of convenience favours the grant of interlocutory relief. Normally, there will need to be some evidence of what attempts have been made to communicate with the proposed defendant, and to notify it of the intention to make the application – except where such a course would defeat the purpose of the application, such as on an application for Mareva relief or an Anton Piller order.

On an application for ex parte relief, an applicant is obliged to make full disclosure to the court of all relevant matters – including, in particular, all those matters within its knowledge that the respondent might have raised, if present, in opposition to the relief sought. A party applying ex parte to the court bears a heavy onus of frankness and candour in placing material before the judge in connection with the application.[2] Failure to comply with this obligation will result in the ex parte injunction being dissolved, although such dissolution is without prejudice to a further application for a further interim injunction.[3] This said, judges nonetheless appreciate that ex parte applications often have to be made in circumstances in which the facts are cloudy and the applicant and its advisers have an imperfect knowledge of the relevant material and context, and that material may not available in a form that could properly be put before the court, and those considerations are balanced with insistence upon the obligation of frank disclosure.[4]

Procedure on ex parte applications

The first step in making an application for an abridgement of time for service or ex parte relief is the preparation of the relevant documents. For this type of application, all the documentation required is:

- a summons,
- the affidavits relied upon, and
- preferably, short minutes of the orders sought.

No notice of motion is required: the interlocutory relief sought can be specified in the summons. A notice of motion for the interlocutory relief sought is necessary only if the initiating process is a statement of claim, which in the duty judge context is exceptionally rare, because the urgency of the proceedings usually does not permit the preparation of a statement of claim, although on occasion it may be seen in an intellectual property case in conjunction with which Mareva and Anton Piller relief is sought, and in such a case, the duty judge should be approached with a draft motion setting out the interlocutory relief sought, which may be filed once the duty judge has abridged time or made ex parte orders.

If the application is to be late in the day, or out-of-hours, warn the judge's associate that it is impending. If it is complex or involves extensive documentary material, inquire whether the duty judge would like the material delivered to chambers in advance.

Even less so is there any need for a motion claiming an order abridging time for service, making the application returnable *instanter* before the duty judge, and so on. While the revenue of the court benefits from multiple filing fees on a summons, a motion for interlocutory relief, and a motion for an abridgement of time for service and ex parte relief, the motions are an unnecessary expense for clients. Those who persist in this practice can anticipate that the court will happily accept the superfluous process and extract the filing fees, but direct that no charge in respect of them be passed on to the client!

If the application is to be late in the day, or out-of-hours, warn the judge's associate that it is impending. If it is complex or involves extensive documentary material, inquire whether the duty judge would like the material delivered to chambers in advance.

Generally speaking, approach the duty judge in the court in which he or she is sitting at the time. If the judge isn't in court, contact the associate in chambers. No prior notice is required, although as already indicated, sometimes - particularly if the matter is a complex one - prior notice to the judge's associate, and delivery of documentation, is appreciated. Most judges take ex parte applications at 10.00am,

at 11.50am (after the morning adjournment), at 2.00pm and at 3.45pm before the evening adjournment. But if the matter requires immediate attention, mention to the court officer that it is particularly urgent and it will be drawn to the judge's attention and dealt with as soon as the court can.

Sometimes, where notice has been given of an intended application, the proposed defendant will attend court. There is said to be a view that the defendant is not entitled to be heard on an ex parte application. If there is such a view, I do not understand it. As far as I am concerned, if the opposing party attends it is entitled to be heard, and if they chose not to be heard but their presence is established their silence may be taken into account.

In the case of an out-of-hours application between say 9.00am and 6.00pm, a telephone call to the judge's chambers should be the first attempt at contact. Outside those hours, a call to the security desk number – which is advertised daily in the law list – will result in the security officer telephoning the duty judge or associate, who will return the call to ascertain the nature of the application and make arrangements for its disposition. Out-of-hours applications are sometimes dealt with over the telephone, or in electronic form. In years gone by, judges sometimes entertained such applications at their homes – but since one received a visit from counsel and solicitors accompanied by clients of very menacing appearance, that practice has been less favourably viewed. If a hearing is appropriate, the court will sit out of hours, late at night or during the weekend. But if you do persuade a duty judge that you have a sufficiently urgent matter for the judge to sit in court on the weekend, then it is not good form for counsel to appear in sporting attire when the judge has gone to the trouble of convening a court and robing for the occasion. In the last three years, I have convened a court on a weekend only once. But modern technology facilitates the prompt disposition of urgent business – such as by issuing orders to restrain a bank from dealing with a cheque, by mobile telephone while on the way into town in the morning so that the orders were in place before bank opening hours; or restraining late at night a cattle sale to take place the following morning by having the papers forwarded electronically, and then transmitting the order from the home computer.

Out-of-hours applications are sometimes dealt with over the telephone, or in electronic form. In years gone by, judges sometimes entertained such applications at their homes – but since one received a visit from counsel and solicitors accompanied by clients of very menacing appearance, that practice has been less favourably viewed.

Upon making the application, an undertaking will be required from the applicant's solicitor to pay the appropriate filing fees in connection with the summons or motion. If interim relief is granted, the usual undertaking as to damages will be required. Generally speaking, the form of orders will be along these lines:

> Upon the undertaking of the plaintiff's solicitor to pay the appropriate filing fees, grant leave to the plaintiff to file a summons in the form initialled by me, dated this day and placed with the papers.
>
> Direct that the summons be returnable on <date> before {the Registrar *or* the duty judge}.[5]
>
> Abridge time for service of the summons to <date and time>.
>
> Order that in the first instance, notice of the Summons may be served by transmission of a facsimile or a sealed copy thereof to the defendant at facsimile number <number> {*or*, delivery of a sealed copy to Messrs XYZ solicitors, *or* delivery of a sealed copy addressed to {the defendant's solicitors} at Document Exchange box <number>, *or* email transmission of a PDF copy to <email address>}.

If interim relief is granted then an order will be made in the form:

> Upon the plaintiff by her counsel giving to the court the usual undertaking as to damages, order that until <return date>, the defendant be restrained from by himself, his servants or agents …

Or, in the case of an extension of a caveat:

> Upon the plaintiff by his counsel giving to the court the usual undertaking as to damages, order that the operation of caveat 123456 be extended until <return date>.

The papers will be conveyed to the registry by the court officer or tipstaff and filed, the order engrossed and entered, and the applicant's solicitor will take away the service copies and attend to service. The solicitor must wait at court and accompany the papers and court officer to the registry, to file the initiating process, pay the filing fee and to collect the service copies. It is bemusing to see the number of occasions on which the process of the court is urgently invoked, and an injunction or abridgement of time obtained, yet no one to file the process or uplift the service copies can afterwards be found! When an injunction is granted, then the order must be taken out in the registry. Under the old rules, it was necessary to obtain a direction that an order be entered forthwith, because the rules provided that an order could not be entered for a number of days unless the court otherwise ordered - to enable an order to be settled after notice to each party. There is no longer any such provision in the rules, and Rule 36.11(2) provides that a judgment or order is taken to be entered - in the case of a court that uses a computerised court record system, as the Supreme Court does - when it is recorded in that system. Rule (2A) provides that if a court directs that a judgment or order be entered forthwith, it is taken to be entered when a document embodying the judgment or order is signed and sealed by a registrar. Strictly speaking, there is no longer any requirement for a direction that an order be entered forthwith, but strict speech and registry practice do not always coincide, and the registry will only engross and seal an order if there is the direction that it be entered forthwith. So, it is still necessary to obtain from the duty judge a direction that the order be entered forthwith - which will result in the registry engrossing, sealing and issuing the order. One hears occasionally of alleged delays in obtaining orders from the registry. If the solicitor attends the registry following the pronouncement of an injunction and a direction for 'entry forthwith', this should not be a problem. Many judges' associates nowadays, once the associate's record of proceedings has been prepared and checked by the judge if necessary, will transmit it electronically to the registry, which can then be copied into the formal order to expedite the process. If the registry is closed, sometimes the judge's staff will engross the order and have it sealed by the judge, but ordinarily resort to this course is required only out of hours.

If only an abridgement of time for service is obtained, it is endorsed by the registry on the initiating process; no formal minute of the order is required (although a formal minute is necessary if the abridgment is accompanied by a grant of substituted service).

Substituted service

It is commonplace for applicants for abridgments of time for service and ex parte relief to seek substituted service of the initiating process. Substituted service is authorised by *UCPR* r 10.14, which provides that if a document is required or permitted to be served on a person in connection with any proceedings and it cannot practicably be served in person or cannot practicably be served in the manner provided by law, the court may direct that instead of service such steps can be taken as are specified in the order for the purpose of bringing the document to the notice of the person concerned. The touchstone for the power to order substituted service is therefore the *impracticability* of ordinary service in accordance with the rules. Initiating process must be served personally and mere inconvenience in effecting personal service is not sufficient ground for substituted service: it must be shown that personal service is impracticable. That said, in cases of urgency what is practicable will take into account the speed with which it must be effected.

Often, the court may make a direction that *in the first instance* service may be effected by an alternative means without dispensing with the requirement for personal service. That is not a true order for substituted service, but has the result that the court can be satisfied in respect of the urgent interlocutory application that appropriate steps are taken to give notice to the defendant. In such a case, the practical result is often that the defendant files an appearance, so that further (personal) service becomes superfluous; but if that does not happen, the originating process must still be personally served in due course. Another way of dealing with it is, when abridging time for service, to provide for some alternative form of service (for example electronically or by fax) within a short time frame, leaving a long time frame for personal service.

It is bemusing to see the number of occasions on which the process of the court is urgently invoked, and an injunction or abridgement of time obtained, yet no one to file the process or uplift the service copies can afterwards be found!

On any application for substituted service there must be some evidence that the proposed form of substituted service is likely to bring the document to the notice of the defendant. This means, for example, evidence (not assertion from the bar table) that a solicitor is acting for the defendant and some evidence of the address, facsimile number or other contact detail of that solicitor – for example, a letter emanating from that solicitor. As the precedent set out above indicates, orders for substituted service require precision in respect of the email address, telephone number or address at which substituted service is to be effected, and the evidence must establish those matters.

Personal service and substituted service must be strictly proved, in the absence of an appearance by the defendant. Often the evidence of service is quite unsatisfactory. With surprising frequency, one sees affidavits of solicitors deposing: 'I caused this to be served on X by placing it in an envelope and putting it in the out tray of the office'. That does not prove service by post: the proper means of proof of service by post is having the clerk who placed the letter into the post

box depose to having done so. Service by post - or by facsimile - is not proved by a solicitor saying that his or her clerk did it. In the case of facsimile transmission, the person who operated the facsimile machine should swear the affidavit of service, although a machine generated report proving transmission is likely to be acceptable.

Applications for interlocutory injunctions

On an application for an interlocutory injunction, the test is whether the plaintiff has established a sufficiently seriously arguable case for a final injunction as to justify the grant of interlocutory relief, having regard to the balance of convenience. Putting the test that way emphasises:

First, that the plaintiff always has the onus of establishing a case for an interlocutory injunction in particular, a seriously arguable one.

Secondly, that the balance of convenience is not reached unless and until there is a seriously arguable case for final relief.

Thirdly, however, the strength of the case for final relief may influence the balance of convenience and conversely the preponderance of the balance of convenience can effect how strong a case for final relief is required to justify the grant of a final injunction. Thus a strong case for final relief may warrant the grant of an interlocutory injunction even though the balance of convenience tilts barely if at all in favour of granting rather than withholding relief, whereas even a weak case for final relief - so long as it passes the threshold of being seriously arguable - can justify an interlocutory injunction if the balance of convenience weighs heavily in favour of granting injunctive relief.

It is sometimes said that in applications for interlocutory injunctions, a third consideration is whether damages are a sufficient remedy. But this is really an aspect of the first limb – whether there is a seriously arguable case for a final injunction. Properly understood, the real question is whether final injunctive relief would be declined on the basis that damages were a sufficient remedy. If it can be seen at an interlocutory stage that a final injunction would be declined for that reason, then no interlocutory injunction would be granted because there was no sufficiently seriously arguable case for a final injunction.

Where, on an interlocutory application, the major issue is a question of law, the court will usually endeavour - at least if time permits - to determine the question of law if it can, rather than merely considering whether the question is sufficiently arguable. So when, on application for interlocutory injunction, there is a pure question of law, or a question of law based on facts which are not really in contest, the judge will endeavour to decide that question, as usually it is in the interests of the parties that the court do so. As Young J (as his Honour the chief judge then was) said in *D'Arcy v Burelli Investments Pty Ltd* (1987) 8 NSWLR 317, 320:

> In an interlocutory application for injunction where a question of law arises, the prevailing view is that that question of law should be decided, unless the judge considers that there are good reasons for not doing so. Those good reasons will usually occur because there has been too little time to do research or the questions of law might be affected by the facts.

Sometimes, an application for an interlocutory injunction will have the effect of practically determining the final outcome of the case. Typically this may be so in cases of restraints of trade for relatively short periods, which will have expired before the case can have a final hearing - where there is a post-employment restraint of three months or even six months, it may be very difficult to get the case on for final hearing in that time, so that the interlocutory determination will practically determine the rights of the parties. Where the determination of the interlocutory application will substantially determine the action finally in favour of whichever party succeeds, then it is necessary to give closer and more careful consideration than otherwise to the relative strengths of the cases for final relief, which adopts in that context a much more significant role than otherwise in determining whether or not interlocutory relief should be granted.[6]

The circumstances in and the basis on which interlocutory relief is granted means that it is not to be regarded as immutable pending the final hearing - it can be reconsidered when the justice of the case so requires. But to warrant reconsidering interlocutory relief will usually require that there has been some relevant change of circumstance since it was last granted or considered, that bears on the criteria governing the grant of relief - typically whether it can still be said that there is a seriously arguable question to be tried, or whether in some way the balance of convenience has changed. There is a clear distinction to be drawn in this respect between the granting of interlocutory relief properly so called after an interim injunction, and the variation of interlocutory relief after it has first been granted. After an ex parte injunction or an interim injunction has been granted, but before there has been an interlocutory hearing, the applicant continues to bear the onus of justifying the continuation of the injunction. But once there has been an interlocutory hearing and an interlocutory injunction has been granted until further order - as distinct from an interim injunction until the next return day - then the onus shifts to the party seeking to have the injunction varied to demonstrate some relevant change of circumstances. As Bryson J said in *Elders Rural Finance Ltd v Westpac Banking Corp* [NSWSC, 24 May 1989], the nature of claims for interim injunctions means that they are usually made on a basis which admits

of some debate or reargument, but repeated returns to the court for reconsideration of a claim for an interim injunction cannot be regarded with favour. Nonetheless, there are circumstances where reconsideration may be appropriate. Gibbs CJ, Murphy, Aickin, Wilson and Brennan JJ in *Adam P Brown Male Fashions Pty Limited v Phillip Morris Inc* (1981) 148 CLR 170, 178 mentioned circumstances where new facts had come into existence or were discovered which rendered the enforcement of an interlocutory order unjust. As Bryson J commented:

> Their Honours did not, of course, endeavour to give an exhaustive statement of which reconsideration would be appropriate and it would hardly be possible to do so. However, there ought in my view for this as for other discretionary applications to be some new matter to be raised which could represent a sound and positive ground or otherwise a good reason for embarking upon reconsideration.

My view, for what it is worth and acknowledging that it is impossible to state a principle with universal application in this field, is that as a general rule interlocutory relief is not to be reconsidered when all that is involved is a review on the same facts as prevailed when it was originally granted or declined, or on facts which ought then reasonably to have been contemplated: in those circumstances, the remedy is an application for leave to appeal and, if granted, an interlocutory appeal. But if new facts have emerged that may affect the arguability of the case for final relief, or the balance of convenience, then the question of interlocutory relief can be reconsidered.[7]

Often, in connection with the grant of interlocutory relief, liberty to apply or liberty to restore is reserved. This does not mean that one can automatically apply for variation of the existing orders. Nor is it a means for enforcing compliance with directions. There is no point in having a matter restored to the list just because the opposing party is in default – there is only utility in the exercise if it is proposed to seek some further order or relief (and *not* one that the opposing party comply with an order that it is already bound to comply with). Usually, it is the party in default that should have some incentive to put the matter back into the list to remedy the default, but there is simply no point in bringing the matter back before the court for the purposes of berating or embarrassing a defaulting party with nothing more. To address this, liberty to apply will usually be granted in the following terms:

> Liberty to apply on X day's notice, any such notice to specify the directions or relief to be sought.

Requests to restore a matter to the list pursuant to liberty to apply which fail to specify sensible relief to be sought result in a judicial requisition for specification of that relief, which seems usually to provoke silence.

Usually, it is the party in default that should have some incentive to put the matter back into the list to remedy the default, but there is simply no point in bringing the matter back before the court for the purposes of berating or embarrassing a defaulting party with nothing more.

Particular interlocutory applications

That then brings me to particular types of interlocutory applications. Again, this is not the time to review in any exhaustive degree the law relating to Mareva injunctions, Anton Piller orders, rights of way, lockouts and so on, but only to touch on what is involved in some of these applications.

Practice Notes SC Gen 14 and SC Gen 13 provide extensive detail as to the practice and procedure on applications for freezing orders (which seems to be the current fashionable name for asset preservation orders, Mareva orders or Mareva injunctions), and search orders (the currently fashionable name for Anton Piller orders). Anyone appearing on such an application should be familiar with them.

My personal view is that a defendant who receives a penal notice and attached order in the form of that recommended by SC Gen 14 would require comprehensive legal advice to have much hope of understanding the extent of the obligations it imposes. It is a document of unnecessary complexity and I much prefer to make a simple order to the following effect.

> Order that the defendant be restrained from by himself, his servants and agents alienating encumbering or further encumbering any of its assets except insofar as it would not reduce his assets below X dollars in value, and provided that this does not prevent him drawing $500 per week for living expenses or paying up to $10,000 for reasonable legal expenses in connection with this application.

Such an order can be expressed in two or three paragraphs, on a single page document, with the standard Notice to Party Bound, and is much more readily capable of being understood by the average intending defaulting judgment debtor than the form of penal notice and order that the practice note suggests.

On an application for a Mareva injunction, there must be evidence showing:

- what is the cause of action for final relief and the circumstances showing that there is a good arguable case - or, if there is already a judgment, details of the judgment;
- the amount of the claim, or at least an assessment of it, if it is an unliquidated claim;
- the nature and value of the respondent's assets so far as they are known;

- the identity of any person other than the respondent who might be affected by the order and how that person might be affected by it;
- if, as is often the case on a Mareva application, the application is made without notice to the respondent, any possible defence that the respondent might have;
- above all, circumstances showing – rather than a mere expression of fear – that there is a risk of dissipation if an order is not granted. Sometimes, but very rarely, a letter requesting an undertaking coupled with a refusal to give an undertaking may clear that hurdle, but normally more is required. That something more may be found in the conduct of the litigation or the cause of action itself - if there is evidence of fraud or misbehaviour up to that point - but usually something more than a mere refusal to give an undertaking will be required.

So far as Anton Piller orders are concerned, there must be:

- a description of the things or category of things in relation to which the order is to be made;
- the address or location of any premises in relation to which the orders are sought and whether they are private or business premises, and if the premises include residential premises, whether or not there is a female occupant, a child under the age of 18, a vulnerable person or a combination of one or more of them;
- why the order is sought, including why there is a real possibility that the things to be searched for might be destroyed or lost if notice is given or unless the order is made;
- the prejudice that the loss of those items would occasion;
- importantly, the name, address, firm, and commercial litigation experience of an independent solicitor who consents to being appointed to supervise the execution of the order. Evidence of the independent solicitor's consent should include a form of consent signed by that solicitor, appropriately verified in accordance with the rules, and that the solicitor gives the undertakings referred to in the relevant schedule to the proposed order in the Practice Note under the heading 'Undertakings by Independent Solicitor'.

A common application is one for an interlocutory injunction enforcing a restraint of trade. An applicant must be able to demonstrate what is the legitimate protectable interest of the applicant that the restraint protects, and why the restraint is not unreasonable at least to the extent of the interlocutory relief sought. Normally, if those matters are sufficiently established, the balance of convenience will not pose a significant difficulty, because equity favours the enforcement of negative contractual stipulations.

Applications concerning caveats are also very common. Generally speaking, a caveat application comes before the duty judge in two ways. The first is an application by the caveator, having received a lapsing notice 20 days earlier, for an order extending the operation of the caveat; the second is an application by a caveatee for removal of the caveat. The test is the same on both, and it is the same test as applies for an interlocutory injunction: even if the caveatee files a summons claiming an order removing a caveat and the caveator is the defendant, it is the defendant caveator who bears the onus of justifying the caveat. First, the caveator - whether applying for an extension of the caveat or resisting its removal - must demonstrate that the caveat has or may have substance.[8] The term 'may have substance' encompasses the concept of a seriously arguable case. Secondly, the court will have regard to the balance of convenience, although it is a rare case that a valid caveat will be allowed to lapse or be removed on balance of convenience grounds. But it can and does occur - for example, where there is a valid caveat in respect of a security interest, but a substantial equity remains in the property and the registered proprietor proposes to refinance and can do so without seriously prejudicing the position of the caveator, then the court may permit or require that the caveat be removed, with leave to relodge it once the refinance has been completed, upon terms that protect the caveator's interest.[9]

Despite comments in judgments reported and unreported,[10] an enormous number of caveats still claim 'an equitable interest' and no more. A caveat that claims merely 'an equitable interest' is insufficient to specify an interest claimed by the caveator as required by the relevant provisions of the Real Property Act.

Despite comments in judgments reported and unreported,[10] an enormous number of caveats still claim 'an equitable interest' and no more. A caveat that claims merely 'an equitable interest' is insufficient to specify an interest claimed by the caveator as required by the relevant provisions of the *Real Property Act 1900* (NSW). The regulations provide that it is unnecessary to describe an interest as 'equitable', thus 'equitable' adds nothing and all such a caveat does is claim 'an interest', which tells the registrar of titles, the caveatee and the court absolutely nothing. If you encounter such a caveat, then the summons should include, as well as, or better still in place of, an application for extension of the defective caveat, an application for leave to lodge a fresh caveat claiming substantially the same interest as that claimed in the original caveat.[11]

Other common applications for interlocutory injunctions include injunctions to restrain obstruction of rights of way, and injunctions to restrain landlords from locking out tenants, particularly as often seems to happen in the context of disputed exercise of options. In this context, be aware of the sometimes overlooked *Conveyancing Act 1919* (NSW), ss133E, 133F and 133G, which have the effect that despite any provision in a lease which makes an option subject to performance by the lessee of any specified obligation, no breach by the lessee of such an obligation precludes the lessee's entitlement to the option unless (1)

the lessor has given a prescribed notice within 14 days after the lessee purports to exercise the option stating that subject to any order of the court the lessor proposes to treat the lessee as disentitled to the option, and (2) the court has dismissed any application brought by the lessee for such relief; and that the lease continues in force until the issue is determined.

The undertaking as to damages

As a condition of ex parte relief or interlocutory relief, an applicant is required to give the usual undertaking as to damages. Rule 25.8 describes the usual undertaking as to damages as an undertaking given to the court to submit to such order if any as the court may consider just for the payment of compensation to any person whether or not a party affected by the operation of the interlocutory order or undertaking *or of any interlocutory continuation with or without variation of the interlocutory order*. Thus the undertaking as to damages only needs to be given once, and enures automatically in respect of every interlocutory extension or variation; there is no need to repeat it each time.

Whether an undertaking as to damages is valuable may be material, and even decisive, on the balance of convenience. Generally speaking, when an undertaking as to damages is proffered the court will assume that the undertaker is representing that he or she or it has the ability to make that undertaking good. In circumstances where there is doubt as to its worth, the court may require that it be secured - that is, that the applicant give some sort of security for its undertaking as to damages. If there is reason to doubt the worth of an undertaking as to damages, then evidence will be required to show that it is valuable. A defendant who wants to put in issue the value of the undertaking, should notify the plaintiff that it is in issue, because otherwise the court will proceed on the basis that the value of the undertaking is not in issue. Once it is put in issue, the applicant bears the onus of showing that it is valuable.

Alternative outcomes

In the interests of the just, quick and cheap resolution of litigation, other options need to be explored in each case. Courses of action that a duty judge might adopt include:

- adjourning a matter to an expedition judge's list - either with or without the grant of interlocutory relief in the meantime;
- fixing an early final hearing before the duty judge or some other judge if time can be found for it;
- even hearing the matter on a final basis, if that can be done without injustice.

Conclusion

Finally, can I urge these things?

Remember that when you approach the duty judge you are normally approaching a busy court in which there will be a number of matters with competing claims for urgency. Take a pragmatic approach to what is really urgent and what is not. There are not many applications that really cannot wait until the next morning as opposed to 6.00pm the night before, and there are few that will be prejudiced in being heard on Monday rather than the preceding Saturday.

In terms of presentation of duty judge applications before the court, if there were two points to stress they would be conciseness, and proportionality to the real issues in dispute on an interlocutory application. The court will not be interested in extensive submissions as to why the plaintiff should not be believed, because credit normally does not count for much on an interlocutory application. Concise written outlines - even dot point outlines - are normally more helpful than extensive and detailed submissions, although in a contested interlocutory hearing, longer submissions may be appropriate.

Endnotes

1. UCPR, r 25.2(3).
2. *Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 955, [38].
3. *Frigo v Culhaci* (NSWCA, 17 July 1998, unreported, BC 9803225); *Harrem Pty Ltd v Tebb & Anor* [2006] NSWSC 1415; *Bennett v Excelsior Land Investment & Building Co Ltd* (1893) 14 LR(NSW) Eq 179, 182.
4. See, for example, *Mutch v English & Anor* [2006] NSWSC 946.
5. Some judges prefer to make proceedings returnable before the registrar, on the basis that they might not require the attention of the duty judge on the return date. Others make them returnable before the duty judge, on the basis that they then know what is in the list the following day, rather than have surprises appear.
6. *Kolback Securities Ltd v Epoch Mining NL* (1987) 8 NSWLR 533.
7. *Harrison Partners Construction Pty Ltd v Jevena Pty Ltd* [2005] NSWSC 1225, [17].
8. *Real Property Act 1900* (NSW), s74K.
9. S Jackson, 'Removal of a Valid Caveat - How Convenient' (1996) 4 APLJ 1; *Australian Property & Management Pty Ltd v Devefi Pty Ltd* (1997) 7 BPR 15,255; *Esther Investments Pty Ltd v Wilson International Pty Ltd* [1982] ANZ ConvR 647; *Buchanan v Crown & Gleeson Business Finance Pty Ltd* (2007) 13 BPR 24,513; (2007) NSW ConvR 56-173; [2006] NSWSC 1465.
10. Including *Hanson Contruction Materials Pty Ltd v Vimwise Civil Engineering Pty Ltd* (2005) 12 BPR 23,355; (2006) NSW ConvR 56-137; [2005] NSWSC 880; *Circuit Finance Pty Ltd v Crown & Gleeson Securities Pty Ltd* (2005) 12 BPR 23,403; (2006) NSW ConvR 56-143; [2005] NSWSC 997; *Sutherland v Vale* [2008] NSWSC 759.
11. *Real Property Act 1900* (NSW), s74O.

Calderbank offers

The Hon Justice M J Beazley AO at the Australian Lawyers Alliance Hunter Valley Conference, 14-15 March 2008

Introduction

This paper was born out of a great deal of judicial frustration (not only mine) in dealing with applications for indemnity costs based on Calderbank offers and the seeming lack of understanding of the now substantial jurisprudence in New South Wales relating to those offers.

The paper is only about Calderbank offers. I do not propose to deal with the law that relates to offers made under Pt 20 r 20.26 of the *Uniform Civil Procedure Rules 2005 (*the UCPR), and the consequences of non-acceptance of such an offer: Pt 42, r 42.14. However, I would be remiss in a paper dealing with offers of compromise, if I did not draw your attention to the regime which is provided under the UCPR. Accordingly, there are annexed to this paper copies of both rules. I do not propose, at this stage, to say anything more about the costs rules. I will return to them later, when I wish to raise for your consideration the question of your professional obligations in advising your clients as to the making of offers of compromise.

Let me then return to Calderbank offers. The genesis of Calderbank offers is the English decision of *Calderbank v Calderbank*.[1] The issue in *Calderbank v Calderbank* was whether a party could in a 'without prejudice' communication in which an offer of settlement had been made, reserve that party's right to waive the confidential (that is, the 'without prejudice') nature of the offer in order to rely upon it for the purposes of making an application for indemnity costs. Cairns LJ held that that was permissible.

In the years following the decision in *Calderbank,* there remained a question whether the procedure was available in jurisdictions other than matrimonial causes. This was finally resolved in *Computer Machinery Co Ltd v Drescher*.[2] Sir Robert Megarry VC examined the history of 'without prejudice' offers of compromise, noting that it had been settled law that if such letters did not result in a settlement, they could not be considered by the court on the question of costs unless the parties consented: see *Walker v Wilsher* (1889) 23 QBD 335; S*totesbury v Turner* [1943] KB 370. This of course provided no incentive to a party to settle. The position could be overcome if a money claim was involved by the payment into court of the proposed settlement sum.

However, if relief other than a money sum was sought, for example, relief by way of a declaration, there was no means by which a party seeking to resolve a matter could do so in circumstances that would entitle that party to a costs benefit. Megarry VC commented that some such procedure was needed and endorsed the approach taken by Cairns LJ in *Calderbank* as providing an appropriate means of doing so. Megarry VC also considered that notwithstanding the authorities to the contrary, the procedure was one of general application and was not confined to matrimonial cases.

That part of the Calderbank jurisprudence is now undisputed and does not need to be revisited. Such offers are commonplace and there is never an argument about whether the 'without prejudice' nature of the offer precludes reliance upon it for the purposes of costs.

There are now numerous cases in the Court of Appeal in which the jurisprudence surrounding Calderbank offers has been developed. I propose to deal with those authorities, not in chronological order, but in a sequence that I consider appropriately brings to the forefront the matters that you should have in mind when advising a client in respect of making an offer of compromise by this method.

Each of the principles that are discussed in this paper is based on the premise that, in the case of a plaintiff, the result of the court's adjudication is as favourable or more favourable to the offeror than the offer of compromise, or in the case of a defendant, the court's adjudication is less favourable to the plaintiff than the offer. A reference to a Calderbank offer will be used in that context.

Basic rule as to costs

The starting point in respect of the costs of proceedings is that costs follow the event: see UCPR r 42.1. That general rule is subject to the court determining that some other order should be made as to the whole or in any part of the costs: UCPR r 42.1. Costs ordered to be paid are assessed on the ordinary basis (replacing the language of 'party/party' costs) unless the court otherwise orders: UCPR r 42.2. The making of a Calderbank offer is one circumstance in which the court might exercise its discretion under r 42.1.[3]

Public policy and purpose underlying Calderbank offers

There is both a public policy and a private interest in encouraging offers of compromise so as to settle legal proceedings (see *Computer Machinery Co Ltd v Drescher;*[4] *Cutts v Head;*[5] *South Eastern Sydney Area Health Service v King*.[6] In *South Eastern Sydney Area Health Service v King* (a case dealing with an offer of compromise under the rules of court), Hunt AJA (Mason P and McColl JA agreeing) stated the purpose of the rules of court as being:

> … to encourage the proper compromise of litigation, in the private interests of the litigants and in the public interest of the prompt and economical disposal of litigation.[7]

See also *Macquarie Radio Network Pty Ltd v Arthur Dent (No 2)*.[8] The same policy and purpose underlie offers of compromise made in the form of Calderbank offers: see *Leichhardt Municipal Council v Green;*[9] *Elite Protective Personnel Pty Ltd v Salmon*.[10] In *Leichhardt Municipal Council v Green,* Santow JA said:

> … the practice of Calderbank letters is allowed because it is thought to facilitate the public policy objective of providing an incentive for the disputants to end their litigation as soon as possible. Furthermore, however, it can be seen as also influenced by the related public policy of discouraging wasteful and unreasonable behaviour by litigants. [11]

The nature of the private interest (which itself underpins the public policy) was articulated by Fox LJ in *Cutts v Head* in these terms:[12]

> If a party is exposed to a risk as to costs if a reasonable offer is refused, he is more rather than less likely to accept the terms and put an end to the litigation. On the other hand, if he can refuse reasonable offers with no additional risk as to costs, it is more rather than less likely to encourage mere stubborn resistance.

The public policy in encouraging settlement also finds statutory encouragement: first, in the *Evidence Act 1995*, s131 and now in the *Civil Procedure Act 2005*, s56.

Section 131 Exclusion of evidence of settlement negotiations

(1) Evidence is not to be adduced of:

(a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute, or

(b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

(2) Subsection (1) does not apply if:

…

(h) *the communication or document is relevant to determining liability for costs …'* (Emphasis added).

Section 56 of the CPA relevantly provides:

(1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the *just, quick and cheap* resolution of the real issues in the proceedings.

(2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule …' (Emphasis added).

Underlying the continuing acceptability of Calderbank offers as a means of settling claims, is their flexibility.[13]

Calderbank offers and orders for indemnity costs

The discussion which surrounds Calderbank offers is customarily couched in terms of indemnity costs. The party making the 'successful' Calderbank offer, whether plaintiff or defendant, usually makes an application for indemnity costs. However, the correct principle is that a Calderbank offer may entitle a party to a different costs order, other than that costs follow the event. To that extent, the order made will be an advantageous costs order. In the case of a successful plaintiff who has also made a Calderbank offer, the advantageous order will be an order for indemnity costs, usually from the date the offer was made. That is because the successful plaintiff will be entitled, in the usual case, to an order for costs in accordance with UCPR r 42.1.

However, in the case of a defendant, the advantageous costs order is not necessarily an order for indemnity costs. Where a defendant makes a Calderbank offer in terms which are more favourable than the court's order, an advantageous costs order in favour of the defendant is one to which it would not otherwise be entitled. The court might, therefore, order that the successful plaintiff pay the defendant's costs on the ordinary (party/party) basis. It might order that each party pay their own costs. The court might also order that the defendant have an order for costs on an indemnity basis: *Commonwealth of Australia v Gretton*.[14] I will return to the question of whether an order for indemnity costs should be made later.

It is important to recognise that a Calderbank offer does not automatically result in the court making a favourable costs order: *SMEC Testing Services Pty Ltd v Campbelltown City Council*.[15] Rather, the question that the court has to determine in deciding whether to do so is

> … whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rule as to costs, and that the offeree ends up worse off than if the offer had been accepted does not of itself warrant departure …[16]

SMEC was upheld by the Court of Appeal in *Jones v Bradley (No 2)*.[17]

SMEC v Campbelltown City Council and *Jones v Bradley (No 2)* displaced an earlier line of authority to the effect that, prima facie, a successful Calderbank offer should result in an order for costs on an indemnity basis in favour of the offeror.[18]

It is not necessary to lead evidence explaining why the procedure provided for under the rules for the making of an offer of compromise was not availed of: see *Jones v Bradley* at [12].[19]

Fundamental principles governing Calderbank offers

In *Commonwealth v Gretton Hodgson* JA observed, at [121], that the underlying rule in relation to costs was one of fairness. His Honour said:

> In my opinion, underlying both the general rule that costs follow the event, and the qualifications to that rule, is the idea that costs should be paid in a way that is fair, having regard to what the court considers to be the responsibility of each party for the incurring of the costs. Costs follow the event generally because, if a plaintiff wins, the incurring of costs was the defendant's responsibility because the plaintiff was caused to incur costs by the defendant's failure otherwise to accord to the plaintiff that to which the plaintiff was entitled; while if a defendant wins, the defendant was caused to incur costs in resisting a claim for something to which the plaintiff was not entitled: cf *Ohm v Walton* (1995) 36 NSWLR 77 at 79 per Gleeson CJ. Departures from the general rule that costs follow the event are broadly based on a similar approach.

In the same case, I expressed my agreement with Hodgson JA, at [85], in these terms:

> I agree with Hodgson JA that the exercise of the discretion must be based on fairness and that underlying that concept itself involves a consideration of the responsibility of parties in incurring the costs.

The relevance of the party responsible for costs of the proceedings being incurred had earlier been considered by me in *Monie v Commonwealth of Australia (No 2)*.[20] That case is considered below on another point. However, on this question, in Monie, at [29], I said (Mason P agreeing):

> … there is both a private interest and a public policy in the encouragement of settlements. One of the reasons these proceedings have not been finalised and are now to be the subject of at least a sixth judicial determination, is because [the defendant] did not accede to an offer which has been exceeded by the Court's determination of damages in respect of two of the appellants.

There are now a multitude of cases where the court has sought to work out the circumstances in which an 'offeree's failure to accept the offer' warrants departure from the ordinary rule that costs follow the event.[21]

The offeror bears the persuasive burden of satisfying the court to exercise the costs directions in the offeror's favour. In *Evans Shire Council v Richardson* the court used the language of onus, stating that there was an onus on the claimant to establish it was unreasonable for the offeree to refuse the offer.[22] In this case, the opponent had not put on any submissions to the contrary. Nonetheless, the offeror still bore the 'onus' of establishing that it was unreasonable for the offeree not to accept the offer.

In order to discharge that onus, a party may be required to disclose to the court the quantum of any costs order that it has in its favour and which is not included in the Calderbank offer.[23]

Genuine compromise

An offer of compromise must be a 'genuine offer of compromise'[24] and the offeree must be provided with an appropriate opportunity to consider and deal with the offer.[25]

Whether a particular offer is a genuine offer of compromise involves an evaluative judgement upon which judicial minds might differ. The court has held that a relatively small disproportion between the offer and the award may represent a genuine offer of compromise.

In *Maitland Hospital v Fisher (No 2)*, the Court of Appeal held that a differential of 2.5 per cent between the appellant's offer and the judgment sum (a judgment of $206,090 compared to an offer of $200,000) was a real, not a trivial or contemptuous offer.[26] In coming to that decision, the court considered it relevant that the appellant was a kitchen maid, to whom the sum of $6,090 would have been a significant amount.

In *Forbes Services Memorial Club Ltd v Hodge* a differential of $129.24 (judgment of $30,129.24 compared to an offer of $30,000) was held to constitute a genuine offer of compromise.[27]

In *Manly Council v Byrne (No 2),* the respondent made an offer of compromise on the appeal in which she sought payment of the damages award she had received at trial, but waived interest on that sum.[28] The waiver of interest meant forgoing interest for 79 days at nine per cent, which amounted to approximately $8,000. This was held to be a genuine offer of compromise. In that case, the court reaffirmed that the means of the plaintiff was a relevant matter to take into account in deciding whether the compromise was a real one.[29] Likewise, the prospect of success on the appeal was also a relevant consideration.

There are cases which have held that a 'walk-away' offer, for example, that the party withdraw from the appeal and each party pay their own costs, did not constitute a genuine compromise: *Townsend v Townsend (No 2)*;[30] *Herning v GWS Machinery Pty Ltd (No 2)*.[31]

However, it all depends upon the circumstances. *Leichhardt Municipal Council v Green* concluded that no error of legal principle exists in holding that a 'walk-away' offer can, in a particular case, be a 'genuine offer of compromise'.[32] It is the task of the court to consider 'whether the particular offer in the circumstances represented a genuine attempt to reach a negotiated settlement, rather than merely to trigger any costs sanctions'.[33]

Rejection of offer must be unreasonable

Factors that are relevant to the question whether a rejection is unreasonable include:

- whether there was sufficient time to consider the offer;
- whether the offeree had adequate information to enable it to consider the offer; and
- whether any conditions are attached and if so, whether those conditions are reasonable.

The question whether the rejection of an offer was unreasonable is usually determined without adducing further evidence. Indeed, in *Elite v Salmon*, Basten JA stated at [147] that the question must be determined on a summary basis. His Honour said:

> Greater sympathy may be accorded a defendant who receives an offer early in proceedings where there has been no reasonable opportunity for it to assess its questions of liability or its likely exposure in damages. Such matters must be assessed on a case by case basis. Usually litigation will not be the first that the defendant hears of the claim. However, a defendant which receives an offer of settlement in circumstances where it reasonably requires more time to consider its position would no doubt be advised to respond to that effect and, if necessary, make a counter-offer in due course.[34]

His Honour's comments need to be understood in context. Take the example where the offer of compromise is made in circumstances where the party making the offer has not obtained or has obtained but not served all of the party's expert evidence, medical or otherwise. If such evidence contains material that would have been relevant to the assessment of the offer and it is not served until after the offer expires, the offeree may be able to establish that it was not unreasonable not to have accepted the offer. In that case, some material will have to be before the court to establish those circumstances. That is usually done by the tender of the documents, with the covering letter that establishes the date of service. It may be done by an agreed statement from the bar table.

Such a situation arose in *South Eastern Sydney Area Health Service v King.* In that case, Hunt AJA (Mason P and McColl JA agreeing), stated:

> …However, the fact that the plaintiff's case had changed significantly between the date of the plaintiff's offer and the trial in which the judgment obtained is higher than the amount of the offer does provide a sufficient basis for an order denying the plaintiff's entitlement to indemnity costs: *Maitland Hospital v Fisher [No 2]* (at 725). The very nature of the situation itself demonstrates that it would be unfair to a defendant to make an order for indemnity costs when the evidence at the trial is different from that known to the defendant at the time of the offer. Whether or not this is an 'exceptional' situation does not matter.[35]

In *Vale v Eggins (No 2)*, I said, in relation to a rules offer:

> … the respondent, at the time that he made the offer of compromise, had not served all the medical reports which he already had in his possession. In those circumstances, when the respondent already had material in his possession which he did not serve, and which was relevant to an assessment of the offer made, he ought not to be entitled to the favourable costs provisions under the Rules. It is not an answer, as submitted by the respondent, that the appellant could have himself made an offer of compromise once all the evidence was in his possession.[36]

If there are developments in a case after the offer is made, the rejection of an offer may be found to be reasonable: see also *Rolls Royce Industrial Power (Pacific) Ltd v James Hardie and Co Pty Ltd.*[37]

In *Blagojevch v Australian Industrial Relations Commission*, the court found that rejection of a settlement offer, after the offeree had been warned of a challenge to the truthfulness of his evidence (and the evidence was subsequently found to be false), may be held to be unreasonable.[38]

These cases demonstrate that the 'prospects of success' is a relevant consideration to the costs determination.

Where the offer is subject to a non-monetary condition, such as requirements for an apology or release, proper exercise of the discretion will involve the court considering the reasonableness of the condition, and whether or not the judgment result was, in substance, more favourable than the offer: *Magenta Nominees Pty Ltd v Richard Ellis (WA) Pty Ltd;*[39] *Timms v Clift;*[40] *Assaf v Skalkos;*[41] and *Skalkos v Assaf (No 2).*[42] The rejection of an offer that is conditional upon the release of unrelated proceedings may be considered reasonable: *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd.*[43]

In *Commonwealth of Australia v Gretton* the court was concerned with a Calderbank offer made by a defendant. The trial judge had held that notwithstanding the jury verdict in favour of the plaintiff was substantially lower than the Commonwealth's offer, it was not unreasonable for the plaintiff to have rejected the offer. Accordingly, the court rejected the Commonwealth's application for indemnity costs or another advantageous costs order.

The Commonwealth appealed, seeking an order for indemnity costs, or alternatively, costs on the ordinary basis. The Commonwealth's appeal was disallowed. Relevantly, in respect of the question whether the rejection of the offer was unreasonable, Hodgson JA stated:

> … where the question is whether, by reason of refusal of a Calderbank offer, a party should have to pay costs on an indemnity basis rather than party and party basis, it is generally necessary that the party seeking assessment on an indemnity basis satisfy the court that the other party was acting unreasonably in refusing the offer.[44]

His Honour referred to *Rosniak v GIO,* where Mason P had stated in relation to the requirement of unreasonableness for indemnity costs, in contra-distinction to party/party costs:

> Later cases have emphasised that the discretion to depart from the usual 'party and party' basis for costs is not confined to the situation of what Gummow J described as the 'ethically or morally delinquent party' ... Nevertheless the court requires some evidence of unreasonable conduct, albeit that it need not rise as high as vexation. This is because party and party costs remain the norm, although it is common knowledge that they provide an inadequate indemnity.[45]

Hodgson JA had noted earlier that cases such as *Hillier v Sheather* and *Leichhardt Municipal Council v Green* were decided at a time when the rules relating to a defendant's offer of compromise were different from the current rules.[46] Previously, under the Supreme Court Rules and the District Court Rules, a defendant who had made a successful offer was only entitled to costs on a party/party basis. In *Leichhardt Council v Green* the defendant had been successful in the action and was thus entitled to party/party costs, but was seeking indemnity costs on the basis of a Calderbank offer. As Hodgson JA points out, the advantageous costs order in such a case had to be an order for indemnity costs.[47]

Usual form of a Calderbank offer

What then constitutes a Calderbank offer, and what are the circumstances in which it may be, or is best, made?

The usual form of a Calderbank offer derives directly from *Calderbank v Calderbank* itself: namely, a 'without prejudice' offer in a money sum plus costs, with an exception that the offer may be used in relation to costs. However, the use of a particular form of words is not necessary.[48] A Calderbank offer does not have to be in any particular form or use any particular formula. As I said In *Elite v Salmon,* the court should consider such a Calderbank offer:

> … according to its terms and to determine whether, in all the circumstances, the Court should exercise its discretion to award indemnity costs.[49]

Types of offers that may be made

Offers inclusive of costs: Elite v Salmon

The question whether an offer made inclusive of costs could be properly considered as a Calderbank offer was decided recently in *Elite v Salmon.* By majority, it was decided that such an offer was a Calderbank offer and could be taken into account in determining the appropriate costs order. However, as I said, 'there may be difficulties in the path of a party who seeks indemnity costs when the application is based upon an offer inclusive of costs'.[50]

Basten JA also held that an offer inclusive of costs could constitute a Calderbank offer. His Honour also recognised that there may be difficulties in a party making such an offer. I refer to his Honour's analysis of these problems below. Support for the majority view is to be found in *Trustee for the Salvation Army v Becker (No 2)*.[51]

McColl JA, in a strongly-argued dissent on this point, disagreed that an offer inclusive of costs is a 'valid' Calderbank offer.[52]

There are two underlying principles which support the principle that an offer inclusive of costs may be receivable as a Calderbank offer. The first principle recognises the degree of flexibility which the Court of Appeal has said attaches to Calderbank offers. Secondly, as I stated in *Elite v Salmon,* an award of indemnity costs based on a Calderbank offer involves the exercise of a discretion. A general or overarching 'rule' or 'principle' that only offers exclusive of costs could ground a favourable exercise of the court's discretion would operate as a fetter on that discretion and would introduce a rigidity to the making of so called Calderbank offers which has no basis in principle.[53]

The danger in making an offer inclusive of costs is that the court may not be able to determine whether or not it was unreasonable for the offeree to accept the offer. More particularly, it may be difficult for the court to assess whether the offer was equal to or better than the result received on the verdict.

If a plaintiff made an offer inclusive of costs and subsequently received an award of damages in excess of that amount then, on any view, the plaintiff had bettered the offer and should have that taken into account in relation to the question of costs. The matter is not quite so straightforward when the award of damages is less than the offer. In that case, it may not be an easy matter to determine, without an assessment of those costs, whether the award for the plaintiff is at least as favourable or more favourable than the offer.[54]

The real disadvantage of a costs-inclusive offer occurs when a defendant makes such an offer, but the matter proceeds to judgment. Basten JA explained this in *Elite v Salmon:*

> Where the judgment is equal to or above the inclusive figure, the defendant will have failed to better its own offer. However, if the judgment is below the offer there may be uncertainty because the offer included an unquantified element for costs incurred up to the time when it lapsed or was rejected. No doubt the figure for costs incurred to that time by the plaintiff could be resolved by some form of assessment, but if the calculation of the damages component is not clearly seen to provide a figure above the judgment, then the interests of justice will usually not be served by incurring further expense in assessing the costs element of an offer and the plaintiff would be entitled to his or her costs …[55]

Non-conforming rule offers

An attempt to make an offer of compromise under the UCPR which fails for non-compliance may be relied upon as a Calderbank offer. Whether it can be considered as a Calderbank offer will 'depend upon the intention of the offeror as revealed by the terms of the offer'. As Ipp JA (Mason P and McColl JA agreeing) said in *Trustee for the Salvation Army v Becker (No 2)*:

> The offer may disclose an intention that it should take effect only if it complies with the Uniform Civil Procedure Rules. On the other hand, it may disclose a general intent to make an offer, irrespective of whether it takes effect under the Uniform Civil Procedure Rules or not.[56]

For myself, I would caution the exercise of care in assuming that an offer that fails under the rules will be treated by the courts as constituting a Calderbank offer. The rules themselves state that the offer must state that it is an offer made in accordance with the rules: Pt 20 r 26.3(a). If there is non-compliance with the rules there will be an argument as to whether it is a rules offer. If it purports to be an offer made under the rules, but for some reason fails as a rules offer, there may be a real question as to whether it will be accepted as disclosing a general intention to make an offer of compromise. The short message is that it is better to ensure that if you make a rules offer, the offer conforms in all respects. If you do not intend to make a rules offer, that should also be apparent on the face of the written offer.

Offer of compromise limited to liability

An offer may be made limited to liability: *Vale v Eggins (No 2)*.[57]

Offers may be made in the alternative

In *Vale v Eggins (No 2)*, the plaintiff in face made two offers. One was in the terms just stated. The other was of a money sum plus costs.

Offers taking into account contributory negligence

In *Coombes v Roads and Traffic Authority (No 2)* the plaintiff's offer was for there to be a verdict for the plaintiff and damages to be assessed subject to a 25 per cent reduction for contributory negligence.[58] The result (on appeal) was that there was a verdict for the plaintiff and no reduction for contributory negligence. Costs on a solicitor/client basis were ordered in the plaintiff's favour (an award of solicitor/client was made as the offer was made under the rules).

In *Vale v Eggins (No 2),* the offer was that the defendant was to be held 70 per cent liable for the accident and the plaintiff 30 per cent. (Unfortunately for the plaintiff, a finding of 75 per cent contributory negligence was made!)

A combined offer made on behalf of a number of plaintiffs

In *Monie v Commonwealth of Australia (No 2),* an offer of compromise was made in terms:

1. Verdict for the Plaintiffs in the sum of $250,000 plus costs to be agreed or assessed.

2. Such costs to include the costs of the retrial, the first trial and the extension application which Master Malpass as he then was, ordered should be costs in the trial.

> This offer is made pursuant to the principles of *Calderbank v Calderbank* and is open to acceptance up to and until 10:00 am on Monday 6th February 2006.

On the appeal, the court entered verdicts for two of three plaintiffs and ordered that there be a retrial of the third plaintiff's claim. In the result in the Court of Appeal, the total judgment sum for the two plaintiffs who had been favoured with a verdict was in excess of the offer made for the three. The defendant (the Commonwealth) argued that a combined mode of offer on behalf of all plaintiffs could not properly be considered a Calderbank offer. The court rejected that argument. In summary, the court's reasoning was that the effect of the offer was to propose to the Commonwealth, in circumstances where three claims were being prosecuted together, that they had a combined worth of $250,000. An offer of compromise in those terms was also a statement to the Commonwealth that the Commonwealth did not have to concern itself with how the plaintiffs viewed their individual claims, or how the plaintiffs would distribute the moneys amongst themselves.[59]

Offer forgoing interest

An offer of compromise which involves a waiver of interest that would otherwise be payable on the judgment sum may constitute an appropriate offer and result in an order for indemnity costs: *Manly Council v Byrne (No 2)*.[60]

Offer including terms in addition to a money sum

An offer of compromise does not only have to be in respect of a money sum, or, alternatively, it may include terms in addition to a money sum: again this proposition was the reason Calderbank offers received approval in England in the cases to which I have referred. However where the offer is not of a money sum, or there are other terms involved, a question may arise as to whether the offeror has received a more favourable verdict.

This question arose in *Sabah Yazgi v Permanent Custodians Limited (No 2)* (a rules case).[61] The offer in that case sought: judgment for $50,000 against Ms Yazgi; a declaration that that judgment was secured against her interest in the property; orders for the appointment of a trustee under the Conveyancing Act s66; and an order for the distribution of the proceeds of sale. Permanent Custodian's claim for possession failed and the court ordered that Ms Yazgi's interest in the property by mortgage was nil. However, it also noted an offer that had been made by Ms Yazgi to repay $54,000.[62]

Although the amount of $50,000 that Permanent Custodians was prepared to accept by way of a judgment against Ms Yazgi was less than the sum of $54,562.15 plus interest that she was prepared to pay by way of agreement (and without any legal obligation to do so), an agreement to pay an amount is both conceptually and juridically different from a judgment in a lesser sum. Likewise, Permanent Custodians' failure to obtain an order for possession meant there was no legal barrier to Ms Yazgi staying in the property until it was sold. The right to possession is a significant right of monetary value. Further, under the court's orders there was no monetary judgment sum against her. This was also of practical importance, as Ms Yazgi's personal and real property could be made the subject of enforcement proceedings and she was not thereby liable to bankruptcy. Finally, there was no sum secured against her interest in the property. In short, notwithstanding that the money component of the offer was less than Ms Yazgi was prepared to offer, the offer was so conceptually different that the appellant could not establish that its offer was less than it had been awarded under the court order.

Terms not be disclosed

In *Commonwealth v Gretton* the Commonwealth's offer of compromise included a clause that the terms of the offer not be disclosed. With strictly limited exceptions, such a clause is not an order that a court may make. Nonetheless, having regard to the flexible nature of Calderbank offers, the court held that the inclusion of such a clause did not disentitle a party to the favourable exercise of the court's discretion. However, a non-disclosure clause may be relevant to the exercise of the court's discretion and the offeror bears the onus of satisfying the court that such a clause did not have any relevant effect on the offeree's acceptance of the offer or otherwise bore upon the exercise of the discretion. The Commonwealth had not discharged that onus.

Pre-trial Calderbank offers and appeals

One principle that must be borne in mind is that an offer made pre-trial does not necessarily continue to operate for the purposes of an appeal. The Court of Appeal almost invariably refuses to exercise its discretion in favour of a party who has made an offer of compromise pre-trial but who has not renewed that offer or made a new offer prior to the appeal. If there is an appeal, a separate offer of compromise should be made: see *Baresic v Slingshot Holdings Pty Ltd (No 2)*.[63]

Calderbank offers v rules offers

When and why would you advise your client to make a Calderbank offer rather than an offer under the rules? Let me deal with the 'why' part of the question first. To answer that question, it is necessary to have regard to the provisions of the rules. In the first place, it should be recognised that offers that may be made under the rules have become increasingly flexible. Thus:

- an offer may be made relating to the whole or part of a claim: Pt 20 r 20.26(1);
- an offer need not be restricted to a money sum: Pt 20 r 20.26(8);
- more than one offer may be made under the rules in relation to the same claim: Pt 20, r 20.26(10);
- offers made under the rules may be made at any time, including during the course of the trial: Pt 20 r 20.26(7); Pt 42 rr 42.14 and 42.15.

However there are restrictions:

- an offer must be made exclusive of costs, unless the offer is for a verdict for the defendant and each party to pay their own costs: Pt 20 r 26.2;

- an offer may not be withdrawn during the period of acceptance, without the leave of the court: Pt 20 r 26 .11;
- the offer must state that it is an offer made in accordance with the rules: Pt 20 r 26.3(a);
- an offer that purports to modify or restrict the operation of the rules is not an offer for the purposes of Pt 20: Pt 20 r 26.12.

Notwithstanding these restrictions, there is a singular advantage in making an offer under the rules as opposed to the making of a Calderbank offer. If a successful offer is made under the rules, the consequences which follow are virtually automatic. A successful offer made by a plaintiff (a successful offer being one that where the judgment on the claim is no less favourable to the plaintiff than the terms of the offer) results in an order that the plaintiff is to have costs assessed on an ordinary basis from the day after the date on which the offer was made and thereafter on an indemnity basis: Pt 42 r 42.14.

The rule is subject to the court making a different order. A different order will only be made in 'exceptional circumstances'[64]. The effect of Pt 42 r 42.14 is to place an onus on the offeree to establish exceptional circumstances.

This is to be contrasted with the position under a Calderbank offer. A Calderbank offer constitutes no more than a discretionary consideration for the court in determining the appropriate costs order. It is often a powerful consideration. However, the fact that the offeror bears a persuasive burden of having the court exercise the costs discretion in the offeror's favour, is an important matter of which both legal representatives and clients ought to be aware.

The second question is 'when' would you make a Calderbank offer rather than a rules offer? Having regard to the flexibility now encompassed in rules offers, there may not be many circumstances when a Calderbank offer will provide you with flexibility that you would not otherwise obtain under a rules offer. Making an offer inclusive of costs is the obvious circumstance. There may be others, but they do not readily come to mind. That then leads me to my final question.

Why would you not make a rules offer? That question has effectively been answered in what I have already said. In summary:

- an offer made under the rules will generally have the same flexibility as is available under a Calderbank offer;
- it will have virtually automatic, favourable costs consequences for your client;
- your client will have no persuasive burden (or onus) in having the court make a favourable costs order;
- the burden is on the offeree to establish 'exceptional circumstances';
- and finally there is less likelihood of a second 'mini hearing' and therefore less likelihood of incurring the additional costs that inevitably are involved in a second hearing, regardless of whether that 'mini hearing' is in court or by way of oral submissions.

Conclusion

What I have just said is really the conclusion in this matter. Offers of compromise are important litigation tools. They need to be used knowledgeably and in a timely way. You have an obligation to understand the law, both statutory and caselaw, that relate to both types of offer. The purpose of this paper is to aid your understanding as to what is involved in making a Calderbank offer and to caution you to always think first about whether your client is better advised to make an offer under the rules.

Uniform Civil Procedure Rules 2005

20.26 Making of offer

1. In any proceedings, any party may, by notice in writing, make an offer to any other party to compromise any claim in the proceedings, either in whole or in part, on specified terms.
2. An offer must be exclusive of costs, except where it states that it is a verdict for the defendant and that the parties are to bear their own costs.
3. A notice of offer:

   (a) must bear a statement to the effect that the offer is made in accordance with these rules, and

   (b) if the offeror has made or been ordered to make an interim payment to the offeree, must state whether or not the offer is in addition to the payment so made or ordered.
4. Despite subrule (1), a plaintiff may not make an offer unless the defendant has been given such particulars of the plaintiff's claim, and copies or originals of such documents available to the plaintiff, as are necessary to enable the defendant to fully consider the offer.
5. If a plaintiff makes an offer, no order may be made in favour of the defendant on the ground that the plaintiff has not supplied particulars or documents, or has not supplied sufficient particulars or documents, unless:

   (a) the defendant has informed the plaintiff in writing of that ground within 14 days after receiving the offer, or

   (b) the court orders otherwise.
6. An offer may be expressed to be limited as to the time it is open for acceptance.
7. The following provisions apply if an offer is limited as to the time it is open for acceptance:

   (a) the closing date for acceptance of the offer must not be less than 28 days after the date on which the offer is made, in the case of an offer made 2 months or more before the date set down for commencement of the trial,

   (b) the offer must be left open for such time as is reasonable in the circumstances, in the case of an offer made less than 2 months before the date set down for commencement of the trial.

8. Unless the notice of offer otherwise provides, an offer providing for the payment of money, or the doing of any other act, is taken to provide for the payment of that money, or the doing of that act, within 28 days after acceptance of the offer.

9. An offer is taken to have been made without prejudice, unless the notice of offer otherwise provides.

10. A party may make more than one offer in relation to the same claim.

11. Unless the court orders otherwise, an offer may not be withdrawn during the period of acceptance for the offer.

12. A notice of offer that purports to exclude, modify or restrict the operation of rule 42.14 or 42.15 is of no effect for the purposes of this Division.

42.14 Where offer not accepted and judgment no less favourable to plaintiff

1. This rule applies if the offer concerned is made by the plaintiff, but not accepted by the defendant, and the plaintiff obtains an order or judgment on the claim concerned no less favourable to the plaintiff than the terms of the offer.

2. Unless the court orders otherwise, the plaintiff is entitled to an order against the defendant for the plaintiff's costs in respect of the claim:

   (a) assessed on the ordinary basis up to the time from which those costs are to be assessed on an indemnity basis under paragraph (b), and

   (b) assessed on an indemnity basis:

      (i) if the offer was made before the first day of the trial, as from the beginning of the day following the day on which the offer was made, and

      (ii) if the offer was made on or after the first day of the trial, as from 11 am on the day following the day on which the offer was made.

Endnotes

1. [1975] 3 All ER 333; [1975] 3 WLR 586.
2. [1983] 3 All ER 153; [1983] 1 WLR 1379.
3. cf r 42.14, r 42.15.
4. [1983] 3 All ER 153; [1983] 1 WLR 1379.
5. [1984] 1 All ER 597; [1984] 2 WLR 349; [1984] Ch 290 at 311.
6. [2006] NSWCA 2.
7. ibid at [83].
8. [2007] NSWCA 339 per Beazley JA at [15] (Mason P and Basten JA agreeing).
9. [2004] NSWCA 341.
10. [2007] NSWCA 322.
11. [2004] NSWCA 341 at [14].
12. [1984] Ch 290 at 315; [1984] 1 All ER 597 at 612.
13. See *Leichhardt Municpal Council v Green* [2004] NSWCA 341; *The Anderson Group v Tynan Motors Pty Ltd (No 2)* [2006] NSWCA 120 at [10]; *Elite v Salmon* [2007] NSWCA 322 at [135].
14. [2008] NSWCA 117. See especially the discussion by Hodgson JA at [117] ff.
15. [2000] NSWCA 323.
16. Ibid per Giles JA at [37], referring to *MGICA (1992) Pty Ltd v Kenny & Good Pty Ltd* (1996) 70 FCR 236, where Lindgren J at 239 stated that the manner of the exercise of the discretion 'depends on all relevant circumstances of the case'.
17. [2003] NSWCA 258 at [8]-[9]. This principle has also been applied in the Supreme Court decisions of *Nobrega v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney (No 2)* [1999] NSWCA 133 at [10]; *Cummings v Sands* [2001] NSWSC 706 at [4]; *Skalkos v Assaf (No 2)* [2002] NSWCA 236 at [13] to [16]; *Enron Australia Finance Pty Ltd (in liquidation) v Integral Energy Australia* [2002] NSWSC 819 at [10]; *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd* [2003] NSWCA 74 at [113] – [119]; *Leichhardt Municipal Council v Green* [2004] NSWCA 341 at [46]-[47]; *Russel v Edwards (No 2)* [2006] NSWCA 52 at [6]-[7].

   See also the Federal Court decisions of *John S Hayes & Associates Pty Ltd v Kimberly-Clark Australia Pty Ltd* (1994) 52 FCR 201; *The Sanko Steamship Co Ltd v Sumitomo Australia Ltd* (unreported, Federal Court, Sheppard J, 7 February 1996); *Black v Tomislav Lipovac BHNF Maria Lipovac* (1998) 217 ALR 386 at 432; [1998] FCA 699; *Alpine Hardwoods (Aust) Pty Ltd v Hardys Pty Ltd (No 2)* [2002] FCA 224; (2002) 190 ALR 121 at 126; *Natural Waters of Viti Limited v Dayals (Fiji) Artesian Waters Limited (No 2)* [2007] FCA 555 at [14]; *Dais Studio Pty Ltd v Bullet Creative Pty Ltd* [2008] FCA 42 at [7]-[11].
18. *Multicon Engineering Pty Ltd v Federal Airports Corp* (1996) 138 ALR 425 at 451 held there was a 'prima facie presumption of indemnity' in the event of a Calderbank offer not being accepted and the recipient of the offer not receiving a more favourable result than the offer (followed in *Naomi Marble & Granite Pty Ltd v FAI General Insurance Co Ltd (No 2)* [1999] 1 Qd R 518, and *Brittain v Commonwealth of Australia* [2003] NSWSC 270).
19. Meagher, Beazley and Santow JJA stated that the weight of authority did not support the proposition that evidence needs to be led to explain the choice of a Calderbank offer, referring to *Messiter v Hutchinson* (1987) 10 NSWLR 525 at 528; *AMEV Finance Ltd v Artes Studios Thoroughbreds Pty Ltd* (1998) 13 NSWLR 486; *Smallacombe v Lockyer Investment Co Pty Ltd* (1993) 114 ALR 568; *Wollong Pty Ltd v Shoalhaven City Council* (2002) 122 LGERA 331; and *Australian Competition and Consumer Commission v Black on White* [2002] FCA 1605.
20. [2008] NSWCA 15.
21. *SMEC v Campbelltown City Council* per Giles JA at [37]; *Jones v Bradley (No 2)* [2000] NSWCA 323 per Meagher, Beazley and Santow JJA at [8].

22. [2006] NSWCA 61 per Giles, Ipp and Tobias JJA at [26].
23. *Commonwealth v Gretton* at [99].
24. See *Leichhardt Municipal Council v Green,* at [21]-[24], [36] per Santow JA (Stein JA agreeing) and *Herning v GWS Machinery Pty Ltd (No 2)* [2005] NSWCA 375 at [4]-[5] per Handley, Beazley and Basten JJA.
25. See *Elite Protective Personnel v Salmon* [2007] NSWCA at [99], referring to *Donnelly v Edelsten* (1994) 49 FCR 384 at 396 (full court of the Federal Court, Neaves, Ryan and Lee JJ).
26. (1992) 27 NSWLR 721.
27. (Unreported, NSWCA, Kirby P, Priestly and Cole JJA, 8 March 1995). See Kirby P at [14], who stated, 'the amount of a 'compromise' that will be relevant to a particular case will depend upon the prospects of a party's succeeding or failing in the appeal … it would appear that the principle contemplates that so long as some actual offer of compromise, short of the full amount payable under the order under appeal [is made], the rule will apply'.
28. [2004] NSWCA 227.
29. Ibid., at [17]-[22].
30. [2001] NSWCA 145.
31. [2005] NSWCA 375.
32. [2004] NSWCA 341 at [36], applying *GIO General Ltd v ABB Installation and Service Pty Ltd* [2000] NSWCA 118 and rejecting the non-discretionary approach of Dunford J in *McKerlie v State of New South Wales (No.2)* [2000] NSWSC 1159.
33. [2004] NSWCA 341 at [39] per Santow JA.
34. [2007] NSWCA 322 at [147].
35. [2006] NSWCA 2 at [85].
36. [2007] NSWCA 12 at [22].
37. [2001] NSWCA 461; (2001) 53 NSWLR 626 at [95]-[99]. Here, a cross claim was made after the relevant offer. Stein JA (with whom Davies AJA agreed), stated at [95], 'The cross-claim produced a change of circumstance which, if in existence as at [time that the relevant offer was made], would have been likely to have produced a different complexion to the litigation so far as [the offeree] was concerned.'
38. (2000) 98 FCR 45. Marshall and Lehane JJ (with whom Moore J substantially agreed) stated at [35], 'the more confident an employer is of its ability to defeat a claim for compensation on the basis of evidence which it knows to be false, the more reasonable its conduct in rejecting an offer of settlement'. This was not a Calderbank offer, but the same principle applies.
39. (FCA, full court, WAG66/94, 29 August 1995, unreported, BC9506519). Here the offer included a requirement for release and an undertaking as to confidentiality. The offer was found in all the circumstances to be reasonable and an order for special costs orders made.
40. [1998] 2 Qd R 100.
41. [2000] NSWSC 935 at [82].
42. [2002] NSWCA 236.
43. [2006] NSWSC 583 at [73]-[74].
44. *Commonwealth v Gretton* at [117].
45. (1997) 41 NSWLR 608 at 616.
46. *Commonwealth v Gretton* at [113].
47. *Commonwealth v Gretton* at [115].
48. *Elite Protective Personnel v Salmon* [2007] NSWCA 322 per Basten JA at [137]. See also *Trustee for the Salvation Army (NSW) Property Trust v Becker (No 2)* [2007] NSWCA 194 at [25]-[29] per Ipp JA (Mason P and Basten JA agreeing).
49. Ibid., at [7].
50. Ibid., at [7].
51. *Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 194.
52. McColl JA accorded the Smallacombe line of authority greater weight, the premise of which is that an offeree, 'cannot be said to have acted unreasonably in not accepting an offer expressed to be inclusive of costs, because the offeree does not have an adequate opportunity to consider the offer and because of the difficulties posed when a court comes to consider the reasonableness of the offeree's conduct in rejecting/not accepting it. In other words such an offer presents practical difficulties' at [111]. These include 'party and party costs to date on taxation or assessment' at [114]. However, her Honour found that Smallacombe was not a 'definitive rule' that an 'all-in' Calderbank offer can never be considered on the question of indemnity costs, but affords guidance as to the exercise of discretion and informs the question of 'reasonableness' at [115].
53. [2007] NSWCA 322 at [5].
54. Ibid., per Basten JA at [141].
55. Ibid., per Basten JA at [144].
56. *Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 194 at [27].
57. [2007] NSWCA 12.
58. [2007] NSWCA 70.
59. Ibid., per Beazley JA (with whom Mason P agreed) at [20]-[22].
60. [2004] NSWCA 227.
61. [2007] NSWCA 306.
62. Ibid., at [6]–[10].
63. [2005] NSWCA 160.
64. *South Eastern Sydney Area Health Service v King* [2006] NSWCA 2; *Fowdl v Fowdl* (Court of Appeal, 4 November 1993 unreported, Kirby P) at 12, 16; *Hillier v Sheather* (1995) 36 NSWLR 414 at 422–423; *Morgan v Johnson* (1998) 44 NSWLR 578 at 581–582.

Appearing in the Commercial List

The following points are derived from observations made by Justice Bergin in her recent CPD presentation in relation to appearances in the Commercial List.

- Preparation is what it is all about.
- My aim is to have trial counsel briefed as early as possible. The reasons for that are obvious. It is good for the case, it is good for the client, it is cheaper, it is more efficient and, obviously, the by-product is better for the Bar.
- If there's slippage in the timetable, reach a new agreement. Do not wait five weeks before you come along to court and then have to file an affidavit saying why you didn't comply with the court's orders. Only request the intervention of the court when there is good reason and agreement has proved to be impossible.
- Do not deliver a monologue. If the judge speaks, make sure you listen carefully. Wait until the judge has finished speaking before you respond. Do not fall into the trap of talking over the top of the judge.
- No jury speeches, except when you are in front of a jury.
- Lectures, personal attacks on opposing counsel or overstatement are very unimpressive. They are counter-productive and should form no part of your armoury of advocacy skills.
- It is extraordinarily difficult for a judge to know the ripe time to refer a matter to mediation. The judge needs your assistance in this regard. If a judge says that the matter should be referred to mediation immediately and you are of the view that it is not appropriate to do so, make sure you say so and provide clear and cogent reasons as to why it should not be referred at that time.
- When you are appearing in the Friday List, make sure you know what the real issues are in the case. Make sure you know the nature of the expert evidence that will be required and be in a position to answer the questions on these topics that the List Judge may ask. Remember that there are many solicitors in court on a Friday and they will be impressed by counsel obviously in command of their brief.
- Set an example in court craft and etiquette. Although the Friday List is less formal, we need to maintain that respectful link between bench and bar, particularly when clients are present.
- Your aim, when you walk into the courtroom, is to feel comfortable and confident. If you are mumbling and fumbling, looking for papers, not knowing where you are in the list, appearing for someone who is not in the list, comfort and confidence will be absent. Preparation, preparation, preparation is the answer.

Kokoda District Court

These photographs were taken at Kokoda District Court in the PNG Highlands on 23 August 2008. Peter Garling SC and Jeremy Morris walked the Kokoda Track from North to South over 6 days in typical Kokoda conditions - heat, cold, rain, baking sun, mud and dust.

The *Kyeema* air disaster

Saturday, 25 October 2008 marked the 70th anniversary of the *Kyeema* air disaster at Mt Dandenong in which two of the New South Wales Bar's 'best and brightest' – Leonard Abrahams KC and Alfred Gain – perished.

The *Australian Law Journal* (1938-39) (12 ALJ 225) described Abrahams, then 51, as 'as one of Sydney's foremost silks.' He had been admitted to the bar on 29 August 1913 and, according to the ALJ:

> as a junior gained an extensive practice, specialising particularly in bankruptcy and company law. His practice, later, became very general, although (while almost equally at home in the High Court or before a jury) he leaned perhaps to the equity side. He took silk in 1932. At the time of his death he was engaged as leading council for the British Medical Association before the Royal Commission on National Insurance. He had previously appeared at a number of royal commissions and governmental enquiries relating to various matters and had twice appeared before the Privy Council. His advocacy was forceful and clear, his demeanour outstandingly fair and courteous and his capacity for rapidly grasping the essentials of a case, both in fact and law, probably unexcelled amongst the present generation of leaders. No man at the bar was more widely and justly esteemed.

Alfred Gain, 10 years' Abrahams' junior, was described by the ALJ as having 'had a remarkable career.' He had only been at the bar for eight years but was described as having 'occupied a position as a junior almost unrivalled':

> He commenced his career in the Postal Department, leaving that department to enlist at the age of eighteen. He served in the Great War from 1915 to the end of the war, being twice wounded. After his return to Australia, he spent twelve months in Randwick Military Hospital owing to heart trouble, and it was thought that he might not live. However, he recovered and re-entered the Postal Department, afterwards transferring to the Customs Department. From there he transferred to the Taxation Department and, while in this department, he studied accountancy and obtained his degree as a qualified public accountant. Upon the amalgamation of state and federal taxation departments in 1923, he took the opportunity of leaving the service with a view to taking up law. He went through the course at the law school of the Sydney University gaining first class honours. He served for some time with Messrs Allen, Allen & Helmsley, solicitors, and left them in 1930, to go to the bar stepping immediately into a busy and rapidly increasing practice. His practice was general but he strongly favoured the equity side and was a specialist on taxation matters. He combined to an extraordinary degree an immense knowledge of case law and capacity for hard work with common sense and sound judgment. His pleasant, unassuming personality won for him a large number of very firm friends. By his death we have lost one who, much as he had accomplished, was but on the threshold of his career and for whom no place which the bar or the bench could offer seemed too remote.

Sir Anthony Mason knew of both men through his own uncle (Mason KC) who was a contemporary of Abrahams. According to Sir Anthony, his uncle had a very high regard for Abrahams, both professionally and as a person and he regarded him, if not actually, then as potentially the best silk at the New South Wales Bar. As to Gain, the generally received wisdom is that he was brilliant. Sir Anthony recalled that when he himself came to the bar in the late 1940s, he was struck, going through the *State Reports*, the *Commonwealth Law Reports* and the *Australian Law Journal Reports*, by the frequency of Gain's appearances, including on appeal and very often, unled. Bearing in mind that Gain was only in his eighth year at the bar at the time of the *Kyeema* disaster, that is telling as also is the fact that, in many of his High Court appearances, he appeared in cases which emanated from outside New South Wales. In other words, he, after only eight years at the bar, had developed a national reputation and a national practice.

A ceremony to mark the anniversary of the incident and to remember the lives of those lost was recently held at Mt Dandenong. *Bar News* thanks Anthony Abrahams, a well-known solicitor and former Wallaby, for the following personal account of that service in which, amongst others, the life of his grandfather, Abrahams KC, was commemorated.

Abrahams KC, returning to Australia via the United States after a case before the Privy Council, had an introduction to Clark Gable, whom he visited at MGM Studios. Gable was filming *Test Pilot* (released in 1938), which accounts for the uniform. Photo: courtesy of Anthony Abrahams.

Ceremony at Mt Dandenong

25 October 2008: This morning, I got into a rented car in a suburb in Melbourne. I took out of my bag an automobile GPS, applied its suction pad to the windscreen surface and turned it on. Almost instantly the screen informed me that the machine had found several satellites and I tapped into its memory 'Ridge Road, Mount Dandenong'. I had already been guided, with precision, by an Oxford accented female voice, from Melbourne Airport to Canterbury. The same 'lady' had first asked me a series of questions - whether I wished the shortest route or the quickest route, whether I minded paying a toll - my answers to which were made by the slightest touch of a finger on the screen.

Again with precision, the lady took me to a high point on the ridge of Mount Dandenong. Sometimes she would tell me kilometres in advance whether I should hold to the right or veer to the left, which

exit from the roundabout I should take. All the while my groundspeed, my ETA and other pieces of information were being renewed and printed, printed and renewed, on the screen of the GPS.

Seventy years ago: Adelaide, Tuesday, 25 October 1938: It is mid-morning. An Australian National Airlines DC-2 bearing the name *Kyeema* is about to take off for Melbourne (having arrived from there earlier that morning) with its capacity complement of fourteen passengers and four crew. Travel by aeroplane has only just begun to gain acceptance – at least amongst those that can afford tariffs significantly higher than they are today. This and the smaller population of Australia of the time would mean that a number of the plane's passengers, from business, professional and political circles, would have a nodding acquaintance with each other.

The passengers include an exceptional politician, Charles Hawker, whose name is now carried by the South Australian federal electorate of Hawker. Having lost an eye on the Western Front during the Great War, and been wounded elsewhere to the extent that he could only walk with callipers, Hawker's 'longest journey' in his own words, was when, as the youngest minister in the Lyons UAP cabinet, he crossed the floor to vote against the increase of parliamentary salaries in the post-Depression environment of the time, thus condemning himself to ejection from the Cabinet. Hawker is seen as a potential prime minister, both by his own party and by the Curtin led Opposition.

A group of wine growers is also on the plane, representatives of three families in that industry, including Thomas Hardy, the father of yachtsman Sir James Hardy.

The passengers also include a group of lawyers who are returning to Sydney from Perth where they have been representing Australia's doctors, through their client the 'British' Medical Association, forerunner of the AMA, in a royal commission enquiring into the introduction of a national health scheme. The team is led by my grandfather, barrister Leonard Abrahams KC, and includes a brilliant junior, Alfred Gain (also wounded on the Western Front) and two solicitors from the leading firm of Allen Allen and Hemsley (now Allens Arthur Robinson), an open-faced Mr James Massie and a bespectacled Mr Lancelot Shirley. Mr Shirley and his actuarial friend Gordon Goddard (also representing the BMA - and a *Kyeema* passenger) are prominent members of Queenscliff Surf Lifesaving Club. One can imagine these fine professionals, staying overnight at a discreet club or good hotel in Adelaide, after arriving from Perth on 24 October, the royal commission hearings behind them and a good dinner and a few drinks their just reward. All is well.

A three-days-married honeymooning couple, a widow and two businessmen, complete the passenger list.

The advent of the all-metal DC-2 and the DC-3 is seen at the time as a turning point in aviation transport - 'powerful, superbly engineered, all metal machines whose speed, rate of climb, multi-engined safety and blind flying capacity are sufficient to cope with any contingency'. According to flight safety expert (and author of *Disaster in the Dandenongs*), Macarthur Job, 'the unpalatable truth is that without a corresponding technical advance in supporting ground based radio navigation aids, the sophisticated new airliners may even have been

Douglas DC-3, *Kyeema*, VH-UZJ, in flight.
Photo: National Library of Australia, nla.pic-vn3723034

less safe for round-the-clock, all weather operations than the stout old Avro 10s of yesteryear, as the speed of the new machines could render them more lethal in the event of an accident'. Ironically, the technical advances are available but not installed; government slowness in putting them into place is already a scandal. A major air disaster is openly feared by the experts.

The *Kyeema* lies glinting in Adelaide sunshine. When all is ready, the passengers file out of a small departure lounge, enter in by a door set in the rear of the plane to be greeted by 27 year old 'Air Hostess' Elva Jones, 'trim' says Macarthur Job, 'in her brass-buttoned navy blue uniform'. They negotiate varying distances up the slope of the aircraft to their high-backed seats set one to each side of the aisle and Miss Jones commences handing out the obligatory barley sugars. The plane taxis to the end of the runway, the engines are run through the usual procedures, Captain Alfred Webb releases the brakes, goes to full throttle and *Kyeema* is shortly afterward angling its way upwards, its propellers churning the air as it moves toward cruising altitude.

The weather conditions for most of the *Kyeema* flight were fine - so good in fact that the crew probably slipped into 'fine weather relaxation', relying on visual sightings and perhaps delegating the log keeping to a cadet pilot acting as radio operator. Visibility was excellent at the time when the *Kyeema* gave a position report as 'passing [the Victorian township of] Daylesford'. The problem was that they were not passing Daylesford but were over either Sunbury or Gisborne, two townships 20 miles closer to Essendon Airport.

In the Melbourne basin, the *Kyeema* entered into thick fog. Believing the aircraft to be twenty miles further west than it was, the pilot overflew Essendon Airport.

The rugged western slopes of Mount Dandenong are extremely steep, thickly covered by a majestic forest of tall, mostly branchless mountain ash, messmates and stringy barks. Just after one o'clock on Tuesday, 25 October 1938 the *Kyeema* sheared through the trees below the ridge line and slammed into the mountain with such force that the bulk of

its fuselage and wings were entirely fragmented. Our family legend is that my grandfather's gold fountain pen, bearing the initials L.S.A, was found more than one hundred yards from the point of impact. A huge blaze burned for several hours.

A ceremony

The site of the accident is marked by a cairn with a plaque recording the crash; and a second one bearing the names of the victims. A precipitous scramble down the slope brings you to a cross bar mounted on two posts marking the exact point of impact of the plane. Little effort of imagination is necessary; the towering trees, the unchanged slope; it is all as close as could be to seventy years ago. When the fog comes in, syphoning and swirling up the slopes and around the trunks, you can see the two woodsmen, Logan and Murphy, who raised the alarm, peering through the thickest fog they have seen on the mountain and listening with increasing horror, as the whine of the engines becomes a roar and what is to follow becomes a certainty.

Saturday, 25 October 2008 marks the seventieth anniversary of the *Kyeema* crash. A moving ceremony was held, attended, surprisingly, by nearly a thousand people. Several organisations and individuals excelled themselves in the organisation, led by Mr Max Lamb and Mr Job. The smartly decked out and precisely drilled cadets of the Australian Air League beautifully performed all the honours; the Victorian Police Pipe Band played the soldier songs of the time, there was a fly-over – intended to consist of two DC-3s but, due to technical problems, finally made up of one, passing over twice; and a number of people spoke, one of whom, David Hawker, a descendant of Charles Hawker was speaker of the House of Representatives under the Howard government.

But perhaps most evocative of all was the female member of the Wurundjeri People who belong to that area, who performed the Welcome to Country. She spoke of the Land and of belonging to the Land and one gained a sense of the Land, up there on the high slopes, receiving in the dead and forever cradling their souls.

Post scriptum

The *Kyeema* victims did not die in vain. The sound and fury after the accident finally forced the government to bring in the beam navigation system on all major routes throughout Australia, ushering in a new era in civil aviation.

In turning on the GPS to return to Melbourne, I thought of the crew of the *Kyeema*. An aviation version of my device, as simple as a tiny screen and a suction pad could, today, be attached to the windscreen of the aircraft. A crisp-as-starch Oxford-accented voice would instruct the pilot at every turn of the route. The lady would be there at the point of entry into fog in the Melbourne basin; she would be there when Essendon Airport was looming up. And if the pilot should display the slightest tendency to overfly the runway, the slightest inclination to head toward the Dandenongs, lights would flash, beeps would sound, and that precise voice would be heard to intone 'Perform a U-turn at the earliest possible moment'.

By Anthony Abrahams

The writer is indebted to Macarthur Job for much of the technical information in this article.

New South Wales Law Almanacs now online

The entire collection of all past New South Wales Law Almanacs (from 1886), with the exception of 2002 (the only year it was not published), are available electronically on the website www.lawalmanacs.info They have been catalogued by year and are fully searchable.

It is expected that various institutions, including the NSW Attorney General's Department, Law Society of NSW and the Francis Forbes Society for Australian Legal History will have links on their websites to this invaluable resource. The Almanacs have great historical significance; they are an essential tool of trade for legal historians. It is not possible to do any in-depth research into the state's legal history without referring to them. Members of the public seeking information about their family history can also now readily have access to the Almanacs. In the past only a few collections were publicly available. In many cases the earlier volumes, particularly from 1886 to 1932, held in collections had been irreversibly affected by bacteria and were quickly deteriorating.

This project was carried out by the New South Wales Bar Association with the assistance of a grant made by the trustees of the Public Purpose Fund. Special thanks go to the Law Society of New South Wales and the Attorney General's Department, as well as Thomson Legal, for their support and permission to reproduce the works in which they own copyright.

Saving St James Church

The National Trust of Australia (NSW) has launched the St James Church King Street Conservation Appeal. The Hon Moreton Rolfe QC reports.

Photo by Christopher Shain.

The Parish Church of St James is a beautiful building. It was designed by and built under the supervision of Francis Greenway in the early 1800s and consecrated in 1824. It is Sydney's oldest church standing proudly amongst other Greenway buildings, such as The Mint and Barracks buildings and the original Supreme Court.

All these heritage buildings have immense significance to the city both as buildings and in the purposes they serve. The Hon T E F Hughes AO QC described St James, in his eulogy at John Lockhart's memorial service, as 'the parish church of the law', whilst Dan Cruikshank, in his recent television series *80 Treasures of the World*, described it as this city's treasure. It is a wonderful building with a strong association with the law and it must be preserved as such.

Set in the centre of the legal precinct, St James provided comfort, solace and joy to many members of the legal profession and, in particular, members of the bar over a vast period.

As with all buildings, especially heritage ones, the church needs constant maintenance and renovation. Architects, expert in working with heritage buildings, have identified three main areas to which urgent attention must be given. The spire, once the most prominent sight in Sydney, needs to be restored and the copper cladding replaced. This work is already underway with the interior being cleaned out. Soon work on the exterior will begin.

The roof's slate tiles must be replaced. It is proposed that this work should follow that of the spire. It is feared that when the tiles are removed further work to their supports will be found to be necessary. Finally, certain of the brickwork requires remedial work and the perimeter fence must be restored.

In all, the work has been estimated at costing some $3 million. This includes not only the actual work of which the architects are aware, but a contingency sum of an additional 20 per cent and the costs of the appeal. The carrying out of the work has the full support of the National Trust, which has organised that funds given to the appeal, which must be to the St James Church King Street Conservation Appeal, will attract tax deductibility.

An Appeal Committee has been working now for some 18 months. The money needed to repair and reclad the spire has been raised. Barristers have been generous in their support on an ecumenical basis, as they rightly were with the extensive work carried out at St Mary's, and it is hoped that many more will support the appeal over the next two years for more money is needed to carry on the work.

The official appeal launch will be held at 6.00pm on 11 February 2009 in the church and its crypt, and all barristers are welcome, and encouraged, to attend the launch. As appeal chairman, I ask members of the bar to consider seriously supporting this appeal, notwithstanding the rocky financial period we are all now experiencing, thereby ensuring that St James continues to flourish as a vital part of the community generally, but also as a very special part of the community centring on the bar.

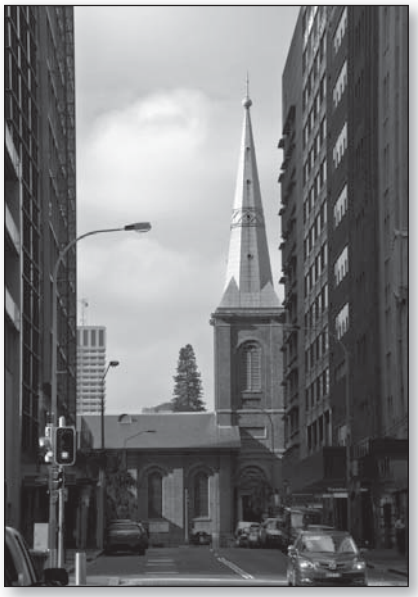


Photo by Christopher Shain.

Dan Cruikshank, in his recent television series 80 Treasures of the World*, described it as this city's treasure. It is a wonderful building with a strong association with the law and it must be preserved as such.*

Richard Edward O'Connor

By David Ash

We know too little about the third member of the first High Court. It is not clear whether he had four or five sons.[1] However, he is the subject of well-known praise, Sir Owen Dixon's observation that his work 'has lived better than that of anybody else of the earlier times'.[2]

When Dixon said those words, it was over half a century since he had himself first appeared in the court and before those three judges. And still a quarter century on, another distinguished chief justice would maintain:[3]

> But of the early justices O'Connor J probably appeals more to the modern legal mind (than Griffith CJ), as he did to Sir Owen Dixon. O'Connor J's judgments on questions of constitutional and public law indicate a sensitive appreciation of the underlying tensions in the Constitution and of the relationship between the courts, the Parliament and government.

A distraction

Before moving to O'Connor in more detail, I cannot pass up Dixon's brief. It will be recalled from the sketch on Sir Edmund Barton in the last but one edition of this journal that the first High Court had already had cause to question the Privy Council. But Dixon's big day out involved a doozy. It was a brief from his uncle[4] and is reported as *Cock v Aitken*.[5] Griffith opens with 'This case presents some features which, so far as I know, are unique in the history of the jurisprudence of the dominions in relation to the Privy Council.'[6]

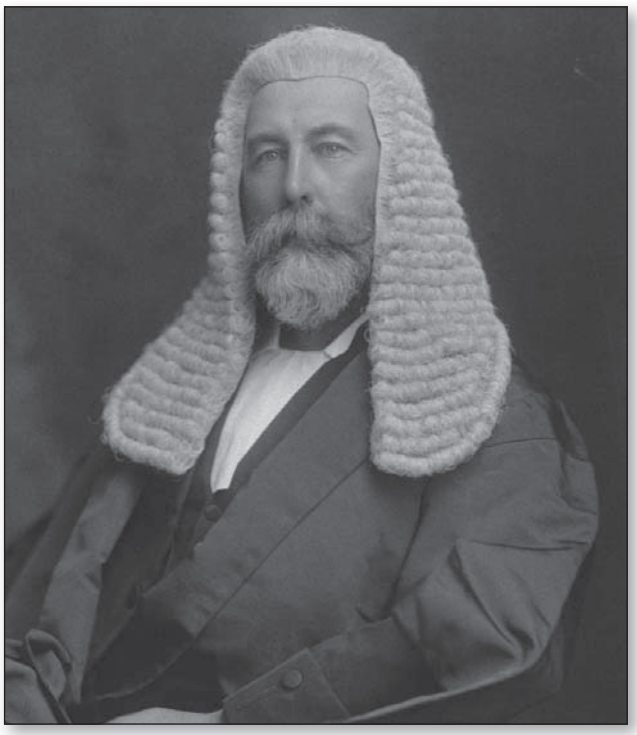
The short version is that two fights were had in the one matter. The first was a fight about the conduct of the trustees under the will of Mr Smith. The second was about the various rights of the beneficiaries under the will of Miss Smith, Mr Smith's daughter. The case was fought in the High Court in 1909. The trustees under the first will appealed to the Privy Council. In 1911, the council allowed the appeal.

Here things go awry. The appeal was conducted by Upjohn KC, who would not live to see his son's appointment to the council in 1960. One assumes that it was he who suggested that if the appeal were allowed, it would be necessary only to discharge the part of the order relating to Mr Smith's trustees. A not unreasonable request, mebbe. Be that as it may, the only opinion that mattered was to the contrary: '… the two parts in reality form only one order, and, therefore, the whole of it must be discharged…'[7]

The disgruntled party was no longer disgruntled, but another party was far from gruntled. Griffith CJ puts the position later the same year, in that first brief:[8]

> [Their lordships] accordingly dismissed the suit. I do not know of any other instance in which a judgment not appealed from, and not impeached, has been reversed by the Privy Council, nor do I know of any other instance in which a judgment has been reversed on the appeal of a person who has no interest in the matter.

I Casebased the 1911 decision to see what would happen. In fact, it has been considered recently by Campbell J in context of the question, whether a decision of the Court of Appeal which has been affirmed in the High Court for reasons different to those adopted by the Court of Appeal, is binding as a matter of law on first instance judges. That



National Library of Australia.

judgment[9] is fascinating for a number of reasons, but it is probably appropriate to stick with the litigation in which Dixon was involved, and then work a way back to the subject of this note.

The 1911 decision was not the end of things, of course. There was costs. Dixon gets another brief and Griffith opens with 'The question we are called upon to decide on this appeal is one that I suppose no court was ever before called upon to decide.'[10] He continues:[11]

> But we have to construe the Order in Council as we find it. I think it is only consistent with the respect which is due to so august a tribunal to say that, when it ordered that the action should be dismissed with costs, it meant costs in favour of the appellants, not costs in favour of persons not before the tribunal. I think it is proper to construe the Order in Council in such a way, if possible, as not to affect the rights of absent parties. It is not unusual for the Judicial Committee when allowing an appeal to leave an order for costs undisturbed. Nevertheless, as I have said, the Order in Council was in form that the order of the High Court should be reversed, and it must, I suppose, be taken that it was set aside and that the parties were, *quoad hoc*, left – so to say – in the air. I think, on the whole, although probably it was not intended, that we must treat the order of the High Court as now non-existent.

The volume in which the last salvo appears is also the volume with comments from the justices on O'Connor's death in November 1912. O'Connor steadfastly refused most honours, twice refusing a knighthood. It seems, though, he was disappointed not to receive an appointment to the council.[12]

Back to O'Connor

Actually, it is not necessary to look to colleagues then or future to get high praise for O'Connor. If a more visceral affirmation is wanted, it is hard to go past Arthur Harry O'Connor. He was this state's crown solicitor for most of the Second World War. As the office's historians have it, if one of his junior officers submitted an advice to him which referred to another justice, he would add something from one of his grandfather's judgments, having already explained 'I think this puts it well'.

This sketch of Richard Edward O'Connor is the second of a series intended to cover High Court appointments from the New South Wales Bar, from Sir Edmund Barton through to the present, whenever the present will be. None is intended as a biography. For that, the reader is referred to the online Australian Dictionary of Biography.[14] It is hoped, however, that the sketches in sum will one day provide something of a prosopography of the court itself, at least of its Sydney profile.

The court in 1903

It should not be thought that O'Connor's colleagues do not have their supporters. Sir Leo Cussen thought Barton's work was the best, while Michael McHugh observed a century after the court was founded that he was 'far from convinced that either of them would have made a better first chief justice than Griffith.'[15]

The New South Wales Bar Association has a frame of three photographs with the title 'Judges of the Federal High Court 1903'. In the middle is Griffith, with Barton on the viewer's left and O'Connor to the right. The descriptors are, respectively, 'chief justice', 'senior puisne judge' and 'second puisne judge'.

What does the frame tell us of the court, beyond the rather obvious fact that there were chosen for appointment three persons with features prototypical of British judges of the early twentieth century?

Significantly, I think, there is the title given to this new court. A century on, many of us who understand without need for thought that the court is the head of the third branch in our system, forget that the system itself – one of federation – was barely older than the court itself.

Section 71 of the Constitution provides that 'The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia…' This is a different creature from the one mooted in 1891; that was to be called the 'Supreme Court of Australia' and was to be left for the parliament and not the Constitution to establish.[16]

The corresponding provision of the US Constitution[17] provides that 'The judicial power of the United States, shall be vested in one Supreme Court…' The link with the US seems an obvious one, both in the 1891 discussions – and bill – and in the final product.

However, two remarks can be made. First, the final product seems diffident; it is difficult to see why the word 'federal' – a word appearing also in our frame – was thought necessary.

Secondly, why did we end up with a 'High' Court? The word 'supreme' makes its way to us from the superlative. Put another way, it really does mean 'highest', and not merely 'high'. There may be something in the debates, but absent my knowledge of it, I suspect that if there was any aping, it was of the mother country and not of our elder cousin.

For the Judicature Act of 1873 had done away with the former superior courts of law and equity, establishing in their place the 'Supreme Court of Judicature' consisting of two beasts, a High Court of Justice and the Court of Appeal.

The upshot appears to be that there was in England a Supreme Court which included a High Court and which was subject to the lords, while Australia opted for a High Court supreme in Australia but, Australia being a dominion, which was subject to the council: see above, or better, supra.

There need no longer be alarm. In Australia, all three branches of government have done their bit to make sure what was called 'High', is on any take supreme. In Britain, upon the commencement of Part III of the Constitution Reform Act 2005, the functions of the lords – and some functions of the council's Judicial Committee – will be taken on by a Supreme Court of the United Kingdom.

What of the sobriquet 'puisne judge'? In relation to judges, the expression has some ancestry. Sir William Blackstone refers to it in the Commentaries. By the time of the Judicature Act, it was the common expression for the junior common law judges at Westminster, and section 5 folds into the new High Court 'the several puisne justices of the courts of Queen's Bench and Common Pleas respectively [and] the several junior barons of the Court of Exchequer'.

A scan of some of our own reports at 1903 shows a variety of practice. In the 1903 State Reports for Queensland, the judges – including Sir Samuel Griffith in his last year as that state's chief justice – are not listed, while in 1904 they are, with the Honourable Patrick Real being 'senior puisne judge'.

Volume 3 of the State Reports of New South Wales, the reports for 1903, list a chief justice (and an acting chief justice) and a number of 'puisne judges' but no 'senior puisne judge'. So too the Western Australian Law Reports.

For reasons beyond me, the Tasmanians waited until the second year of the Second World War before adopting the same practice, although

Each of Griffith, Barton and O'Connor had been closely involved in federation, and clearly wished for the court to contribute in the bedding down of the new nation state. O'Connor J's statement of the paramount principle of constitutional interpretation is as pertinent now as when he said it a century ago…

National Library of Australia.

their legislation had been referring to [a] puisne judge[s] for many years.[18]

In New South Wales, there continues to be statutory recognition that the expression relates to junior members of our general superior court but not to other members of other tribunals, superior or inferior, section 2(1) of the *Judges' Pensions Act 1953* providing relevantly:

> *Judge* means a person holding the office of Chief Justice or puisne judge of the Supreme Court of New South Wales, President of the Court of Appeal or Judge of Appeal, President or other member of the Industrial Commission of New South Wales, Judge of the Industrial Court, judicial member of the Industrial Relations Commission of New South Wales, Chief Judge or Judge of the Land and Environment Court, Chief Judge or Judge of the District Court, or Chief Judge or Judge of the Compensation Court of New South Wales.

Griffith's Court

We don't know whether O'Connor made anything of being lumbered with 'Second Puisne Judge'. As a legislative administrator of great ability, one wonders what he thought of a nomenclature which implied to the layperson at least a hierarchy and not an equality of three.

What we do know is that the thing which must have made O'Connor's appointment one after Barton's was Barton's seniority as first minister and his implicit right to take whichever post he wanted. It is a reasonable inference because on 22 September 1903 Barton as first minister was advising Lord Tennyson as Governor-General 'Griffith will be the C.J., that is for sure; O'Connor will be one of the Judges that is equally sure. The remaining question is, *can* I persuade myself to leave politics and take the second place?'[19]

The details of Griffith's appointment were worked out in telegrams in Latin to preserve confidentiality.[20] Meanwhile, Barton's agonising soon ended. On 23 September, cabinet endorsed the nominees and on 24 September the new prime minister Deakin announced the appointments.[21]

Whatever merit each of the first justices had as a judge, on the question of who made the best first chief justice, McHugh must be right. The most significant features about this new court were that it was new and it was a court. It needed someone running it who was in the business of imposing himself, and Sir Samuel 'Dam Sam' Griffith, already years in the Queensland chief justiceship but also a federalist of note, was the man.

Griffith's own observation of O'Connor says a lot about both men:[22]

> If he had any judicial fault it was a quality due to his great kindness of heart, and one that is indeed generally regarded as a judicial virtue – I mean his long-suffering in the presence of tedious and irrelevant argument.

In his sketch of Griffith, A B Piddington – the next sketch in this series, of course – tells of a matter where C G Wade opened and Griffith was leaning to his argument. The question was whether to

grant prohibition, and Piddington sought to push Griffith back by advancing the proposition that prohibition ought be refused where the law is doubtful. Griffith said 'What does that mean – 'when the law is doubtful?' *The law is never doubtful in a Court of Appeal.*' [23]

When one reads that, one is immediately reminded of Jessel's axiom, a version of which is 'I may be wrong, I sometimes am, but I never have any doubt'.[24] Oddly enough, Piddington has the anecdote to qualify the reminder, recalling that Professor Butler once repeated the story of the axiom to Griffith, who immediately replied 'Well, he could hardly have meant that. He must have meant that he never expressed any doubts, for every judge must always feel some doubts at least until the conclusion of the argument.'[25]

And in a new court especially, each of the members seems to have accepted that there was not much room for doubt and not much room for dissent.

There was particular concern in matters constitutional, for good reason. Our primary image of the first court is as a somewhat parochial beast, hemming itself in with a pro-state reading. But this is to focus on one to the exclusion of the many. Each of Griffith, Barton and O'Connor had been closely involved in federation, and clearly wished for the court to contribute in the bedding down of the new nation state. O'Connor J's statement of the paramount principle of constitutional interpretation is as pertinent now as when he said it a century ago:[26]

> We are interpreting a *Constitution* broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve. For that reason, where the question is whether the *Constitution* has used an expression in the wider or in the narrower sense, the court should… always lean to the broader interpretation unless there is something in the context or in the rest of the *Constitution* to indicate that the narrower interpretation will best carry out its object and purpose.

For those who think that a preoccupation with American law is the province of any particular Australian jurist, Piddington notes that early in the court's history, 'American constitutional cases were resorted to in arguments about the Australian constitution, [with the result that] the custom became universal for the Bar to carry on exhaustive research into American cases.'[27]

Griffith also said of O'Connor that he was 'unsparing of himself in the labour which he had devoted to forming right conclusions upon the infinitely various questions… that came before the court… and to formulating reasons for his conclusions; nor could any kindly remonstrance dissuade him from working for that purpose to the limit – and sometimes, I fear, beyond it – of his physical capacity.'[28]

Piddington is blunter; O'Connor J was not as quick. 'Griffith's speed was a source of some trouble to Mr Justice O'Connor, who, though a very able man and one of the soundest lawyers and most impartial and judicial minds on the bench, was not a man of great quickness, either of apprehension or of expression. 'Dick' O'Connor (as the whole of the profession remember him), in politics, at the bar, and on the bench, was a man of extraordinary industry; indeed his comparatively early death was due to the lifelong devotion to his duty, both as a statesman and as a judge.'[29]

Opening of the first High Court of Australia in Melbourne, 1903. L to R: Edmund Barton, J W Griffith CJ, R E O'Connor J. National Library of Australia.

The Judiciary Bill

The High Court was not founded with federation, but only upon the enactment of the Judiciary Act in 1903. The passage of the bill was no mean feat. There was dissent aplenty. The grounds of economy and states' rights were in the fore, but personalities were not far absent. One particular matter – pensions for judges – was of special relevance to O'Connor.

The bill was initially well-received. Attorney General Alfred Deakin gave his second reading speech in Melbourne on 18 March 1902. Deakin was acknowledged by the English politician Leo Amery as 'the greatest natural orator of my day'.[30] (Members of the NSW Bar Association will recall that former president David Maughan took honours at Oxford ahead of F E Smith and William Holdsworth and counted among his other fellow students Amery and Simon.[31])

Deakin's speech itself was described in glowing terms, a three and a quarter hour effort in which the Attorney articulated not only his idea of the court – most famously, although as a quotation itself, as 'the keystone of the federal arch' – but also his idea of federation. He was able to acknowledge in 1902 that 'I would say that our written Constitution, large and elastic as it is, is necessarily limited by the ideas and circumstances which obtained in the year 1900. It was necessarily precise in parts, as well as vague in other parts.'

But great speeches do not necessarily carry great legislation. As to the question of judicial pensions – something which continues to infect debates from superannuation to sexuality – the Oxford Companion describes the situation as follows:[32]

> The Judiciary Bill 1902 (Cth) would have provided a pension for High Court justices (70 per cent of salary after 15 years service and attaining the age of 65 years), but the provision was deleted from

> the eventual Judiciary Act 1903 (Cth) for reasons of economy. Legislation was enacted in 1918 to grant Chief Justice Griffith the pension he would have received had he remained Chief Justice of Queensland (*Chief Justice's Pension Act* 1918 (Cth)), but High Court justices received no pension until 1926, when a non-contributory pension of 50 per cent of salary after 15 years of service was introduced, with provision for a smaller pension for justices retiring on account of disability or infirmity after five years service (*Judiciary Act* 1926 (Cth)).

Piddington – as one would perhaps expect – has a more whimsical explanation:[33]

> There is no doubt that O'Connor died from overwork, feeling unable to retire because at that time there were no pensions for High Court judges. The absence of the provision for pensions in the original Judiciary Act or High Court Act, whichever it is, was due to a singular accident, the origin of which was related to me. In the bill as introduced by the Deakin government [sic], judges' pensions were provided for. There was a hot attack upon the system of pensions when the bill was going through Committee, and the vote in their favour was carried on a Friday. Before the next sitting day, a member of Parliament saw Mr Deakin and said that he was very disappointed at the pensions provision having gone through in his absence, because he had prepared a very good speech about it and wanted to oppose it. Deakin, 'affable Alfred,' as he was sometimes called, very good-naturedly said, 'Oh, well, if you feel so strongly about it as all that, I'll have the bill recommitted and we can reconsider that clause in the bill.' The recommittal took place in due course, and on the next occasion the House reversed its decision and rejected pensions by one vote.

A human rights activist

What was the view of our founding fathers to what we know as 'human rights'? In a comparison between the British and US constitutions as illuminating today as when they were writing a century ago, Quick and Garran characterise the rights, privileges and immunities under each as, respectively:[34]

> [Under the former] Contained in numerous charters, confirmations of charters, and Acts of Parliament assented to by the Crown from the earliest period of English history, including Magna Carta (1215); the Petition of Rights (1627), 3 Char. I. c. 1; the Habeas Corpus Act (1640), 16 Char. I. c. 10; the Bill of Rights (1688), 1 Wm. And Mary c. 2; and the Act of Settlement (1700), 12 and 13 Wm. III. C. 2. The Bill of Rights is of special interest as declaring that certain recited rights are 'the true ancient and indubitable rights and liberties of the people to be firmly and strictly holden and observed in all times to come.'
>
> [Under the latter] Defined by the Constitution as amended from time to time. Subject to modification by the sovereign people, but secure against Federal and State Governments.

In fact, in Sydney in 1897 Andrew Inglis Clark proposed a clause providing inter alia that a state should not 'deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws'. In Melbourne in 1898, O'Connor proposed something similar, with its substance defeated by 23 votes to 19.[35]

Commentator Justice Ron Sackville has observed that one reason for rejecting the sentiment was that positively discriminatory legislation – against the Chinese, most obviously – would not have survived scrutiny and that non-Europeans generally might try to enjoy the (distinctly non-universal) rights hitherto the province of the Europeans. Sackville concludes that 'These historical snippets [of expressed concerns] suggest that a bill of rights, in a truncated form proposed by Clark and O'Connor, was rejected by the framers of the Australian Constitution, not because it was unnecessary for the protection of human rights (as understood at the turn of the 21st century) but precisely because it was necessary.'[36]

Had the bill of rights been incorporated, we might today have a very different compact. Certainly, if the US experience is something to go by, the tension between state legislators and federal legislators might be more keenly observed. It would also have had the effect that O'Connor would be seen as a man of reform, an activist, something which is probably not made out when one considers his other achievements.

Which is not to say he was an archconservative, politically or otherwise. Indeed, dogma is not something we see upon him. Rather, his virtue seems to have been an industriousness flecked with moderation, a quality which would make him an outstanding parliamentary administrator and jurist but also a person with neither the flair nor the desire to be inaugural premier or chief justice.

The background

O'Connor's father, also Richard, was born in County Cork and arrived in Sydney in 1835. From the outset, he was involved with administration of what we call 'Macquarie Street'. Among his achievements was being first librarian of the Legislative Council Library. But his legacy to his son must be the three posts he accumulated from the outset of responsible government: clerk of the assembly from 1856, clerk of the council from 1860, and 'clerk of the parliaments' from 1864. By 1868, O'Connor's father had produced the first edition of the Parliamentary Handbook.

O'Connor was born in 1851. Although over two and a half years younger than Barton, it is the consensus among Barton's biographers that his friendship with O'Connor started while they were both at the Sydney Grammar School. O'Connor had reared himself a devout Roman Catholic, previously studying with the Benedictines at their St Mary's College in Lyndhurst.

If he had a rebellious streak at all, its manifestation was a pride in claimed ancestor Arthur O'Connor, Irish patriot and sometime general in Napoleon's army (an appointment made in anticipation of an invasion of Ireland which never came off). The claim may not survive close examination; the Arthur O'Connor who sired the clerk of the parliaments appears to have married someone other than the rebel's French wife and in any event, I think, the rebel was a liberal protestant. Whatever, O'Connor supplemented his income in his early years at the bar by contributing to the Freeman's Journal, described by W B Dalley's biographer as 'the unofficial Catholic paper'.[37]

O'Connor read with Frederick Darley, being admitted to the bar in 1876. (Darley – himself Irish stock of a protestant variety – would later become chief justice.) O'Connor would take silk in 1896. His professional home was eventually Wentworth Court. The bar's history describes it in the following terms:[38]

> The first case of any large number of barristers having chambers together in one building had been at Wentworth Court, into which the first barristers moved in the early '80s. By 1890 there were twenty-eight barristers with chambers in the building and by 1920 forty-two. The last barrister moved out in 1927 when the building was demolished after housing the largest number of barristers in any contemporary chambers in Sydney over a period of forty years. Wentworth Court had a frontage to Elizabeth Street, in which it was first numbered 116 but later 64. The building extended to Phillip Street, its long corridor being almost a public thoroughfare ere Martin Place was conceived.

The Wentworth theme was continued when the bar tendered to the new High Court a dinner on 10 November 1903 to which the Supreme Court judges were invited. The Wentworth Hotel bill showed 81 diners costing 10/6 each. The High Court rose to the occasion, delivering their first judgment the next day.[39]

One might expect that the O'Connor who became the judge that he did was a conscientious barrister. Piddington confirms this:[40]

> In the eighties, when he was at the Bar, O'Connor came into Mr Robertson's shop and asked him if he had any book on the anatomy of the horse's foot. Mr Robertson replied 'No, but I can borrow one for you.' This he did, and later on O'Connor brought the work back and said 'That book won my case, and from now on there's only one book-shop for me.'

His role in the colonial parliament was a constructive one, although he succeeded with Barton in becoming embroiled in an affair which brought down the government, a tale which has been told in the sketch of Barton.

One thing which features prominently in the bar's history is O'Connor's role in provoking statute law consolidation. It appears that the colony had fallen behind. Victoria had consolidated its legislation only 15 years after consolidation. Queensland had Griffith. In New South Wales, however, 'the jungle was quite uncleared.'[41]

Into the mix was the fact that Queen Victoria was living too long: the practice of referring to statutes by regnal years was causing more than usual confusion. Mr Justice Windeyer had been confronted with an example in a divorce case in 1886.[42] A provision, 22 Vic 7 s3, dealt with the competence and compellability of spouses in relation to the giving of evidence. Section 13 of the Matrimonial Causes Act purported to repeal 22 Vic 10 s3, a provision of an Act since spent and which was to do with the prevention of scab in sheep. His Honour had little difficulty in applying an interpretation of necessary intendment to the spouses, although never mind the sheep. Still, not something which the law would wish on a regular basis.

On 29 December 1893 and at O'Connor's instigation, a royal commission was issued to about fifty men including members of parliament, judges, barristers and solicitors for the purpose of directing a 'diligent and full enquiry into the Statute Law in force in the colony.' Three years later, the job devolved solely to Charles Gilbert Heydon, and he committed great energy to it up until 1902. Coincidentally, he would be president of the New South Wales Court of Arbitration in the year O'Connor assumed the federal role.

O'Connor the strikebreaker

We tend to associate Henry Bournes Higgins with arbitration. He was empathetic to it and was author of the Harvester judgment. However, volume 1 of the Commonwealth Arbitration Reports records as the sole president of the Commonwealth Court of Conciliation and Arbitration 'The Honourable Mr. Justice O'Connor', appointed on 10 February 1905 and resigning on 13 September 1907.

In an essay published a century on, Stuart Macintyre wrote:[43]

> Nearly one hundred years ago a novel tribunal conducted its first hearing. A diminutive figure with a rasping voice and quick temper rose in a courtroom in Sydney to present a log of claims on behalf of the Merchant Service Guild. Opposing him was the counsel for the shipping companies, an experienced and smooth-tongued barrister. Presiding over the proceedings was one of the three judges of the recently formed High Court of Australia, seconded despite his resistance to serve as the foundation president of this Commonwealth Court of Conciliation and Arbitration.
>
> The proceedings were remarkably tranquil. The president, Richard O'Connor, stately, careful and courteous, heard arguments from counsel and evidence from a number of witnesses, then arbitrated on the union's claims (terms of engagement, wage rates, hours of duty, classification levels) and embodied his decisions into a binding award.
>
> It was a sweet moment for the union advocate, William Morris Hughes. His own work experience spanned employment as a young teacher-pupil in London, then migration to Queensland and later New South Wales where he took whatever was going, including spells as assistant to an oven-maker, and a mender of umbrellas. Billy Hughes knew the pinch of poverty: he worked his passage from Brisbane to Sydney as a galley hand. When he won election to the New South Wales parliament as a representative of the new Labor Party in 1894, his supporters bought him a suit.

The suit lasted well. By volume 2 of the court's reports, 'The Honorable [no 'u'] William Morris Hughes, M.P.' appeared as one of the two attorneys for the currency of the volume, the presidency being by now with Higgins.

O'Connor the strikemaker

If O'Connor was a reluctant conciliator and arbitrator, he was an even more reluctant striker, but strikers he, Griffith and Barton were.

The problem was ultimately one of personalities. In 1905, the attorney was Sir Josiah Symon; he had been knighted in 1901 for services to federation. Significantly for current purposes, he had been leader of the

South Australian Bar, he had been chairman of the Judiciary Committee at the 1897-98 Federal Convention, he had been reportedly 'very angry' about not receiving a seat in 1903, and – with a kind of ironic foresight – he had spoken in the senate with 'ominous reserve' about Griffith's own appointment.[44]

The dispute of 1905 involved a number of things, from an allowance for Griffith's shelving and the justices' travelling expenses to wider questions of where the court would call home and whether it should continue on circuit. The first salvoes were by Symon without the restraining hand of Reid (in a letter dated 23 December 1904) and Griffith without consultation with his colleagues (in a reply dated 27 December 2004).

By 21 January 1905, the nation's top judge was telling the nation's first law officer that he regretted that the officer had appeared 'to instruct the justices of the court as to the principles which should actuate them in the exercise of their discretionary power, but also to convey your disapproval of the manner in which they have already exercised them.'[45]

By early February 1905, the three judges had sent three jointly signed letters. The first was in defence of circuits. The second was an explicit reply to what they saw as an attack on the bench's independence, in which they refused to recognise the attorney's 'claim to instruct and censure the justices of the High Court with respect to the exercise of statutory powers conferred upon them in their judicial capacity.'[46] The third letter dealt with travelling expenses and the question of their residences.

Both Symon and the judges were seeking support, the latter to Deakin, although he had refused a place in Reid's ministry. Still the matter escalated. By March 1905, Symon was insisting that all vouchers for the judges' travelling expenses be submitted to him personally.[47]

O'Connor was due to sit in Melbourne on Monday 1 May, but on the preceding Saturday Griffith brought the fight to the public: from Sydney, he announced that sittings in Melbourne were to be adjourned.

Joyce continues the tale[48]:

> Symon telegrammed O'Connor to ask for his reasons for not sitting. Griffith replied: 'Mr Justice O'Connor has handed me your telegrams of yesterday we cannot recognise your right to demand the reason for any judicial action taken by the court except such request as may be made by any litigant in open Court'. Scribbled notes by Symon reveal his frustration: 'how can any Ct. because of disagreement as to Hotel Expenses go on strike?... no wharflabourers union do such a thing'; R[eid] behind my back since 1 January. Neither fair nor loyal to me. Is he committed to them in anyway. Did he make any promise or statement after our conversations 28 Feb. or any promise in Sydney now'.

It was only when the government fell at the end of June 1905 – with, in July, the accession of Deakin to the premiership and Isaacs as the new attorney – that things improved.

The Barton Ministry, taken in its first term of office, showing the members of the first federal Cabinet From L to R (standing): Senator J G Drake, Senator R E O'Connor, the Hon Sir P O Fysh, the Hon C C Kingston, the Hon Sir John Forrest Seated: the Hon Sir W J Lyne, the Rt Hon Edward Barton, Governor-General Lord Tennyson, the Hon Alfred Deakin, the Hon Sir George Turner. Photo : A1200, L13365, National Archives.

One suspects that Symon allowed a legitimate concern about economy to run away with itself, in circumstances where a personality like Griffith's was never going to wilt. Don Wright in a biographical note concludes that 'Symon's cause was just, but he spoiled it by the violence of his argument. Perhaps he was partly motivated by the events of 1900 and even by envy of Griffith's appointment.'[49] Symon remained the pre-eminent advocate in South Australia, a man of broad and deep learning and a noted philanthropist. He also had the pleasure of outliving the other protagonists by a good margin, only succumbing to a state funeral in 1934. Some words 'scandalous, offensive, and defamatory to the persons about whom they were written' were ordered to be omitted from probate.[50] But, and I stand corrected, the phrase 'the keystone of the federal arch' was his.

Overview

Readers were told that this was not a biography, and they cannot have been disappointed. There is no discussion of O'Connor the federalist and of his particular contribution to the debate about the degree of the proposed states' control over money bills. Nor is there discussion of his dexterity as government leader in the first senate.

I can report that he enjoyed long walks, trout fishing and camping, and that he engaged in 'violent bodily discipline' in the parliamentary gym,[51] and that his death in 1912 spared him from learning of the deaths of his oldest and youngest sons in France. We do know that he had two daughters, neither more nor less, one marrying the pianist and composer Roy Agnew,[52] and the other Alexander Maclay, son of the scientist and explorer Nicholai Mikluho-Maklai.[53]

O'Connor was able to draw upon his father's knowledge as a parliamentary clerk and his own training and practice as a barrister to make a contribution to Australia in three areas, its formation, its first parliament, and its first court. As to the first, he was no Barton. As to the second, he was no Deakin. As to the third, he was no Griffith. But his calm presence and informed contribution let leaders lead at a time when leadership was needed, and he was a great Australian.

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His Honour Judge Storkey VC

By our defence correspondent

This is the 90th anniversary of the award of the Victoria Cross to Percy Valentine Storkey, a member of the New South Wales Bar and Bench. A second year law student at Sydney University, he enlisted in the Australian Imperial Force just three weeks after the Anzac landings at Gallipoli. He fought on the Western Front for three years where he was twice wounded. He earned the Victoria Cross on 7 April 1918, early in the decisive battles around Villers-Bretonneux in which Australian troops quenched the last great German offensive of the First World War. After repatriation he completed his studies and practised at the bar from 1921 to 1939 when he was appointed as a judge of the District Court.

The great American Jurist and Civil War combatant, Oliver Wendell Holmes, judged character according to an exacting standard. He said in a famous Memorial Day address to army veterans[1]:

> I think that, as life is action and passion, it is required of a man that he should share the passion and action of his time at peril of being judged not to have lived.

This brief account of the life and valour of Percy Valentine Storkey VC proves that he lived to Holmes's high standard as few others would dare.

Storkey was born in Napier, New Zealand on 9 September 1891. He was educated at Napier Boys Grammar School and Victoria College, Wellington. He migrated to Australia in 1911, initially working for the Orient Steamship Co. in Sydney. Within a year he joined the administrative staff of the University of Sydney. This background assisted him in 1913 to enrol in law at the university, where he completed first year in 1914. On 10 May 1915 he enlisted in the AIF as a private. Close to his 24th birthday in September of the same year he was commissioned as a second lieutenant in the AIF. In December 1915 he sailed to England via Egypt to join members of the 19th Battalion in training.

On 14 November 1916 he joined his unit in France. Within a week of arriving at the front he was wounded near Flers at the end of the Battle of the Somme. He was promoted to lieutenant in January 1917 and was wounded again on 10 October 1917 in the Third Battle of Ypres.

As he convalesced, events unfolding two thousand miles away to the east began to give shape to the final contest of the war in which he would be involved. After the October 1917 Bolshevik Revolution in Russia hostilities ceased on the Eastern Front, releasing almost a million German soldiers for transfer to the Western Front.

In early 1918 the German High Command calculated that the reconquest of Amiens would threaten Paris and force the Allies to seek an armistice before fresh US troops could influence the course of the war. Without warning on 21 March 1918, a mass of 47 German divisions moved against the British Third and Fifth Armies across an 80 mile front east of Amiens. The British Fifth Army collapsed under this pressure and a gap opened in the Allied lines. Australian troops under General Monash ultimately blocked the enemy thrust towards Amiens with a thin extended line which first began to hold on 27 March 1918.

The Germans renewed their attack in force on 4 April 1918 and threatened to encircle Villers-Bretonneux, an important gateway to Amiens and about 10 kilometres to its north-west. Their troops

Studio portrait of Captain Percy Valentine Storkey VC, 19th Battalion. Australian War Memorial Negative number: P02939.028

penetrated dangerously to the south-west of the town and infiltrated a strategic timbered rise, called Hangard Wood, just two kilometres to its south (see figure 1).

Australian infantry were ordered to counter-attack and to retake Hangard Wood on 7 April so as to remove the German threat south of Villers-Bretonneux. The 5th Brigade (2nd Division AIF) of which the 19th Battalion was a part led this counter-attack. Lieutenant Storkey was a platoon commander in the company at the very leading edge of the assault.

Even before it had begun, the military logic of the plan to take Hangard Wood was neutralised by faulty intelligence and artillery failures. Allied aircraft had reconnoitred the wood and intelligence had quite wrongly concluded that it was only lightly held by enemy forces and could be covered by a nearby allied field of fire. The planned 5.00 am infantry attack was to be supported by an artillery barrage to hold the enemy fast in their trenches. Instead, only a few random shells fell, prompting the Germans to prepare for the imminent assault.

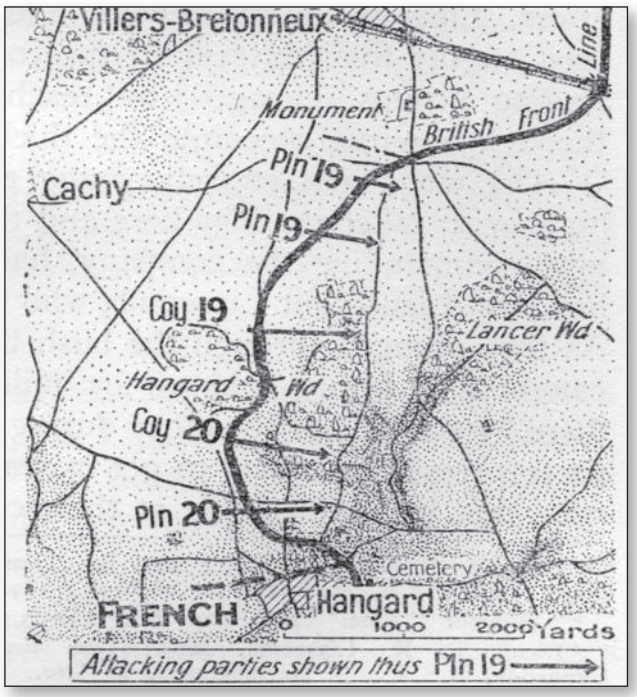


Figure 1: CEW Bean, *Official History of Australia in the War of 1914-1918,* Vol. V, The AIF in France 1918, p. 505.

The company launched from a small covered area just west of Hangard Wood, across open ground, from where it was hoped the company would penetrate the wood and mop up the few German soldiers thought to be inside. Exhausted from continuous battles since 21 March, Lieutenant Storkey had dozed off and awoke to see his company 75 yards ahead of him, crossing the open country.

Just as he rejoined his company on the open ground, it was caught in a murderous fire of unseen machine guns from inside Hangard Wood itself. The company commander, Captain Wallach, was hit through both knees. Two other lieutenants were killed. Twenty five percent of the company were hit before Storkey and the small leading party of the company could make it to the northern perimeter of Hangard Wood. Storkey, now the company's senior surviving officer and its commanding officer, was assisted by another surviving officer, Lieutenant Lipscomb. They struggled through the wood. Apart from Storkey, Lipscomb and the ten men with them, the rest of the company had gone to ground, to avoid further casualties from the machine gun bullets raking the ground around them.

The 12 Australians made their way around to the east and then pressed south (see Figure 2) trying to get to the rear of the machine guns. Suddenly they burst into a small clearing where just ahead they saw half a dozen short enemy trenches, each one a machine gun post, manned by a hundred Germans, riflemen and machine gun crews, all with their backs to Storkey's party. The heavily armed enemy outnumbering Storkey's party ten to one, were still firing at what remained of his company.

What then followed can be no better described than in war historian C E W Bean's own words:

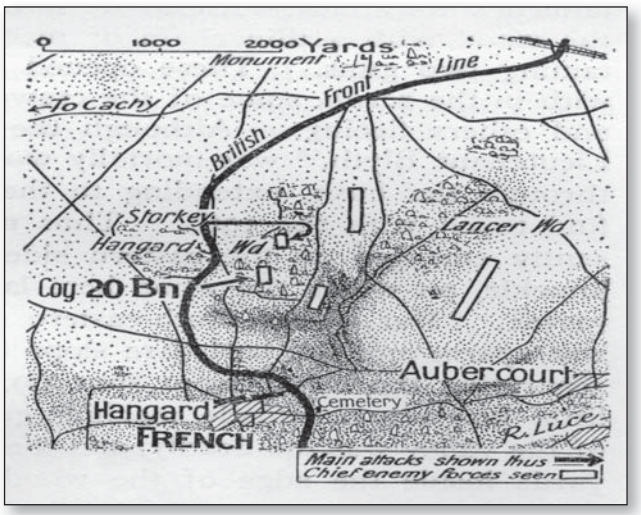


Figure 2: CEW Bean, *Official History of Australia in the War of 1914-1918,* Vol. V, The AIF in France 1918, p. 507.

> As the Germans were seen there was a yell, and some of the enemy, looking round, caught sight of the Australians emerging into the open behind them. The situation called for instant action – either attack or be annihilated – and Storkey's decision was immediate. Shouting as if the whole battalion was following, he at once led a charge upon the rear of the Germans, himself at one flank of his ten men, Lipscomb at the other. The Australians had only twenty yards to go. Before the nearer Germans could realise what was happening, the New South Welshmen 'got in quickly,' as Lipscomb wrote, 'with bombs, bayonet, and revolver'. The Germans in the nearer trench at once put up their hands, but those in the farther ones hesitated. They had only to swing round one of their machine guns and the Australians standing close above the northern part of their line could have been annihilated. But Storkey's confident manner made them uncertain as to what forces might not be in the surrounding bush. On the first sign of hesitation to obey his order to surrender and climb out of the trench, he immediately shot three with his revolver (which then jammed) and some of his men slipped the pins from their bombs, rolled a couple into the trenches, and then ducked away to avoid the explosion. In all 30 Germans were killed, and the remainder, three officers and about 50 men, were made prisoners and were at once sent to the rear, the two escorting Australians carrying back one of the machine guns.[2]

Storkey's brave action cleared the defenders from the area and saved the lives of the rest of his company. As a result, Australian infantry took Hangard Wood and secured the southern side of Villers-Bretonneux. Only two weeks later the town would be lost by the British and then famously retaken by Australian troops in an audacious attack on the third anniversary of Anzac Day.

Storkey continued to fight with 19th Battalion throughout the Australian advance to the Hindenburg Line after the exhaustion of the German Spring Offensive. In May 1918, Storkey was appointed company commander and promoted to the rank of captain. On 10 June 1918 he was confirmed in that rank. His Victoria Cross was awarded to him by King George V in a ceremony at Buckingham Palace in July 1918.

Storkey returned to Australia on 26 November 1918 and his AIF appointment ended in January 1919. Thereafter he was allocated to the Reserve on 1 July 1920. He went back to law school and completed the remainder of his degree whilst acting as an associate to Sir Charles Wade, a puisne justice of the Supreme Court.

He was called to the bar on 8 June 1921, a memorable year for new admissions. Also admitted in 1921 were the powerful common law advocate, J W Shand (father of Alec) and Ada Evans, the first woman barrister in New South Wales (although she never practised).

Storkey commenced a common law practice from the old Selborne Chambers. It was the custom of the bar in the 1920s for new barristers to nominate their availability for practise on one of five country circuits. Storkey selected the South Western Circuit, covering an area bounded by Goulburn, Albury, Deniliquin, Hay, Wyalong and Broken Hill. The *Law Almanac* for 1921 shows that also at least nominally practising on the Southern and South Western Circuit were one F R Jordan, one J G Latham (from Melbourne) and one C Gavan Duffy. He continued to practise from Selborne Chambers until 1925 when he was appointed a crown prosecutor for the South Western District and moved to Crown Prosecutors Chambers.

Perhaps not surprisingly, given all he had been through, as a prosecutor Storkey was regarded as practical and realistic and had an outlook tempered by humour and compassion. Judge H T A Holt illustrates[3] this characteristic with a story. Having prosecuted two men on circuit for theft for removing a safe, blowing it open with explosives and then stealing its contents, Storkey later fell into private conversation with the judge who expressed some doubts that he had sentenced too leniently. The judge said: 'Dangerous men Storkey, using explosives like that…'. The prosecutor, who had seen more explosives than either of these criminals is said to have replied rather mildly, 'Well, how were they to get the money out?'

Storkey was often briefed by the Crown and quickly appeared in a number of reported cases. He appeared as junior counsel to the attorney general in *Ex parte Attorney-General, Re Cohen*[4] before the full court, a case dealing with the availability of the writ of *certiorari* against inferior courts. He appeared as junior counsel for the appellant in *R v Eade*[5], a case dealing with what evidence might constitute corroboration of the unsworn evidence of a child. As many crown prosecutors did in those days, he maintained a right of private practice at the common law bar and also appeared in negligence cases, such as *Barton & Jamieson v Transport Commissioners*[6], a cause concerning the duty of railway authorities to fence property to prevent injury to straying stock. He appears in the *Commonwealth Law Reports* only once in *R v Porter*[7], before Sir Owen Dixon sitting as a single judge exercising the original jurisdiction of the High Court in the Australian Capital Territory before the creation of the ACT Supreme Court.

As the Second World War approached, Storkey again felt the call of duty and re-enlisted in the army in October 1938. However, in May 1939 he was elevated to the District Court and relinquished his army service. He became chairman of Quarter Sessions for the Northern District of New South Wales. There it is said that he 'became an identity making many friends and being recognised for his quick assessment of character and for his sound commonsense'.[8] The Hon John Slattery AO QC, who was interviewed for this article, came to the bar in 1946 and still remembers Storkey, the judge, as 'always courteous and efficient, whilst running his courtroom with great decorum'.

Curiously, Storkey's appointment to the District Court was not his first exercise of judicial functions. Officers in the AIF maintained disciplinary jurisdiction over their men. Storkey's exercise of this jurisdiction in July 1916 in England intersected with a simmering but now forgotten Australian wartime dispute – the alleged failure of significant numbers of rugby league players to enlist in the AIF. Storkey sentenced Bob Tidyman, one of the few league players who did enlist, to four days confinement to barracks for being late on parade. Tidyman, who played for Easts before the war, was later listed missing in action[9].

Storkey retired from the bench in 1955 to England, where he lived in Teddington, Middlesex, with his wife Molly. He died on 3 October 1969. He bequeathed his Victoria Cross to his old school at Napier, New Zealand.

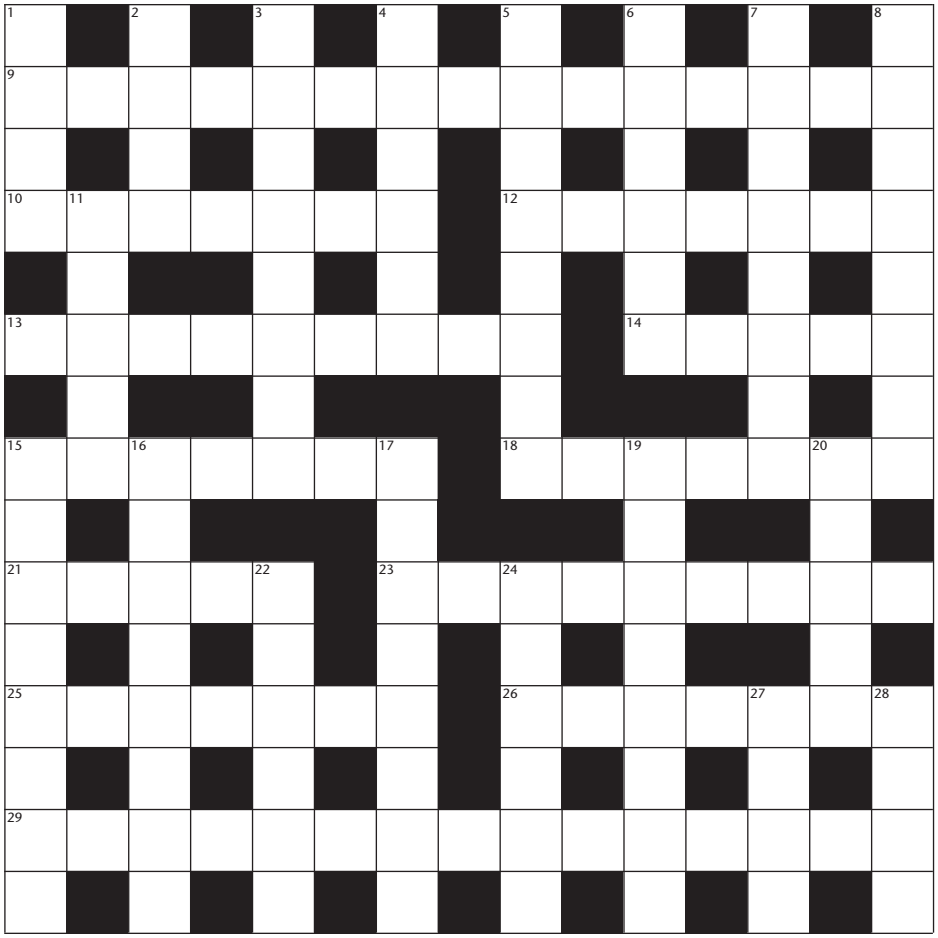
Whilst he was a District Court judge only one appeal from Judge Storkey to the full court was reported in the *State Reports*, the matter of *Waugh v Waugh*[10]. It is a convention of legal reporting that post-nominals and the decorations of judges and counsel, which are unconnected with the law, are not included in case reports. In *Waugh v Waugh* a notable reported exception to this convention was made for Storkey. The appeal came before Chief Justice Sir Kenneth Street and justices Maxwell and Owen in May 1950. Only Justice Owen referred to the trial judge by name, describing him by his full title as 'His Honour Judge Storkey VC'. This departure from convention, quite apparently to honour Storkey, is especially understandable in Justice Owen's case.

Sir William Francis Langer Owen, who was later appointed to the High Court, had run away from Shore School in 1915 at the age of sixteen to join the AIF. Just six months after Storkey's enlistment, Owen himself enlisted, claiming to be eighteen. He served on the Western Front from September 1916 until he was gassed in May 1918. Sir William Owen had the clearest possible understanding of Storkey's heroism. He ensured that the judge's Victoria Cross was referred to in his judgment and hence in the *New South Wales State Reports*. In doing so he saluted a great Australian.

Endnotes

1. Memorial Day Address delivered 30 May 1884, at Keene New Hampshire, before John Sedgwick Post No 4, Grand Army of the Republic, in R.H. Posner, *The Essential Holmes,* University of Chicago Press, 1992, page 82.
2. *Official History of Australia in the War of 1914 – 1918*, Vol 5, The AIF in France 1918, CEW Bean, pp 507 – 508.
3. H TA Holt, *A Court Rises*, The Law Foundation of New South Wales, p.225.
4. (1922) 23 SR (NSW) 111.
5. (1923) 24 SR (NSW) 117.
6. (1932) 33 SR (NSW) 17.
7. (1933) 55 CLR 182.
8. *Australian Dictionary of Biography*, Online Edition, Percy Valentine Storkey (1893 – 1969) Warren Derkenne.
9. http//www.rl1908.com/Rugby-League-News/Anzacs.htm, 'Rugby League ANZACS of World War One'.
10. (1950) 50 SR (NSW) 210.

| CROSSWORD BY RAPUNZEL |



Across

9 Arraigned tumble tumble into a seagreen soup. (7,8)

10 Bullet position for heavy metal 'Ball'. (4,3)

12 Partly for elegance, dressage involves this, left or right. (7)

13 A silk or a junior joins princess for seamless slides across the notes. (9)

14 Fool doctor in two? (5)

15 Dour pun gives rise to shout over. (5,2)

18 Is Perth about a groovy saint's doubt? (7)

21 Remove Roundhead from skirt, place in Central Ireland, shake, and leave scot free in these. (5)

23 Segregate strange-looking festive ovum. (6,3)

25 Officer commanding on new head or first second puisne judge? (1,6)

26 'Deep Purple' sets doctor around vessel for a talking horse. (4,3)

29 One thing leading to another. Unhinged then hinged? (4,11)

Down

1 Wader alibis bundy off. (4)

2 Afternoon abbreviation drops babe in it. (4)

3 Sup with Spode? Pseudo presumed. (8)

4 Part of the first first arm, part of the first second arm, part of the first third arm (Oz). (6)

5 Directed *Birth of a Nation* (US). Assistant producer Birth of a Nation (Oz). (8)

6 Cardinal dislike? (6)

7 Iron edge to entry condition? (3,5)

8 Clasp around his heart a 'negative ion' redhead nightie. (8)

11 Hades love 'hi'. (5)

15 Bribes gardeners' semi-finals? (4-4)

16 Free United Nations washrooms' measure. (8)

17 Is purely in other words an inflamation of the lungs. (8)

19 Paltrier preparation is not favoured by the Court for this conference. (8)

20 Two shots up for this high flier. ((5)

22 Carbon free gossip, for walking. (6)

24 Corrupt southeastern Italian leader. (6)

27 Downpour sounds the rule. (4)

28 Formally eat back Blyton. (4)

For solutions see page 114

Chief Justice Gleeson AC

On 29 August 2008, the High Court of Australia held a ceremonial sitting to mark the retirement of Chief Justice Murray Gleeson AC.

His Honour was appointed chief justice on 22 May 1998, having served as chief justice of the Supreme Court of New South Wales for the preceding 10 years.

Chief Justice Gleeson was born at Wingham near Taree on the mid north coast of New South Wales. Unsurprisingly, his Honour excelled at high school both academically and at debating and oratory. According to the president of the Australian Bar Association, Tom Bathurst QC, his Honour had also whilst at school 'performed more than satisfactorily at cricket'. Although since then, his Honour is perhaps better known for his tennis – of which Mr Ross Ray QC, president of the Law Council of Australia, observed:

> It has been said of your tennis playing that you attack a tennis ball with the same single-mindedness you apply to stripping away irrelevancies in the court room – that is, quick and deadly.

Chief Justice Gleeson studied arts and law at Sydney University, from where he graduated in March 1962 with first class honours. After completing a year of articles at Murphy & Moloney, his Honour was admitted to the New South Wales Bar in 1963 and joined Seven Wentworth. There he read with Laurence Street (as he then was) and shared chambers with Anthony Mason (as he then was). His Honour rapidly gained a formidable reputation as an advocate, taking silk in 1974. Although probably best known initially for his expertise in tax and commercial law, his Honour appeared in a wide variety of cases (including some well known and publicised cases) and jurisdictions, including the Privy Council. At the time of his appointment as chief justice of the Supreme Court of New South Wales in 1988 – the first appointment of a chief justice of that court direct from the ranks of the bar since Sir Frederick Jordan in 1934 – his Honour was recognised as the leader of the New South Wales Bar and pre-eminent advocate in Australia.

During his time at the bar, his Honour also served as a member of the Bar Council of the New South Wales Bar Association (including as president in 1984-85), as well as on the Law Council of Australia. In 1986 (and two years before his appointment to judicial office), he was made an Officer of the Order of Australia in recognition of his major contributions to law. In 1992 he was made a Companion of the Order of Australia.

At the time of his appointment as chief justice of the Supreme Court of New South Wales in 1988... his Honour was recognised as the leader of the New South Wales Bar and pre-eminent advocate in Australia.

The extent of his Honour's practice at the bar (in particular in constitutional law) was not lost on the attorney-general for the Commonwealth of Australia, the Honourable Robert McClelland MP, who also spoke at the ceremonial sitting:

> In fact, I recall that part of your constitutional work included providing advice to the Liberal Party in 1975 on the dismissal powers of the governor-general.

As the son of one of Gough Whitlam's ministers, this is one occasion that I would have preferred your Honour's formidable legal mind to have been put to other use.

Of his Honour's practice at the bar, Bathurst QC also noted:

> Being your Honour's junior in cases was an occasion likely to induce shock and awe. Your Honour used conferences to refine your Honour's knowledge of the case by an extensive cross-examination of the junior who had the misfortune to sit on the opposite side of the desk. Many of those who survived the experience themselves forged distinguished careers in the legal profession. … Lesser lights rapidly came to the conclusion that the best way they could assist your Honour was by not turning up at the conferences.

This approach was carried over after his Honour's appointment as chief justice of the Supreme Court. As Bathurst QC recounted:

> Notwithstanding the difficulty inherent in presiding over a court of the size of the Supreme Court of New South Wales in a period of growth and increasing public scrutiny, your Honour took time to sit in every jurisdiction. This gave a wider range of barristers an insight into the technique that your Honour had used with your juniors.
>
> I cannot say there was not a sigh of relief at the Newcastle Bar when your Honour said you were not going to do the next Newcastle sittings, but went back to resume normal duties in the Court of Appeal and the Court of Criminal Appeal.

Of his Honour's term as chief justice of the High Court, Bathurst QC observed:

> Your Honour's leadership and judicial qualities were recognised by your appointment to the position from which you retire today. That appointment was met, of course, with universal acclaim. Nobody doubted the nation would profit from having such an eminently qualified jurist, judicial administrator and fine person in the highest judicial office in the land.
>
> You presided over this court in times of change, high level of public scrutiny and, again, enormous increase in the judicial workload. Once again, you have responded to those by introducing new procedures, including procedures to deal with special leave applications, the assessment and determination of which, of course, is a significant part of the court's work and a significant burden on all the Justices of the court.
>
> The court in your period as chief justice has had brought before it, perhaps more than any other time, many of the more prominent issues of the last decade. The immigration and detention cases are of course one; the WorkChoices legislation; *Re Wakim* and significant public liability issues in cases such as *Brodie* and *Ghantous*.
>
> The court dealt with all those matters in such a way, under your guidance, that maintained its reputation for fearless independence and intellectual rigour.
>
> Your Honour has steadfastly maintained the court's independence, while at the same time avoiding any perception of entering into the field of political debate.
>
> You have provided leadership to the legal profession generally over a whole range of areas, advocating the need for ongoing judicial education, the importance of the rule of law and the need for lawyers to be sensitive to public concerns about the profession. In a speech to the Australian Legal Convention last year, you pointed out to practitioners the pitfalls of employing disproportionate litigation procedures leading to unnecessary costs and complexity by succinctly noting 'litigation is a perfect example of Parkinson's law; work expands to fill the available time.' Perhaps it could have been put slightly less tactfully, 'the available billable hours'.
>
> Your Honour's succinct approach to writing judgments is well known, and many counsel have had the benefit of your firm views on presentation of submissions.

These remarks were reiterated by the attorney-general, Mr McClelland, who stated :

> Over the last two decades, you have clearly made a substantial mark on Australia's legal system and, indeed, Australia's legal history.
>
> In particular, as chief justice and head of the Council of Chief Justices, you have worked to foster and strengthen judicial institutions and the sense of a national judicial identity. You have placed a high value on judicial education and supported the establishment of the National Judicial College, which met here earlier this morning.
>
> You are an acute observer of legal and judicial developments and their implications. I note recently at a speech to the Press Club you commented that a huge change in the work of the courts has occurred in the last 10 to 15 years and that most of the work of the courts now involves interpreting and applying Acts of parliament. You encouraged legal educators to catch up with this development. In fact, I recently visited a university in Melbourne which had clearly recognised the legitimacy of your comments and they were taking appropriate steps to address that matter.
>
> You leave your current office with deep respect, admiration and gratitude of the judiciary, the legal profession and the people of Australia. You leave a very valuable legacy to this court and, indeed, to the entire Australian community.

In his reply, Chief Justice Gleeson made a number of observations about the role of the legal profession in Australia and its interplay with the judiciary:

> The participation in these proceedings of the presidents of the Law Council of Australia and the Australian Bar Association signifies the role of the legal profession in the work of the Australian judiciary. A strong legal profession, imbued with a spirit of independence, is vital to the work of the judicial branch of government.
>
> We administer justice upon an assumption that a fair outcome is most likely to be achieved by hearing strong arguments on both sides of the case. That assumption is sometimes contestable and it may break down entirely when parties to litigation are inadequately represented or, for some other reason, unable to put their cases to their best advantage.
>
> I am afraid that institutionally the distance between the profession and the judiciary may be increasing. Courts no longer retain the direct control over legal education and admission to the profession that they had in former times. The mercantilisation of some aspects

The court in your period as chief justice has had brought before it, perhaps more than any other time, many of the more prominent issues of the last decade. The immigration and detention cases are of course one; the WorkChoices legislation; Re Wakim *and significant public liability issues in cases such as* Brodie *and* Ghantous.

of professional practice has altered the context in which bench and bar relate. Even so, in this country, we have maintained a strong association between the profession and the judiciary and I hope that this will remain so.

The establishment of a national legal profession, through arrangements of reciprocity and uniform standards of admission and regulation, has been beneficial. Ultimately, however, legal practitioners are officers of the courts. The historical role of the courts in setting the standards for admission, and in professional regulation, reflected a defining aspect of the professional status of lawyers. The ethical obligations and the privileges of lawyers are directly linked to their participation in the administration of justice.

His Honour also commented on the development of Australian judicial institutions over the period since his appointment as chief justice of the Supreme Court, their independence and the current state of the Australian judiciary:

One of the most significant changes since I became chief justice of New South Wales in 1988 has been the development of Australian judicial institutions. The independence of the judiciary from the political branches of government is essential to the legitimacy of the exercise of judicial power.

I am convinced that the capacity of the judiciary to develop its own organisational resources is essential to its independence. Twenty years ago, those resources were limited. The Australian judiciary was highly decentralised, with little institutional expression except the courts themselves. Every two years there was a meeting of state chief justices that was also attended by the chief justice of the Federal Court. That gathering had no permanent secretariat and its meetings were chaired by the host of the occasion. It disclaimed any formal representative role.

His Honour compared that with the current position, in particular referring to the formation of the Australasian Institute of Judicial Administration, the Council of Chief Justices of Australia and New Zealand, the Judicial Conference of Australia and the National Judicial College, and the work done by each of these bodies. His Honour then concluded his remarks by stating:

You leave your current office with deep respect, admiration and gratitude of the judiciary, the legal profession and the people of Australia. You leave a very valuable legacy to this court and, indeed, to the entire Australian community.

There is now a strong sense of national identity at all levels of the judiciary. Unlike the United States counterparts, all Australian judges, state and federal, are appointed. They come from substantially the same professional backgrounds. Movement of judges between state or territory and federal courts is not unusual. I came to this court from a state supreme court. My successor comes from the Federal Court.

Proposals are being developed to formalise arrangements for judicial exchange, which in the past has occurred, but on an ad hoc basis. All Australian governments now recognise the necessity of judicial education and continuing professional development. Inevitably, there has also been recognition of the importance of dealing with those issues on a national basis.

This sense of national identity, breaking down the earlier decentralisation, has both fostered, and been strengthened by, the development of the institutions I have mentioned. Since a primary object of that development has been to support and sustain judicial independence, it is self evident that it should not be permitted to undermine that independence.

The bodies to which I have referred were not created for the bureaucratisation of the judiciary. Judicial independence is both institutional and personal. Ultimately, it is not merely an attribute of judicial authority, it is a constitutional imperative. The challenge is to foster the judiciary's organisational resources without sacrificing the qualities they are designed to protect and I am confident that this challenge will be met.

It has been a great privilege to serve as chief justice of this court, and of Australia. It remains only for me to express my warm good wishes to my colleagues of this court, and to my wider group of judicial colleagues, the judges and magistrates of all Australian courts.

Remarks on the final sitting in Sydney of Gleeson CJ [2008] HCATrans 302 (26 August 2008)

Sydney, as you know, is a scene of much activity for the High Court. As it happens, applications for special leave to the High Court are not currently increasing. The number for the year end 30 June 2008 was almost exactly the same as the number for the year end 30 June 2007, but 72 per cent of those were filed in the Sydney Registry.

There is a certain symmetry about this occasion. In October 1988, I was appearing in my last case as a barrister. It was a commercial arbitration, at that stage being heard in London. I was appearing with Mr Kenneth Hayne QC, and Mr Mukhtar of the Victorian Bar. In the finest traditions of the New South Wales Bar, I left them both and flew back to Sydney. I was sworn in as chief justice in early November. When I came to the New South Wales Bar, I had read with Mr L W Street, and he was my predecessor as chief justice. He arranged to retire on All Saints Day in 1988, giving himself the best possible opportunity of salvation, and I was sworn in on 2 November. Here, today, I am sitting on my last case as a judge in company with Justice Hayne.

Thank you for your observations.

Special sitting of the High Court of Australia to welcome French CJ, Sydney, 30 September 2008

FRENCH CJ: Mr Gageler and Mr Macken and ladies and gentlemen, I thank you for the welcome that you have accorded me on behalf of the legal profession in New South Wales.

The legal system in this state has been contentiously compared to a judicial vortex. In its metaphorical application, the term 'vortex' is defined as a state of affairs likened to a whirlpool for violent activity and irresistible force. In 22 years as a judge of the Federal Court who sat many times in Sydney at first instance and on appeals, I can say that I have never found the local profession to be violent in its activity or more than usually irresistible.

On the other hand, I have, both in practice, before I joined the Federal Court and while serving on that court, made many friends among the practitioners and judges of this jurisdiction. Western Australians saw quite a number of Sydney counsel in their courts from the 1970s when barriers to entry were lowered to practitioners from anywhere in Australia accompanied by the equivalent of a local collective shout of 'Bring it on'.

Both the Sydney and Perth professions were early and enthusiastic proponents of the idea of a national legal profession. A class of person known as 'West Australian entrepreneurs', for a time a term of national abuse, generated much work for both professions. One of the earliest cases of large-scale prosecutions for criminal conspiracy in the 1970s attracted to Western Australia, among others, as they then were, William Deane and Malcolm McLelland.

I enjoyed working with and against Sydney counsel in Perth, appearing as junior to Robert Ellicott in a case about dredging where we were opposed to Tom Hughes and James Allsop, with Richard Conti in the middle. James Allsop, I remember, came to town with 15,000 interrogatories. All I had to confront him was an ancient authority called *American Flange*.

The Australian Broadcasting Tribunal was active in Perth in the early 1980s and many of us in the local profession saw quite a lot of the Sydney Bar in that jurisdiction. I recall appearing in one hearing before the tribunal where Mr Stuart Littlemore foreshadowed an unspecified constitutional point. I inquired through the tribunal what the point was. Mr Littlemore said it was all there in section 51. He added, gratuitously, that I probably had not had much of an opportunity to peruse that section. I have looked forward as a judge, and still do, to having him appear and explain section 51 to me.

I have made many friends amongst the judiciary on both the Federal and the Supreme Court. The experience of sitting on the Supreme Court of Fiji with Chief Justice Spigelman, former president of the Court of Appeal, Keith Mason, Justice David Ipp and Justice Ken Handley, was very enjoyable and stimulated my own ideas about the desirability of judicial exchange. These ideas have focussed upon horizontal exchange between courts of co-ordinate jurisdiction which I am delighted to see has been taken up with enthusiasm in New South Wales.

Vertical exchange, where appellate judges sit on trials, and vice versa, is also to be recommended, although it can be hazardous. Chief Justice Rehnquist, when he was on the Supreme Court of the United States, sat at first instance in a human rights case in Virginia and was reversed on appeal. I will not be emulating his example.

To be welcomed by the Sydney profession is to be welcomed by familiar and friendly faces. I thank you and look forward to my new task and to sitting from time to time in this jurisdiction.

Chief Justice French

On 1 September 2008, Robert French was appointed chief justice of the High Court of Australia.

His Honour is the twelfth chief justice of the court, succeeding Chief Justice Murray Gleeson AC. At the time his appointment was announced, his Honour was a judge of the Federal Court of Australia, having been appointed to that court in 1986 at just 39 years of age, and having served on that court for nearly 22 years. Whilst his Honour is the third West Australian to serve on the High Court in its 105 year history (he having been preceded by justices Wilson and Toohey), he is the first West Australian to be appointed chief justice of that court.

Chief Justice French was educated at St Louis Jesuit School in Claremont in Perth, where he was dux and school captain. After completing secondary school, his Honour attended the University of Western Australia, where he graduated in science (majoring in physics) and law. Of the former it was said by the president of the Australian Bar Association, Tom Bathurst QC, at the ceremonial sitting on the occasion of his Honour's swearing in:

> Despite your early dreams of becoming a great physicist, your Honour admitted that your decision to choose the law over science as a career became fairly clear-cut once you were informed by your science dean that 'You express yourself magnificently, but I am not sure you know what you are talking about.'
>
> That would surely be the last time that your Honour has been accused of a lack of clarity.

Whilst at university, his Honour was president of the university's Liberal Club and served briefly as treasurer of the University of Western Australia Student Guild. In 1969 at the age of 22, he contested the safe Labor federal seat of Fremantle for the Liberal Party. He lost to Kim Beazley, Sr.

Upon completion of his law degree, his Honour was admitted to practice in Western Australia in 1972, where he practised initially as a barrister and solicitor for 11 years. In 1983 he was called to the bar. According to Bathurst QC, his Honour's career at the bar 'could only be described as short but spectacular'.

His Honour played a central role in establishing the Aboriginal Legal Service of Western Australia in 1973, and was its founding chairman from 1973 to 1975. He also chaired the New Era Aboriginal Fellowship, which was a vehicle for many non-Aboriginals to work with Aboriginal people to establish health, legal and other services for Aboriginal people and Torres Strait Islanders. The Justice Committee of the New Era Aboriginal Fellowship established the Aboriginal Legal Service in Perth and expanded it to serve Aboriginal and Torres Strait Islander peoples in the north and south of Western Australia. Since then, the Aboriginal Legal Service of Western Australia has continued to expand, and is now one of the (if not the) largest community based Aboriginal and Torres Strait Islander legal organisation in Australia. It provides such legal services throughout Western Australia.

Before his appointment to the Federal Court in 1986, his Honour also served on the Town Planning Appeal Tribunal of Western Australia (including as chairman), the Legal Aid Commission of Western Australia, the Trade Practices Commission and the Law Reform Commission of Western Australia. His Honour also made a substantial contribution to the activities of the Law Council of Australia, having served as a member of the Australian Courts Committee from its establishment, and as a member and chairman of the Privacy Law Committee.

Following his appointment to the Federal Court, his Honour continued his interest in the rights of Indigenous Australians and in 1994 was appointed the inaugural president of the Native Title Tribunal, a position he held until 1998. During his time on the Federal Court, his Honour was also appointed an additional judge of the Supreme Court of the Australian Capital Territory and a permanent non-resident member of the Supreme Court of Fiji. From 2005 until his appointment to the High Court, his Honour also served as deputy president of the Australian Competition Tribunal.

Outside of his office as a judge, his Honour chaired the Council of the Western Australian College of Advanced Education from 1988 to 1990. In that time, the college attained university status and in 1991 Justice French continued as foundation chancellor of the Edith Cowan University (as the college became), a position which he retained until 1997. In 1998, the university awarded his Honour the highest honour within its power to bestow - an honorary degree of Doctor of Laws.

His Honour has also actively participated in legal reform, including serving as a part-time commissioner of the Australian Law Reform Commission from July 2006, during which time he participated in the ALRC's Inquiry into Client Legal Privilege in Federal Investigations (ALRC Report 107) and the recently completed major review of Australian Privacy Laws and Practices (ALRC Report 108). He is also a member of the Australian Association of Constitutional Law and served as president of that association from 2001 to 2005. In July 2007, his Honour was named as one of 36 foundation fellows of the Australian Academy of Law and was selected as one of the speakers at the academy's formal launch and inaugural symposium in 2007.

Outside of the law, his Honour also has a passion for health and fitness. He runs marathons and his 'Workplace Program' on the 'Be Active' website[1] details some of his Honour's tips on keeping fit for those people whose job requires them to spend long periods sitting down.

In speaking at the ceremonial sitting on the occasion of his Honour's swearing in as chief justice, the attorney-general for the Commonwealth of Australia, the Honourable Robert McClelland MP, said of his Honour and his time at the Federal Court:

> Your Honour brings to this court considerable experience and an outstanding reputation as a jurist.
>
> Your Honour has developed special expertise in constitutional, administrative, native title and competition law. You are renowned for combining your technical legal excellence with a wide interest in broader social and economic issues.

As a result of your experience at the National Native Title Tribunal, your Honour has had first hand exposure to cultural diversity, and the particular problems facing indigenous Australians. Your career long involvement in these issues has extended much beyond mere intellectual appreciation. Significantly, your Honour served as the inaugural president of the tribunal from 1994 to 1998, guiding it through a period of charged public and political debate.

In concluding my remarks, your Honour, might I refer to a speech that you recently gave on the federal system at a recent conference where you said, 'Federalism is a solution to the problem of combining different political communities in a national polity while allowing them to retain their identities. There are different ways of distributing power between the components of a federation. Any such distribution will set limits to the legislative competencies. When a national policy is necessary to meet a need, perhaps not foreseen as such when the Constitution was created, the legislative and other powers necessary to implement such a policy may cross those boundaries.' Your Honour, may I wish you well in determining those boundaries.

Mr Bathurst QC (speaking on behalf of the members of the Australian Bar) concluded his remarks by observing :

Your Honour's ascension to this office is a deserved recognition of your outstanding contribution to the affairs of this nation.

The appointment of a new chief justice or, indeed, any judge of this court, often, of course, promotes great interest and speculation, both informed and less so. The fact that the media have been unable to fit you into any particular box, variously describing you as a traditionalist, an activist, a black letter lawyer, a progressive, a scientist turned jurist with a bent for science fiction, and a small 'l' liberal, demonstrates that throughout your career you have tried each case on its merits and applied the law to the facts in a careful and, where possible, compassionate manner. One cannot ask more from a judge.

The depth of your learning and the breadth of your experience eminently qualify you for the job and the challenges which lie ahead.

In reply, Chief Justice French stated :

The seat I have taken today is one of great honour. That honour owes nothing to my efforts. It comes from the place of the court under the Constitution. It comes also from the labours of the 11 chief justices who have preceded me and the judges, including those now present on the bench, with whom they have worked.

The place of the High Court under the Constitution was explained in 1902 by the first attorney-general of the Commonwealth, Alfred Deakin, giving the second reading speech in support of the Judiciary Bill:

The Constitution is to be the supreme law, but it is the High Court which is to determine how far and between what boundaries it is supreme.

The court was, he said, 'the competent tribunal which is able to protect the Constitution and to oversee its agencies'. He called it 'the keystone of the federal arch'.

In its very first judgment delivered on 11 November 1903, the first chief justice, Sir Samuel Griffith, with justices Barton and O'Connor, spoke of the court as 'the embodiment of the judicial power inherent in every sovereign state … an essential part of the structure of the Commonwealth'.

In announcing my appointment the prime minister described this office as 'the most important constitutional office in the land'. Taken as a reference to the court as a whole, it is entirely consistent with the vision of those who drew our Constitution and created this body.

The honour that comes with a seat on this court is therefore historical and institutional. With it comes a great sense of responsibility and for me that harsh modesty which follows from a realistic appraisal of my own capacities.

Mr Attorney, Mr Ray, Mr Bathurst and Mr Colvin – you have done your best with your generous remarks to undermine that realistic appraisal. I thank you for them. You will not think me ungracious if I keep them in a proper perspective.

A proper perspective reminds all of us who occupy public office, be it parliamentary, executive or judicial, to see ourselves as other Australians see us. This will often be at best with a kind of sceptical respect.

It requires us to examine and re-examine the way in which we do things and to look for ways of doing them better. The courts are human institutions. There is always room for improvement. In the 22 years I have been a judge, I can say the effort to improve has been relentless. It will continue across all Australian courts. In the end, however, the fundamentals of our system of justice require decision making that is lawful, fair and rational. It requires each case to be decided carefully according to its merits under the law. It requires it to be decided by an independent judge with the capacity and the determination to make a decision without fear or affection, favour or ill will. Those are the fundamentals which apply equally to this court and to the busiest Magistrates Court.

The responsibility which I accept with this appointment is made lighter by the fact that I share it equally with the other justices of the court, each of whom has welcomed me warmly to their company.

Endnotes

1. http://www.beactive.wa.gov.au/whatson_beactiveday_work.asp

The Hon Justice Nye Perram

On 8 August 2008 the Hon Justice Nye Perram was sworn in as a judge of the Federal Court of Australia.

Born in 1969, and elevated to judicial office at the tender age of thirty-nine, Justice Perram is one of the youngest ever appointments to the Federal Court of Australia. His Honour is a product of Sydney Boys High and the University of Sydney where in 1989 he obtained a Bachelor of Arts, and in 1991 a Bachelor of Laws (Honours). His Honour later completed a Bachelor of Civil Laws at the University of Oxford, specialising in European and comparative law. His Honour was admitted to practice in 1992 and worked briefly for a period with Mallesons Stephen Jaques before being called to the bar. His Honour took silk in 2006.

His Honour's practice at the New South Wales Bar was exceptional. At the time of his appointment his Honour was a member of the New South Wales Bar Council. He had also served on the board of the Law and Justice Foundation and was in 2005 a director of the Public Interest Law Clearing House. Perram J contributed to the *Oxford Companion to the High Court of Australia* on various topics and whilst at the bar appeared in many significant cases including *Re: Wakim Ex Parte McNally* (1999) 198 CLR 511; *Australian Competition and Consumer Commission v CG Berbatis Holdings* (2003) 214 CLR 51; *New South Wales v Commonwealth* (2006) 229 CLR 1; *Telstra v The Commonwealth* (2008) 243 ALR 1. Not long prior to his Honour's appointment his Honour also travelled to Fiji to represent the deposed prime minister against the government of Prime Minister Bainimarama, which was recently handed down by the Fiji High Court: *Qarase & Ors v Bainimarama & Ors.*

At the bar his Honour was also known for his diligence, commitment and great fearlessness as an advocate - and for his respectful and courteous approach, not only as an advocate but also to his colleagues.

Attorney-General Robert McClelland described the appointment of his Honour as the appointment to the Federal Court of 'one of the Sydney Bar's best and brightest'. The attorney noted that:

> Your Honour's appointment is, in fact, one of the first under the government's new, more transparent appointments process. These appointments were made on merit from an extensive field of serving judicial officers, barristers, solicitors and academics and I appreciated your words of encouragement about that process. I would like to thank the court and, in particular, the chief justice and members of the Advisory Panel for their role. As a matter of fact, it is their hard work that has brought me accolades for making such an excellent appointment.

The president of the New South Wales Bar Association spoke on behalf of the Bar. Katzmann SC noted the hoards of people pouring out of each door and standing up both inside and outside the court, reflective of the respect with which his Honour is held by colleagues and friends at the bar and beyond.

Katzmann SC referred to a continuing theme throughout the speeches - that of his Honour's formidable intellect and his youth. Katzmann SC observed that his Honour was reputed to be the first judicial officer 'federal or state' known to own a Sony Play Station, his Honour's favourite game understood to be *Grand Theft Auto*.

On more serious matters, Katzmann SC noted:

> In the more complex cases, your Honour soon became known among senior counsel as the 'junior of choice'. Your Honour was the architect of the challenges to the cross-vesting laws that culminated in the High Court declaring that the cross-vesting scheme was constitutionally invalid. The Federal Court duty judge was said to be so sceptical about the merits of the case that he was more reluctant to issue the s78B notices to the attorneys-general. The Law Council issued a press release after the decision expressing its alarm at the ramifications of it. The then ASIC chairman complained that the impact of the decision 'in terms of delay, disruption, uncertainty and sterile debate about technicalities has been all too real and expensive.' The High Court's decision led to a flurry of legislative activity across the country to validate all the earlier decisions. Ironically, it stripped this court of most of its jurisdiction in Corporations Law matters. It was probably a direct cause of the collapse of the national corporations law and the passage of the Corporations Act in 2001. And in the long term, it has probably had a much wider effect on our Constitutional arrangements.
>
> It was quite a case for a junior barrister of roughly three years standing to have undertaken. It showed, as one of your former colleagues put it, that 'you had the courage to take an unorthodox position and [the talent to] be vindicated.'
>
> Another remarked that the case typified your Honour's constitutional practice: 'entirely self-developed and powered by intense intellectual curiosity, rather than years of experience accumulated in government service.' The then attorney-general was not so generous in his praise.

> He is said to have referred to your Honour as 'a constitutional vandal'.
>
> Your Honour has given back to the bar in spades. On the Bar Council, you have served with distinction. You have always been calm and measured, logical and persuasive and tremendously helpful. The attorney has referred to your pro bono work and your stint in Fiji last year. That case well illustrates your forensic skills, your generosity and all those other qualities of which the attorney has spoken.

Katzmann SC also spoke of his Honour's interests outside the law – mathematics, English literature and classical music. In concluding remarks, Katzmann SC described his Honour as a clever, warm, funny, generous, loyal and honourable person.

Mr S Westgarth spoke on behalf of the solicitors of New South Wales, again highlighting his Honour's considerable intellectual and academic achievements and his plethora of additional extra-curricular activities and interests outside the law. Referring to his Honour's recent appearance representing the ousted Fijian prime minister Mr Westgarth said:

> Your Honour's performance in court was so impressive that members of the Fijian community went online to commend you on your performance, one saying, and I quote:
>
> > His arguments in front of the Court in the case brought by Laisenia Qarase against the state were simply magnificent. His preparation and delivery is simply outstanding. They – referring to the state's defence – are very scared of being ripped to shreds by Nye Perram.

In reply, Perram J noted the role of a judge was to look at what had been said in the past and apply the past to the present set of facts. His Honour noted that had he taken this approach and surveyed a number of speeches given by new judges on the occasion of their swearing in ceremonies. He noted that a 'dour afternoon's reading presented five emerging principles':

> First, by and large, new judges, at their swearing in, are a very thankful bunch. That seems to me to be a sound principle and one to which, despite some of Ms Katzmann's remarks, I will return in due course.
>
> Secondly, many, but by no means all, give a brief exposition of their proposed judicial method, usually intertwined with the expression of a generalised hope that they will not be as horrible as some of the ogres they recalled as practitioners. Judicial ogres are not as common as they once were, having been largely ousted by an era of judicial politeness, ushered in I think by Justice Kirby when he was the president of the New South Wales Court of Appeal. Since that time, the notion of an appellate hearing being a blood sport, similar perhaps, to fox hunting, had faded in most courts, although as Justice French, who I am pleased to have sitting here today, may soon discover, the hounds are still running in some parts.

Your Honour was the architect of the challenges to the cross-vesting laws that culminated in the High Court declaring that the cross-vesting scheme was constitutionally invalid...
The High Court's decision led to a flurry of legislative activity across the country to validate all the earlier decisions. Ironically, it stripped this court of most of its jurisdiction in Corporations Law matters.

> Thirdly, many new judges are often moved to speak in favour of the rule of law. It is always a relief, no doubt, for the court and the public to find, often after some no little anxiety that the new judge is, in fact, in favour of the concept. I will not be speaking in favour of the rule of law but I would not want it thought that by omission I was against it. I am not. It is merely that I do not think that in the 36 minutes that I have been a judge I have yet become equipped with any particularly new or especially interesting insights into the concept.
>
> Fourthly, some new judges look forward to the challenge and responsibility of the office and hope to discharge its onerous burdens. You may be assured that is most certainly my position.
>
> Fifthly, many are often forced to respond to some of the calumnies heaped upon them by the speakers at the bar table. In this case, there are probably too many to do that properly but I will just say one thing about *Grand Theft Auto*. I am not very good at it. In a recent game I was mugged by an accountant, which is, I think the game's way of telling you that it thinks you are truly hopeless.

His Honour thanked his family, friends and partner, Ross. In paying respects to those with whom he read His Honour said as follows:

> I had the distinct advantage of reading with David Higgs and also Michael Pembroke. I effectively also read with Justice Rares, who is here today, although not in a formal sense. From Mr Pembroke I learnt the benefits of calm and order, from Mr Rares I learnt the benefits of off-piste advocacy and from Mr Higgs I learnt the value of the strategic deployment of drama. I thank all of them. I also thank the Twelfth Floor, which has provided me with the most warm and intellectually stimulating environment since I was young, or I should say since I was a younger man. I will greatly miss it.

The Hon Justice Jayne Jagot

On 3 September 2008 the Hon Justice Jayne Jagot was sworn in as a judge of the Federal Court of Australia.

For all those who had believed there was a chance for the environment and for Sydney to come out of its industrial revolution, smog-infested thinking, it was a very bleak day indeed.

So said City of Sydney Councillor Chris Harris (The Greens) shortly after Justice Jayne Jagot handed down her judgement in *Drake-Brockman v Minister for Planning* in the Land and Environment Court in August 2007.

Whether because of despair brought on by the continuing industrial revolution in Sydney, or for some other reason, Cllr Harris is no longer the deputy lord mayor of Sydney. Justice Jagot is also no longer a judge of the Land and Environment Court of New South Wales, having been sworn in as a Federal Court judge on 3 September 2008.

Justice Jagot's transition is unlikely to have had anything to do with the assessment of Councillor Harris, but is certainly related to her Honour's reputation as both a brilliant lawyer and outstanding judge.

Justice Jayne Jagot was born in the United Kingdom, but migrated to Australia with her family as a young child in the late 1960s. Her parents, so she has said, looked to Australia to provide their children with the best and fairest of opportunities and in particular education. 'Australia', Justice Jagot said at her swearing in, 'did not let my parents down.... their good judgement [in migrating] was my good fortune. Through its public school and university systems Australia offered opportunities that I believe would otherwise have been inaccessible to me.'

These opportunities lead to Justice Jagot completing an arts degree at Macquarie University, and her law degree at Sydney University. She graduated with first-class honours in both disciplines. On the way, she appears to have won every available prize in law.

In 1991 she was admitted as a solicitor and commenced her legal career at Mallesons Stephen Jaques. Just six years later she became a very young partner in that firm, practising primarily in environmental planning, local government, real property and administrative law.

After five years as a partner at Mallesons, she decided to join the bar. The then New South Wales attorney general, the Honourable Bob Debus, recounted at her Honour's swearing-in as a judge of the Land and Environment Court that one of her colleagues at Mallesons said upon her departure 'if you must leave, then the least you can do is leave us your brain in a jar'. Whatever might be the views of Councillor Harris, Justice Jagot did not do so.

In her four years at the bar, Justice Jagot maintained an enviable practice, acting on behalf of a number of Commonwealth and state departments and authorities in her various areas of expertise, and she quickly secured a reputation as the Land and Environment Court's leading junior.

On 1 February 2006 her Honour was sworn in as a judge of the Land and Environment Court of New South Wales. The solicitor general, Stephen Gageler SC said at her Federal Court swearing in that during her time on the Land and Environment Court Justice Jagot developed 'a reputation as a judge who has an ideal judicial demeanour, is clear thinking and practical, and listens carefully and politely to argument put forward.' Her move to the Federal Court may be a new challenge,

but her Honour will take fond memories of her time as a judge in the Land and Environment Court. At her swearing in as a Federal Court judge, her Honour said of the Land and Environment Court:

> This legislative structure [of the Land and Environment Court] meant that I had the opportunity to hear and determine a variety of matters. These included environmental and planning appeals, determinations of compensation for the compulsory acquisition of land, appeals against land valuations for rating and taxation purposes and claims to Crown lands by Aboriginal land councils. They also included appeals on questions of law, judicial review of administrative decisions, civil enforcement, as well as criminal proceedings in the court's summary and appellate criminal jurisdiction. This range of work made my time on the Land and Environment Court very enjoyable. I also very much enjoyed the short period I had as an acting judge in the Equity Division of the Supreme Court of New South Wales.

It is certain that Justice Jagot will show the same qualities as a judge in the Federal Court that she displayed in the Land and Environment Court. It is to be hoped also that her new appointment brings her as much enjoyment.

The Hon Justice Lindsay Foster

On 4 September 2008 the Hon Justice Lindsay Foster was sworn in as a judge of the Federal Court of Australia.

The popular and irrepressible Lindsay Foster SC was sworn in as a judge of the Federal Court of Australia at a heavily attended ceremonial sitting of the court. His Honour came to the bar in 1981 and took silk in 1994. He had a national practice and, as noted by Solicitor-General Gageler SC, speaking on behalf of the Commonwealth attorney-general, 'was widely known as someone who did factually tough, legally complex and often very long cases in this court, in the Supreme Court of New South Wales and in supreme courts throughout the country'. He also appeared as leading counsel in the recent important decisions of the High Court in *Baxter Healthcare v ACCC* (2007) 232 CLR 1 and *Butcher v Lachlan Elder Realty* (2004) 218 CLR 592.

Foster SC was for many years a member of the Eleventh Floor Wentworth Chambers before becoming a founding member of Fifth Floor St James Hall in 1994. Prior to his call to the bar, he had worked as a solicitor at Henry Davis York and Baker & McKenzie before a two-year stint as general counsel and director of real estate acquisitions at McDonald's Australia. He was educated at Knox Grammar, which he had attended on an academic scholarship and where he had been dux in each year as well as an outstanding sportsman and participant in the school's extra-curricular activities, and subsequently at University of Sydney from which he obtained a Bachelor of Arts and Law and a Master of Law. His Honour was also an extremely accomplished sportsman representing New South Wales in rugby at under 19 and under 20 levels and playing in the Sydney First Grade Rugby Competition as well as the senior levels of the Sydney Grade Cricket Competition. As the solicitor-general observed on the occasion of Justice Foster's swearing in – 'when your Honour's background is considered, it is hard to imagine someone who, by scholarship, training and simple depth of life experience, would appear better suited to the discharge of the functions of office of a judge of the Federal Court of Australia'.

Speaking on behalf of the Law Council, the Australian Bar Association and the New South Wales Bar Association, Bathurst QC observed:

> Your Honour was a most dangerous opponent, both, I am told, at rugby and certainly, I know, at the bar. You retained throughout your career what appeared to be an innocent charm, which most people could only envy. That charm had a real tendency to lull your opponents and witnesses and even judges into a false sense of security.
>
> Your Honour never hesitated to take advantage of this ability. You refined it at rugby with innocent glances at the referees to dodge penalties for your numerous infringements. As a junior at the bar, it was a constant source of amazement to your colleagues as to how you were able to convince hard taskmasters such as the then chief judge of the Commercial Division of the New South Wales Supreme Court, Rogers J and later, Cole J, that it really did not matter that your client was three months behind in complying with directions and did not intend to comply for another few months. As a silk, you used the same technique. You were able to present the most outrageous propositions with such charm that they were accepted by judges, even if only for a short time.
>
> Your Honour was known as a vigorous and highly skilled cross-examiner. Once again, your Honour's charm stood you in good stead. I have seen many instances where witnesses were taken apart by your Honour without realising what was happening to them. I can recall a number of occasions being opposed to you, generally unsuccessfully, when my clients, after cross-examination, commented how pleasant and courteous you were. With gritted teeth, I would tell them to go away and read the transcript. They did and they came back with a somewhat different view.

Bathurst QC concluded:

> Your Honour will be missed at the bar, not only for your ability but also for your social skills. Your own room was, if not a bar, at least a social networking site, particularly on a Friday afternoon. Your advice, particularly in respect of ethics and professional conduct, was often sought and generously given. Many readers have benefited from having you as their tutor and you have often assisted the continuing development program of the bar. … All members of the legal profession are truly delighted with your appointment and wish you well in the next phase of your career. Like the Subaru, there is no doubt your speed and performance will be outstanding.

Speaking in reply, Justice Foster made particular acknowledgment of his colleagues on Fifth Floor St James Hall as well as inspirational former leaders including Palmer QC, Hely QC, Gyles QC, Hunter QC and Hughes QC. His Honour acknowledged his love of the bar but also emphasised that, for him, it was time for a new challenge to which he was very much looking forward.

His Honour observed:

> For almost all of my life I have been fascinated by the courtroom and the law with, I hope, an ever-increasing appreciation of the role which the law and those who administer it are required to and do play in a healthy democracy. It was, therefore, almost inevitable that I would try to become a lawyer and in particular, a barrister. As you have heard earlier today, for a very long time now, I have been privileged to be a member of the legal profession, initially as a solicitor, then as junior counsel and for the last 14 years, as a silk. Despite its imperfections, the legal profession occupies a vital place in the administration of justice.
>
> One of the things that has been said to me frequently by fellow judges since the announcement of this appointment is that the role of the profession is fundamental to the due exercise of this court's functions. The profession has afforded to me the opportunity to pursue a passion, to exercise my brain, to challenge my competitive spirit, to earn a comfortable living and hopefully, to do some good, all within an environment which expects and demands a high level of integrity and standards of professional behaviour.
>
> But the time has come for a change. Some people thought that perhaps I was just a barrister who just could not let it go. That is not so. We must all embrace change, not for change's sake but in order to ensure that we remain vital and useful contributors to our society.

The Hon Justice Robert Macfarlan

On 8 September 2008 Robert Macfarlan QC was sworn in as a judge of the Supreme Court of New South Wales and as a judge of appeal.

His Honour was educated at Cranbrook School and graduated from Sydney University with a Bachelor of Arts majoring in economics and a first class honours degree in law. His Honour first worked as an associate for his father, a commercial and admiralty list judge of the court. He then undertook articles with Dawson Waldron, and was appointed an associate within a year of admission.

Macfarlan JA was called to the bar in September 1976, and read with David Bennett QC. His Honour practised from 13th Floor Wentworth Chambers for a year, before moving to Eleventh Floor Wentworth. His Honour was appointed silk after ten years at the bar. Spigelman CJ noted that he and Macfarlan JA had taken silk on the same day.

The president of the Bar Association, Anna Katzmann SC spoke on behalf of the New South Wales Bar and Hugh Macken spoke for the solicitors of NSW. Macfarlan JA responded to the speeches.

Katzmann SC noted that during his time at Dawson Waldron, his Honour had worked under the tutelage of Nick Carson, 'the man whose record defamation verdicts brought the High Court as close as it has ever come to departing from the principles in Planet Fisheries' and said that his Honour had been lured into the corporate takeovers unit which was referred to as F Troop.

The president referred to his Honour's reputation for attention to detail:

> Your Honour is a neat man, compulsively if not obsessively so. Your desk is always clear at the end of each day's work and also for conferences enabling you to avoid distractions and demonstrate to those instructing you that you have their complete attention. You are meticulous in your work and remarkably efficient. One of your former juniors described you as the most focussed person he had ever met.
>
> You also have an economy of language and a capacity to separate the wheat from the chaff reminiscent of the Honourable A M Gleeson QC. As always your Honour took the lead from your hero. 'A little less conversation, a little more action please. All this aggravation ain't satisfactioning me. A little more bite and a little less bark. A little less fight and a little more spark'. Good advice for any aspiring barrister.

The president's quote picked up her earlier reference to the music of Hoagie Carmichael and to his Honour being a fan of the popular music of his generation, from Elvis, to Roy Orbison, to the Animals, Gene Pitney and Patsy Kline.

The president described Macfarlan JA as 'the gentleman's gentleman', 'a hard and dangerous opponent, but utterly scrupulous, never devious and always charming and affable out of court'. His Honour is said to have taken to extremes the 'open door policy of which our bar can justifiably be proud'.

The president noted Macfarlan JA's contribution to the legal profession and the community, having served on the Bar Council for two years, as a director of the Barristers Sickness and Accident Fund for 14 years, representing the bar on the New South Wales Supreme Court Commercial List Users' Committee for 13 years, lecturing in equity at the University of Sydney, and having been appointed a member of the Legal Services Tribunal and later Legal Services Division of the Administrative Decisions Tribunal. His Honour's contribution to the wider community included being a member of the Australian Theatre for Young People's Foundation Advisory Committee.

Mr Macken quoted Sandy Street SC describing his Honour as one of the finest legal minds in New South Wales, an awesome and fearsome advocate, someone he had always held in awe as one of the best role models and barristers in the legal profession:

> I was working as a paralegal at Ebsworth & Ebsworth and thought Rob was the best and brightest at the bar. In fact he stood out like a shining beacon so I asked if I could read with him. I later found out that Rob had read with David Bennett QC, formerly solicitor-general, who had in turn read with the Honourable Ken Handley AO. Ken Handley had read with my father, the Honourable Sir Laurence Street AC KCMG QC, who in turn had read with Rob's father (former Justice Bruce Macfarlan OBE QC).

In his reply, Macfarlan JA said he had enjoyed being a barrister, never having thought there was an occupation which he would have preferred to undertake, although he said the bar did have its stresses and strains, especially in the early years.

> I remember, for example, when I was in full sail in one of my first cross-examinations, having my brimming confidence instantly deflated by the District Court judge before whom I was appearing. He interrupted my enthusiastic cross-examination in a rather abrupt way to say 'Mr Macfarlan, please correct the jaunty angle at which your wig is positioned on your head'. The self-satisfied smile that came over the witness's face seemed to say, 'yes, I thought there was something a bit odd about you, but I could not quite put my finger on what it was'.

Opponents were always a rather annoying feature of life at the bar. The tactics they employed of course varied markedly. One tactic that sticks in my mind was used in a large commercial case in which I was led by a silk. The silk decided to allow me to do the cross-examination of the expert witness to be called by the other side. I prepared assiduously for what was for me a very big occasion. I made endless notes which laid out my opening gambit, and covered all the permutations and combinations of answers that might arise from it. The big moment finally arrived. When the senior silk on the other side completed his examination-in-chief and sat down, I rose with all the gravitas I could muster, ready or so I thought, to launch into my penetrating opening questions.

I think it was whilst I was giving the witness the requisite preliminary steely glare that panic first set in. My hands were groping for my notes. My eyes had to leave the witness to conduct a frantic search for the notes which were nowhere to be found. It was only after catching sight out of the corner of my eye of the smile on my opponent's face – and it seems he was not known as 'the smiler' for nothing – that I realised that a little shove here and there from him had sent the notes into a completely obscured position behind the lectern.

This setback to the cross-examination was followed about half an hour later by another. After what I thought was a reasonably effective start to the cross-examination, the court adjourned for its mid-morning break. Counsel trooped into the judge's chambers for morning tea. No sooner had we sat down than the judge, referring to the witness I had just started to cross-examine, said to us all, as if there could not possibly be any disagreement, 'Well, she really is a very impressive witness, isn't she?'

His Honour paid particular tribute to members of the Eleventh Floor Wentworth / Selborne, where he had chambers for 31 of his 32 years at the bar, and to his friend of long standing, Rein J, a friendship commencing when as a solicitor Rein J briefed Macfarlan JA in the early 1980s, flourishing when Rein J read with his Honour on admission and continuing since. His Honour said

> As a former pupil of mine, Justice Rein will no doubt have been pleased to note when my commission of appointment to the Supreme Court was read a little while ago that he was recorded as being senior to me. As his former pupil master it will however be my duty to point out to him that that seniority only lasted the few seconds it took the principal registrar to read out the following commission of my appointment to the Court of Appeal.

The Hon Justice Julie Ward

On 29 September 2008 the Honourable Julie Kathryn Ward was sworn in as a judge of the Supreme Court of New South Wales.

Her Honour was educated at Newcastle Girls High School; in keeping with a record rich with academic achievement her Honour graduated dux of her year in 1976.

Her Honour then studied arts at the University of Sydney, before graduating in law in 1982, with first class honours and the university medal. Her Honour spent the first year after graduation as associate to Sir Nigel Bowen, the first chief justice of the Federal Court. Her Honour then resumed worked at Mallesons Stephen Jaques – having previously been employed by that firm as a summer clerk.

Two years later her Honour travelled to Oxford, where she completed a two year BCL course in one year, graduating with first class honours. Her Honour then returned to Mallesons. In 1988 she became the firm's youngest ever partner.

Over the next 20 years her Honour built a formidable and well deserved reputation. The chief justice in his opening remarks noted:

> You have for several decades been one of the most senior litigation solicitors in this state.

Bathurst QC, senior vice-president of the New South Wales Bar Association, remarked:

> Your Honour quickly developed a justified reputation as one of the outstanding litigators in this city if not in the whole country.

Mr H Macken, president of the Law Society of New South Wales said:

> Your Honour is an outstanding litigator and widely regarded as one of the most eminent commercial lawyers in the country. Your sharp legal mind has helped make New South Wales the centre of commercial litigation in the Asia-Pacific region.

In his address Bathurst QC was able to speak from personal experience of working with her Honour:

> It was always a pleasure to be briefed by your Honour. This was not, I hasten to add, merely because of your insistence on a good bottle of champagne at the conclusion of any case, but rather for the fact that any brief delivered by you was always meticulously prepared, precisely identified the issues and contained a clear summary of the arguments both for and, equally important, against your client's position. Your Honour's expectation of barristers was not unreasonable. You expected that they had read the brief, formed a view and were prepared to debate the contrary proposition. No doubt your Honour will expect the same of those who appear before you in court, and I'm sure you will not be disappointed.

The president of the Law Society spoke immediately after Bathurst QC, and his remarks had a poetic touch:

> From time to time we are lucky enough to experience days of miraculous wonder, days where the sun could not possibly shine more brightly or the blossoms on the trees appear more vibrant, days when the air we breathe is pure, unadulterated oxygen. Today is one of those days; a golden day and a red letter day for the profession.
>
> We delight in high achievement and success of our members. We rejoice when the courts secure the best of the best to adjudicate disputes. We have confidence when we have reasons to be confident. Today all of those things have come to pass for the solicitors of this state.

Her Honour took up theme of the solicitors' branch of the profession in her own speech, referring to the importance of that branch contributing to judicial office:

> I think it is important for the continuing strength and depth of the solicitors' branch that solicitors can aspire to judicial office. I see the advantage of appointments from the ranks of those who practised as solicitors as lying in the different perspective they bring to the court. Having practised law perhaps somewhat closer to the coalface than members of the bar, they have an understanding of the commercial context in which transactions are conducted and in which disputes arise. They also have a real understanding of the difficulties of preparing cases for court and which can be encountered in meeting those always so reasonable court deadlines.

Her Honour thanked many who she said had helped or guided her over the years: her parents, David and Elaine Ward, and parents-in-law; her sister and nieces; professional mentors including Sir Nigel Bowen; her colleagues past and present at Mallesons, including their very skilled and supportive secretarial staff; and in particular her husband Bruce and children David and Hilary.

District Court appointments

His Honour Judge Michael King SC was sworn in on 17 June 2008.

His Honour was called to the bar in September 1976, and commenced practice from 9th Floor Frederick Jordan Chambers, reading with Jeffrey Miles, later the chief judge of the Supreme Court of the Australian Capital Territory. His Honour joined Forbes Chambers on its establishment in 1989. His Honour was appointed senior counsel in 2006.

His Honour practised principally in the criminal jurisdiction, both prosecuting and defending, and appeared at numerous commissions of inquiry, as counsel assisting and for witnesses, including the ICAC inquiries into the unauthorised release of confidential information, the Public Employment Office, the Department of Corrective Services, the inquiry in respect of 'Relationships between certain Strathfield councillors and developers' and the Wood Royal Commission. At his Honour's swearing in, the president of the Bar Association noted his Honour's reputation as a thorough and skilful trial advocate and for mastery of the details of his cases.

Readers 02/08

Back row, L to R

Robert Steward
Anthony D'Arcy
Paul Coady
Antony Evers
Simon Priestley
Stuart Bouveng
Geoffrey Dilworth

Middle row, L to R

Jane Muir
James Tobin
Shahan Ahmed
Kenneth Averre
Justine Beaumont
Mathew Leighton-Daly
Malanie Locke

Front row, L to R

Anuja Arunothayam
Genevieve Wilkinson
Lishan Ang
Melanie Cairns
Angela Cook
Elizabeth Stolier
Brenda Tronson

2008 Senior Counsel Presentation Ceremony

The senior counsel of 2008 were presented with their scrolls by the chief justice, the Hon JJ Spigelman AC, at a ceremony on 17 October 2008.

Julia Baird SC, Anna Katzmann SC and Donna Woodburn SC.

Gregory Sirtes SC, John Sheahan SC, Bernie Coles QC.

Michael Windsor SC receives his scroll from Chief Justice JJ Spigelman AC.

Kate Halley and John Halley SC and the chief justice.

Julia Baird SC receives her scroll from the chief justice.

President Anna Katzmann SC welcomes the audience.

Matthew Bracks (1964 - 2008)

Matthew Bracks commenced his legal career as a solicitor in the Sydney Office of the Commonwealth Director of Public Prosecutions in August 1989. His ability was recognised at an early stage, as evidenced by the fact that within three years he had been promoted to the level of principal legal officer. He worked in various positions within the offices of DPP in Sydney and Canberra, and was seconded for a period of time to the Australian Stock Exchange, before accepting a position as the deputy director of public prosecutions in Darwin in April of 1999. The position in Darwin provided Matthew with opportunities to appear as an advocate over and above those which had been available to him in the positions he had held prior to that time. It was therefore no surprise that upon his return to Sydney in February 2001 he took up a position of in-house counsel with the DPP.

Over the ensuing five years, Matthew appeared principally in jury trials and in proceedings before the Court of Criminal Appeal. In doing so, he earned a reputation as a skilled, articulate and committed advocate. He was meticulous in his preparation of each and every case in which he was briefed. His presentation of those cases was equally meticulous, reflective of his appreciation of the fairness with which the Crown is bound to act, and the accompanying need for the Crown to be a model litigant.

Matthew's success whilst in house counsel was such that his progression to the private bar was inevitable. When he made the move in February 2006 he confided in those close to him that he was overcome by feelings of excitement on the one hand, and fear on the other, explaining that his fear stemmed from what he viewed as the possibility of not being able to generate sufficient work in order to survive. He need not have worried - within a short time he had developed a busy criminal trial practice and, after a period, had commenced to build up a sizeable civil practice as well.

Quite apart from his skills as a lawyer and advocate, Matthew was universally regarded as one who upheld the finest traditions of the bar. Without fail he conducted himself, and the cases in which he was briefed, in a way which was reflective of highest of standards of ethics, propriety, honesty and integrity. He was, as his brother-in-law so eloquently described him in the course of a eulogy given at his requiem mass, a man who had the manners of a gentleman of a bygone era, and who carried himself accordingly.

At the beginning of 2008 Matthew had many things to which he was looking forward – being a father to his newly born son Joseph, to whom he was lovingly devoted, was one. The continued consolidation of what was a flourishing career at the bar was another. However, in a cruel demonstration of the fragility of life, he was diagnosed with leukemia on 24 April 2008.

Without fail he conducted himself, and the cases in which he was briefed, in a way which was reflective of highest of standards of ethics, propriety, honesty and integrity.

In the three months which followed that diagnosis, Matthew faced challenges which were many and varied. He dealt with each and every one of them in typical fashion – with courage, determination, and dignity, all aided by his strong and unwavering Catholic faith. The generally positive reports which had been received regarding the progress of his treatment were such as to generate cautious optimism amongst his friends regarding the prospects of his ultimate recovery. It was therefore with both shock and sadness that we learned of his passing on 28 July 2008, just three months after his diagnosis.

A large gathering of family, friends, past and present colleagues, and members of the judiciary, gathered at Matthew Bracks's requiem mass at St Aloysius College on the morning of Saturday, 2 August 2008. A few days earlier, the underlying reasons for the esteem in which Matthew was held were succinctly stated by Christopher Craigie SC, the director of public prosecutions, in a memorandum to his staff:

> He gave outstanding service as counsel and was frequently briefed by the office. That frequency arose from the simple fact that he gave exemplary service, and was a highly competent and ethical lawyer. He had a powerful grasp of the prosecutor's special role in upholding the rule of law. He was held in high professional regard by those who briefed him and by his peers at the Bar, including his opponents. More importantly than all of this, he was a pleasure to work with, a fact very apparent from the great affection generated amongst the many professional colleagues who became Matthew's friends as a result of his personal, as much as his professional, qualities.

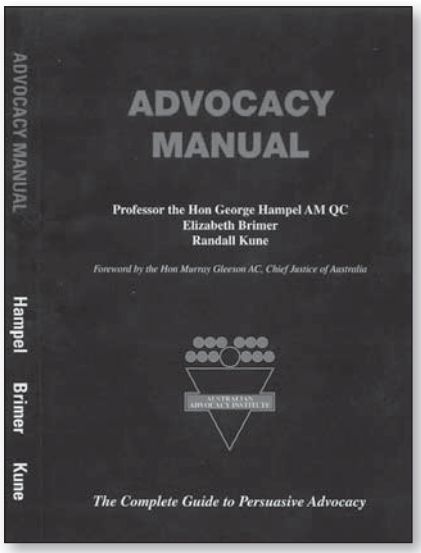
All of us who were fortunate enough to know Matthew Bracks will be poorer for his passing.

May he rest in peace.

By Geoffrey Bellew SC

The Advocacy Manual

Professor George Hempel, Elizabeth Brimer and Randall Kune | Advocacy Institute | 2008



The Advocacy Manual, written by Professor George Hampel, Elizabeth Brimer and Randall Kune, is an outstanding work, which will no doubt become the text book of choice for Bar Reading and other courses designed to teach the elements of persuasive advocacy. It is doubtful whether any other Australians are better qualified to write a manual on advocacy than these three authors. At all events, it would be difficult to find three other authors whose experience in teaching advocacy exceeds their combined experience. Professor Hampel was a superb advocate at the Victorian Bar for 25 years, an outstanding trial judge in the Supreme Court of Victoria for 17 years, the foundation chairman of the Australian Advocacy Institute and, since 1970, a teacher of advocacy in Australia, New Zealand, USA, England, Scotland, Hong Kong, Singapore, South Africa and Malaysia. Elizabeth Brimer, who has practised in criminal, commercial, administrative, environmental and sports law, has been an instructor in advocacy at Monash University, the Australian Advocacy Institute, the Leo Cussen Institute and the Victorian Bar Readers' Course. Randall Kune, a member of the Victorian Bar, has been an instructor at the Australian Advocacy Institute since 2002.

In 246 lucidly written pages, packed with telling examples, the *Advocacy Manual* teaches the inexperienced advocate the lessons that earlier generations of advocates learned only from years of practice, observation and sometimes humiliating experiences. It would be a mistake, however, to think that the manual is a work for tyros. Even the most senior and experienced advocates are likely to find that it contains useful tips that are either new to them or that they have forgotten. (Despite 23 years as an advocate and 21 years as an appellate judge, I had not previously heard of the practice of developing a case theory by preparing a four column table that lists the elements of the claim or defence in one column and then relating the 'facts' of the case to those elements by dividing them into the categories of 'good', 'bad' and 'neutral'. This strikes me as a better and more comprehensive practice than the practice I followed at the bar of simply noting on a single sheet of paper the ultimate facts that established my client's claim or defence and the facts that made those ultimate facts more probable than not. I then conducted the case – whether examination in chief, cross-examination or addresses - by reference to the facts noted on that sheet. The single sheet technique of noting a number of basic facts provides for flexibility in conducting a case, but the four column approach gives a better overall view of the case. It is also likely to assist the advocate to understand and consequently undermine or resist the strengths of the opponent's case. I now think that the single sheet technique is probably best used after preparing and analysing the four column table.)

The centrepiece of the *Advocacy Manual* is a case study of the prosecution before a judge and jury of a person employed in a bottle shop for knowingly supplying an alcoholic beverage to an intoxicated person. The reader is given the statements of a Licensing Squad constable and a witness who was present in the shop when the alcoholic beverage was allegedly supplied, the locality plan which included a plan of the interior of the shop, the record of interview between the employee and the constable and the employee's instructions to his counsel. These materials are then used to explore, explain and illustrate the basic principles of trial advocacy. From them, the authors show how the prosecuting and defence counsel should each prepare and develop a case theory, make an opening address, lead and cross-examine evidence and prepare and deliver a closing address. In the course of doing so, the authors provide valuable insights concerning complying with ethical obligations, arguing questions of law, fact and admissibility of evidence, taking objections, preparing expert witnesses, organising materials and preparing and using notes and communicating with – in the sense of 'getting through to' – the judge and jury.

Other advocacy texts such as the Australian edition of *Fundamentals of Trial Techniques* by Mauet and McCrimmon, *The Advocate's Deskbook: The Essentials Of Trying A Case* by Irving Younger and the massive *Advocacy: Its Principles and Practice* by R K Soonavala contain more detailed examples of advocacy on more subject matters than are found in the *Advocacy Manual.* However, the latter work loses nothing in comparison with these well known texts. Indeed, for the inexperienced advocate, the technique of concentrating on a single case that illustrates the basic principles of advocacy would seem a better teaching tool than a more detailed work.

In addition to the principal case study, the *Advocacy Manual* contains a case study of a plea in mitigation on behalf of a young woman charged with burglary and assault occasioning bodily harm. The reader is supplied with the instructions to counsel and various matters that counsel learns as the result of a conference with the defendant as well as the report of a clinical and forensic psychologist who asserts that the defendant needs 'consistent and ongoing psychiatric treatment.' The authors emphasise that the 'plea can be the ultimate feat in the art of persuasion because in that role the advocate can most effectively influence the outcome for the client', a view shared by all experienced criminal advocates. In 18 concisely written pages, the authors provide illuminating guides concerning the preparation and presentation of a plea in mitigation.

Three other notable features of the work are a chapter on written advocacy – which daily becomes more important as the common law retreats from its oral tradition to greater

reliance on written materials – a chapter on advocacy in mediation and a chapter on communication. Here again the *Advocacy Manual* contains many valuable insights into and analyses of these subjects.

The *Advocacy Manual* does contain, however, one important statement with which I disagree. In the chapter on cross-examination, the authors declare (p.112): 'Don't ask the question if you do not know the answer' 'unless you can contradict the witness if he or she gives an unhelpful answer or you can live with an unfavourable answer.' The authors assert that '[c]ross-examination at trial is not an inquiry, an opportunity to investigate, or a 'fishing expedition'.' Each of these statements are derived from the fourth of the Ten Commandments of Cross-Examination formulated by Professor Irving Younger. This commandment may work well in the USA where pre-trial depositions enable the advocate to know what opposing witnesses will assert. But much useful evidence would be lost if it was literally applied under Australian conditions where the advocate frequently does not know at the beginning of a cross-examination what answer the witness will give concerning a material fact.

A much better approach to cross-examination is that which I learned from the late J W Smyth QC who was without a doubt the best cross-examiner that I ever saw or have read about. He repudiated the view that you should not seek the answer to a question if you did not know how the witness would ultimately answer it. Instead, he contended that in such a situation you could only get an answer that hurt your case if you were negligent. His approach which, as his junior, I saw many times, was to build up to the decisive question by a series of questions which cumulatively increased the probability that he would get the answer he wanted to the decisive question. Using this technique allowed him to back away from putting the decisive question – often at an early stage in the series of questions – if he judged that he was likely to get an answer to the ultimate question that was unfavourable to or might hurt his case. Later he might come back to the issue from a different direction. But more often than not, the step-by-step approach to the ultimate question so built up the probability of getting a favourable answer that the witness could not logically deny it. If the witness did persist in an unfavourable answer - despite its inherent improbability in the light of the witness's previous answers, the unfavourable answer became the platform for a devastating attack on the credibility of the witness. Sometimes the attack occurred in a final address but more often it occurred in a series of further questions where the witness was forced to admit the inconsistency between the unfavourable answer and the logical consequences of the earlier answers. This would often lead to the question, 'Don't you think you had better admit it?' which either got the admission Smyth wanted or an embarrassed and unconvincing denial that destroyed the witness's credibility.

Three other notable features of the work are a chapter on written advocacy – which daily becomes more important as the common law retreats from its oral tradition to greater reliance on written materials – a chapter on advocacy in mediation and a chapter on communication.

Few advocates have Smyth's quickness of thought or ability to dominate a witness by a series of short questions that keep the witness on the defensive. But even for the moderately skilled or experienced cross-examiner, his technique seems to me a better guide to cross-examination than a general command not to ask a question unless you know the answer.

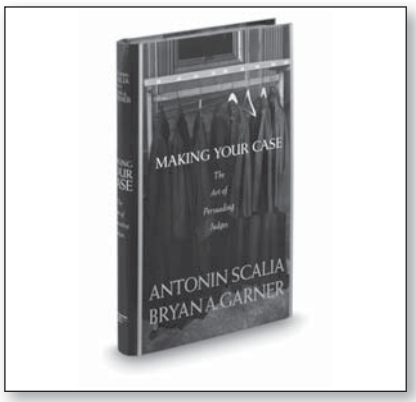
Moreover, literal compliance with Professor Younger's fourth commandment would presumably preclude the probing cross-examination, which frequently results in the undermining or even the reversal of a witness's evidence. Hearings in the abolished Commonwealth Industrial Court were invariably a form of trial by ambush with issues being defined in the most general terms and no advance notice of the evidence that might be called by the other side. In that context, much to my leader's and my chagrin, I once saw a probing cross-examination by Smyth get a critical witness to reverse his evidence and support the case for Smyth's client. The cross-examination began by getting a concession that, when the witness had delivered a document to an address, he believed that he had delivered it to the correct address. The cross-examination then explored the influences which had caused the witness to change his mind and conclude that he had delivered it to the wrong address. Ultimately, the witness was led back to his original belief that he had delivered it to the correct address.

But whether or not one agrees with the *Advocacy Manual's* adoption of Professor Younger's fourth commandment, this is a most valuable work that will repay reading and re-reading by even the most experienced advocate. It should be on the shelves in every advocate's law library. I would not only adopt the statement in the Foreword by the Honourable Murray Gleeson AC QC, one of the greatest advocates that the Australian legal profession has produced, commending 'this valuable work to all aspiring legal advocates', I would also commend it to the experienced legal advocate.

Reviewed by Michael McHugh AC QC

Making Your Case: The Art of Persuading Judges

Antonin Scalia and Bryan A Garner | Thomson / West | 2008



Whatever you think of Justice Scalia and his art of being a judge, I wager that you'll find this book an excellent aide to the practice of everyday advocacy, particularly in the early years. Justice Scalia and the well-known author, Bryan Garner, have joined forces to write what is a compact, accessible, and intensely practical book on written and oral advocacy. The authors readily acknowledge that, in writing on advocacy, they stand on the shoulders of giants (Cicero, Aristotle and Quintilian, among them). In an interview with the American Bar Association Journal, published in May 2008, Bryan Garner said that for the purpose of this book, they had canvassed every book and article on advocacy over the last several thousand years, as well as canvassing other judges and lawyers. Their authorial aim has been to adapt the best of advice, both ancient and modern, to modern circumstances, in the hope that it will be helpful to the bar and, in turn, benefit the bench.

This book is a quick, easy and enjoyable read, whether devoured in one sitting, or savoured in smaller portions over time. It manages to both educate and entertain, and is of general application to argument in any court or jurisdiction. Three important aspects of the book are its structure, brevity and conversational style. These significantly enhance its accessibility and utility, and make it a pleasure to read. The book has been written in four parts. The first two parts deal with principles applicable to advocacy generally. The third and fourth parts deal with written and oral advocacy, respectively. In total, the book comprises some 115 little sections or chapters, each of which is between a paragraph and a few pages in length. Like good written submissions, the heading of each chapter captures the essence of the relevant principle (e.g., 'Master the use of the pause', 'Welcome questions', 'Beware invited concessions', and 'If you're the first to argue, make your positive case and then pre-emptively refute in the middle – not at the beginning or end'). That has two great advantages. First, it makes the book a very convenient work for reference when specific questions arise. Secondly, it provides the advocate with an efficient summary of its substance. Just skimming the table of contents every now and then will give you a valuable refresher on the principles espoused by the authors. The book also includes a helpful and detailed index, and a list of recommended sources for further study, organised by topic.

It will probably come as no surprise to you that the authors do not always agree. However, they agree much more often than they disagree, and when they do the latter, they give the reader their respective views (e.g., on substantive footnotes in written submissions). One point on which their views are unanimous is that most legal writing is 'turgid', because lawyers don't read enough good prose. In an interview with the American Bar Association Journal, published in May 2008, Justice Scalia said (in trademark fashion):

> Of course, the average practitioner is … going to be reading some miserable judge who issued a terribly written opinion, the only virtue of which is that it is authoritative. And that is, as we point out in the book, one reason legal writing is so turgid and generally so bad, because we are reading the worst instead of the best. What we must read is not selected on the basis of whether it's well-written or even, for that matter, on whether it's well-reasoned. It's authoritative and that's why we have to read it. You read enough of this stuff, and you begin to write that way.
>
> One of the more important recommendations in the book is that lawyers read other stuff. Read good literature; good current literature. If you read only legal opinions, you're going to write like legal opinions, which is not what you want to do, generally.'

On this and other issues, they spur us on.

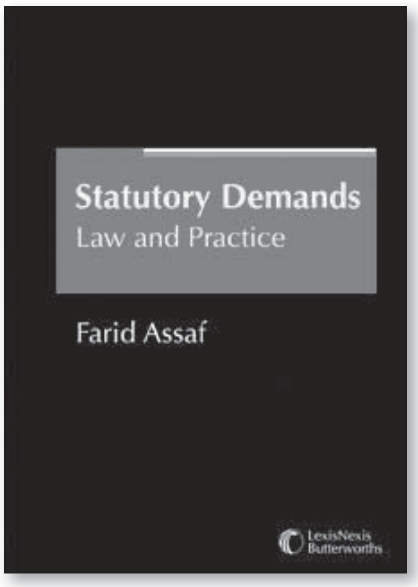
I have found many topics of assistance in this book – from how to present jurisdictional issues, to how to deal with misleading arguments raised by opposing counsel (and whether or not to accuse). This book is now one of my favourite reference books on practical aspects of advocacy. It should be a valuable addition to any library. It deals with the nuts-and-bolts issues one faces when deciding how to present a case, in a way that is unique in my experience, and it has been of considerable practical help to me. I expect it's the kind of book that I will continue to refer to, until its principles have become second nature – or until I have the pleasure of dissenting from Justice Scalia.

Reviewed by Kylie Day

In an interview with the American Bar Association Journal, published in May 2008, Bryan Garner said that for the purpose of this book, they had canvassed every book and article on advocacy over the last several thousand years, as well as canvassing other judges and lawyers.

Statutory Demands

Farid Assaf | Butterworths | 2008



This book, by Farid Assaf, of Blackstone Chambers, was officially launched by Justice Robert Austin on 16 October 2008. What follows are Justice Austin's remarks on the occasion of the launch.

When Farid invited me to write a foreword to his book, my first reaction was surprise that the humble statutory demand had been judged worthy of a 483 page exposition. After all, most statutory demand cases are short applications before the Corporations List judge or an associate justice, typically two hour cases or even less, where the facts and issues are in a narrow compass and the case is often disposed of by ex tempore judgment.

But even brief reflection, confirmed by dipping into Farid's treatise, demonstrates the shallowness and inaccuracy of that initial reaction. The body of case law on statutory demands deserves to be noticed and studied carefully for several reasons.

First, the statutory demand has proved itself to be a highly efficient, indeed an indispensable tool, assisting courts to make the crucial decision about insolvency in a winding up application. In my foreword to Farid's book, I quote from Justice Palmer's judgment in *Hall v Poolman* to show how difficult it is, when the company is still afloat but contending with the waves, to distinguish between a temporary lack of liquidity and an endemic shortage of working capital. Think how much more difficult that task has become for financial companies in the credit crisis, which has made it so difficult to attribute a value to synthetic finance instruments, and where marking to market might amount to recognising a catastrophic loss.

Failure to meet a statutory demand gives the court a presumption of insolvency, which is very often determinative of the outcome of the winding up application. Winding up applications based on statutory demands are high-volume business for the court and if insolvency had to be proved in every case, the system would become jammed. And so there is no better contributor than the statutory demand to the 'just, quick and cheap' administration of justice in commercial litigation.

Secondly, statutory demand cases are the most common contested applications in corporations matters. In the Supreme Court of New South Wales, where the Corporations List judge sits every day, he typically fields two or three statutory demand applications each week, and an associate justice also deals with statutory demand cases. Since our court accounts for 42 or 43 per cent of the corporations work in the Australian judicial system, we can calculate that nationally there must be about five or six statutory demand cases every week of the year. They probably have a greater propensity to run to full hearing than other litigation, often because the creditor finds it hard to accept that the court's role in the typical case is not to decide whether the debt is owing but only whether there is a genuine dispute about it.

Because the cases tend to run, and there are so many of them, and most of them become accessible on the internet and in specialist law reports, we now have a very substantial body of case law to contend with. Judges expect counsel to be fully abreast of relevant case law. And so a clearly organised, coherent and thorough analysis of the cases will be of great utility, almost on a daily basis, for barristers and solicitors who practise in the field of corporate insolvency, as well as for insolvency practitioners. Farid's work has addressed the profession's need admirably.

Farid's work goes beyond practical utility in two ways. First, study and analysis of the statutory demand cases is inherently interesting for everyone who is interested in the rapid development of legal ideas through the litigation process, as a matter of 'applied' jurisprudence. I have elaborated on this point in my foreword to Farid's book.

Secondly, statutory demand cases have a propensity to throw up for judicial decision some very interesting questions of commercial law. This point must be put into context. Statutory demand cases are typically about small businesses such as building or subcontracting companies, often run by a sole proprietor or the proprietor and spouse. What is at stake is vitally important for the parties, but there are normally no consequences for the global, national or even local economy. Typically, therefore, the cases are not commercially significant. Not surprisingly, they do not grab the attention of the media. But if you study Farid's book, you will be struck by the range of important legal issues that have arisen. Let me give a few examples.

In the year 2000 I had to consider whether Suncorp's statutory demand upon the Korean Daewoo Corporation's Australian subsidiary was valid though expressed in US dollars. Amongst the cases I consulted was *Le Case de Mixt Moneys; Gilbert v Brett*, decided in 1604, as well as Dr Mann's treatise on money published in 1938. In the same vein, Farid's research on the meaning of 'debt' has taken him to Professor Simpson's history of the action of assumpsit. Well before the Cross-Border Insolvency Act and the UNCITRAL Model Law, I had to consider, in the same case, whether to set aside the statutory demand so as to give breathing space to the international administrators of Daewoo who were trying to develop a global workout plan that would include a proposal for its Australian subsidiary.

In the *Standard Commodities* case in 2005 Justice Barrett decided that a statutory demand could be issued for the Australian currency equivalent of an award in the creditor's favour in a French court expressed in euros, observing that nothing in the Corporations Act required that the debt be payable in Australia.

In the *Hansmar Investments* case in 2007 Justice White held that a vendor of real property could issue a statutory demand to the purchaser for the difference between the sale price and the vendor's resale price after the purchaser had failed to complete, since the contract for sale treated the vendor's claim to liquidated damages as a debt due and payable.

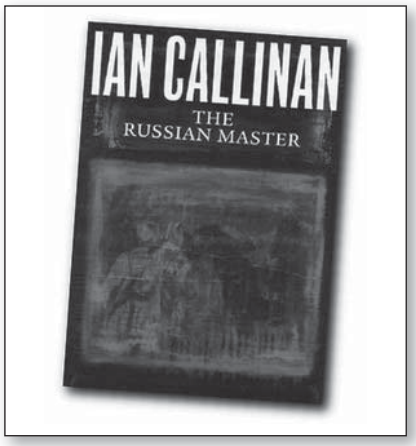
A much more important judgment than any of these, in the scheme of things, was the High Court's decision in *Deputy Commissioner of Taxation v Broadbeach Properties* [2008] HCA 41. The question was whether the commissioner could issue a statutory demand for recovery of GST, interest and penalties, and for income-tax arising from a default assessment, given that the taxpayers had challenged the assessments and had commenced review proceedings under Part IVC of the Taxation Administration Act. You will immediately realise how important that question is for the administration of the tax system and the economic welfare of taxpayers. The High Court held unanimously that the commission's notice of assessment conclusively demonstrated that the amounts identified in the assessments were correct, and consequently those amounts were debts for which the commissioner could issue statutory demands.

In summary, Farid has given us a publication that is not only very useful in a professional sense, but is also a publication that will be satisfying for those of us who love the law. He deserves every success.

By RP Austin

The Russian Master

Ian Callinan | Central Queensland University Press 2008



Davenport Jones, an art curator, is headhunted by the respected London art auctioneering house, Londys, after his well-publicised exposure of a Divera forgery in Australia. He is recruited to provide some 'colonial vigour' to the firm.

For most of the first part of the book, we are left in the dark about what sort of 'colonial vigour' Londys is after. The narrative plods along like a summary of facts. The characters are ushered in through predictable caricature. The humour is largely of the type found amusing by fanatics of such BBC productions as *Dad's Army, It Ain't Half Hot Mum*, or even *Keeping up Appearances.* Callinan's punning is conservative and a little wet. For example:

'I would say this is his first trip to India.'

'Why do you think that?'

'He asked me where he could buy Lomotil.'

Then, half way through the book, 'colonial vigour' rises like the sun from an otherwise bleak landscape. A plot develops. The characters gain vibrancy.

Davenport Jones emerges as the central figure in a quest to procure for Londys the paintings of the legendary Russian master, Kruffinski. He teams up with Rupert, an entertaining, independent art dealer, and Olga, Kruffinski's granddaughter, to try and pry the paintings out of St Petersburg. Davenport turns out to be a closet 'pants man'. He falls into an amusing love triangle involving his former wife, Gloria, the Kruffinski granddaughter, and a sexually predatory Londys financial controller.

Callinan's development of the Davenport Jones character is very good. His asides are clever and witty. Gloria (rather atypically) keeps 'her knees together as a bull-dog clip.' The proofs of a Londys's catalogue were printed 'rather heavy handed with puce.' 'When it rained,' the taxis, 'disappeared as if they were water soluble.' Rupert's penchant for the 'pudding menu' is amusing.

Unfortunately, the plot wears thin. One has the feeling Hercule Poirot could have emerged from the shadows at any point to tell us how it all happened. There is also a disappointingly abrupt ending, as if the author had reached a limit on his word count. In addition, the Davenport Jones character, while funny and well done, is of the all too familiar 'lovable duffer' genre epitomised by Kingsley Amis's *Lucky Jim.*

Despite these pitfalls, overall, *The Russian Master* is a light, frothy and entertaining read. I enjoyed it.

A couple of final comments, however, need to be made. There are a disappointing number of typographical errors in the manuscript and in the blurb on the back cover. It is also a shame that the publisher finds it necessary to quote from reviews suggesting Callinan is comparable to Evelyn Waugh. The comparison is silly.

Reviewed by Duncan Graham

Securities and Financial Services Law (7th ed)

Robert Baxt | LexisNexis Butterworths | 2008

The latest edition of this text, now in its seventh edition, is welcomed for a number of reasons. First, since the last edition in 2003, there has been a large number of cases that have been delivered which have interpreted the far-reaching (the authors have termed them 'revolutionary') changes to financial services law ushered in by the Financial Services Reform Act, which, in large measure, commenced in March 2002. Secondly, with the extreme volatility in equity markets since November 2007 following the credit crunch that commenced a few months earlier, aggrieved retail investors who have experienced a significant diminution in the value of their superannuation entitlements or equity portfolios may be inclined to look closely to the roles of the issuers of financial products and intermediaries in bringing that result about (perhaps encouraged by the recent incidence in securities class litigation, about which more is said below). The advisory and product disclosure obligations of product issuers and intermediaries are comprehensively considered. Thirdly, the publication of this edition virtually coincides with the government's recent Green Paper concerning financial services and credit reform and the text's analysis of the existing laws will serve to focus the attention of contributors seeking to influence legislative change to the existing regulatory framework on a range of topical issues; such as whether there is a need for margin loans, or mortgages over real property, to be added to the inclusive list of financial products in Chapter 7 of the *Corporations Act 2001* (Cth); and whether credit rating agencies should be required to obtain financial services licenses.

The structure of the text has changed substantially since the previous edition. It has been much simplified. This edition has grouped chapters thematically, beginning with an introduction that centres on the regulation and administration of securities and financial services laws (and which includes a chapter specifically devoted to the meanings of 'financial product' and 'security' – whose concepts almost justify a text in itself) and develops with separate parts concentrating on issuers of financial products; markets for products; intermediaries and, finally, market conduct. A virtue of the book is its continued attention towards important decisions in non-statutory law: close consideration is given, for example, to the decision of *ASIC v Citigroup Global Markets Australia*, which among other things, dealt with the existence, scope and contractual exclusion of fiduciary duties owed by an investment bank to its client, a takeover bidder. The multiple roles of the ASX, and the potential conflicts arising from its being listed on an exchange it regulates, are closely examined.

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The text has particular significance to the Bar in its new treatment of securities class litigation, which subject has increased in importance by two recent decisions of the High Court of Australia: *Campbells Cash & Carry v Fostif* (concerning litigation funding for class actions) and *Sons of Gwalia v Margaretic* (concerning the rights of shareholders to sue for defective disclosure by companies). These decisions, beneficial alike to retail investors, have fuelled litigation concerning the prohibition against misleading or deceptive conduct in financial services and the continuous disclosure obligations of listed entities. Separately, the *Glencore* decision by Emmett J in the Federal Court of Australia has demonstrated the ability of companies to retain recourse to the courts in takeover battles through judicial review of decisions by the Takeovers Panel. Intriguingly, the authors speculate that the High Court's decision in *A – G (Cth) v Alinta Ltd*, delivered earlier this year, which posited that s657A(2)(b) of the *Corporations Act* did not confer the judicial power of the Commonwealth upon the Panel, may not represent the last constitutional challenge to the Panel's validity.

Finally, part of the value of the text is its authors, all of whom are authoritative figures in corporate law. They combine deep practical experience, familiarity with the way regulators work, and academic rigour. A feature of the text is its extensive reference to securities cases and literature overseas; particularly in the United States. The text concisely states the law, but not without reference to the policy considerations shaping the law. Judicious reference is made to ASIC's interpretation of the laws, apparent from its Regulatory Guides.

The text is an outstanding companion to *Ford's Principles of Corporations Law* and *Company Directors: Principles of Corporate Governance* in the corporate lawyer's library.

Reviewed by Alister Abadee

Bullfry in Shanghai

By Lee Aitken

The doors of the antiquated lift clanged open and Bullfry, full of dumplings and Tsingtao, staggered forth into the tropical gloaming. A judicial apparition, clutching a luncheon voucher, appeared before him. 'Good afternoon, Jim' slurred Bullfry. The senior jurist, caught unawares, regarded our hero with the usual composure and courtesy he displayed when presiding over the highest tribunal – 'Bullfry, yet again, like the proverbial bad penny – will no-one rid me of this turbulent priest?' – was there to be no escape from him even on a conference jaunt?

The day had started badly for Bullfry – it is always a mistake to eat at a place called 'Mom's' or stay at somewhere called the 'Golden Lotus'. Although the travel agent had made the place sound attractive ('only a short cab-ride to the Shangri-La and your conference'), Bullfry's sleep had been interrupted twice by invitations to try out the hotel's in-house 'hairdressing and massage' facilities. He was past all that – did that mean that he was finally maturing? He hoped not.

As he fought his way aboard a taxi, Bullfry considered the vicissitudes of human affairs. He had lost a lot of money on an informal wager with a close companion on the next appointment to the Supreme Tribunal. He had been absolutely sure that true merit would be recognised and that the run of Executive preferment long enjoyed by his home state would continue. Look how wrong you can be! And was it a sensible idea to promote the notion, a little like Continental Europe, that judicial office had its own career ladder, which one began to climb at the age of forty? There was a large danger if the possibility should ever arise that judges could be scrutinised by the Executive over a long period of time, and their respective careers advanced or delayed.

In olden times, judicial office was normally undertaken by those long in years and experience who succumbed to the blandishments of the attorney after they had cleaned up at the bar. Appointment to certain posts had always been rightly considered as a possible prerogative of success for fighting difficult cases for years before the busiest tribunal. Now it seemed a matter of indulging in worthy causes, a little like bolstering one's Blake's internship application with a gold Duke of Ed. Perhaps all that was an inevitable result of needing to demonstrate one's community relevance.

The English, of course, had always had the right idea! To ensure a steady flow of applicants for judicial office they offered a 'positional good', which the limited money available to a senior counsel could not buy. This was especially so when operating in a socially stratified system where an honorific might appeal particularly to the second Mrs Bullfry. High Court – 'Sir Jack Bullfry'; Court of Appeal – 'Lord Justice Bullfry'; House of Lords – 'Lord Bullfry of the Gorbals'. Using just such a stratagem they had even managed to continue the flow of Privy Council appeals from the seventh state by co-opting the most dangerous member of its Court of Appeal by making him a lord for part of the year in South London! There was no putting it past them. And what was the local equivalent? – not even a handful of silver, just a riband to put in your coat – and a riband which looked like a failed version of its French progenitor.

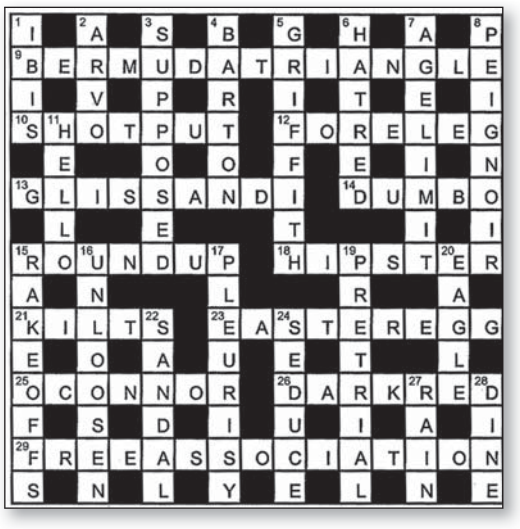
The taxi took Bullfry slowly up Nanxing Lu toward the Bund. The pace of building was incredible but what of the judicial structure which underlay it? The local judiciary operated as a part of the state and aimed first and foremost to maintain social stability. Was it likely even with a new law in place that a large steel enterprise would be allowed to fail and thus deprive its workers of their iron rice bowl, not to speak of the schooling and housing benefits, which it provided to its workforce? And was not that system at least as effective as one in which employees and unsecured creditors could be tossed aside when an enterprise completely failed? The Tribune that morning had been full of talk of a mooted bail-out of a large number of former financial wizards.

Bullfry thought back to all of those who had left the M & A branch of his old firm to join one of the many clients who specialised in 'financial engineering'. Much of it involved the profitable leasing of bits of aircraft in one jurisdiction where the fiscal regime was most favourable; much of it involved hours on the telephone to inconvenient time zones and a large rush at the end to document the transaction. Not nearly as pleasant as a plea in Orange, and a quiet drink at the Canobolas.

The hotel loomed up. Bullfry gathered his shopping – he hoped his mother would like the stuffed Panda. He would have to give serious thought to its packaging to avoid the unwonted attentions of Customs and the Australian Quarantine Inspection Service. It used to be an anchor client when Bullfry commenced at the bar – would he ever forget the 'extension' case, which had taken him over three months with a bibulous instructor to every single-malt distillery in the Western Isles? Or better yet, the film classification brief when he had sat sequestered with a young instructress watching imports for hours on end to opine on his own view of Hicklin in the light of contemporary mores!

He had however, noticed a disturbing trend at Mascot. A flight arriving from the East always necessitated an endless passenger queue at Customs, and zealous scrutiny of luggage by a pack of Beagles. Bullfry normally avoided this by going straight into the red lane and 'declaring' a packet of Tim Tams. It seemed to Bullfry that the delays faced by a Far Eastern flight must mean that some sort of impermissible 'profiling' of relevant passenger groups was going on. Profiling wasn't permitted in relation to any question of terrorists else Bullfry would not have been subjected so frequently to a 'full body' search! So why was it permitted with respect to lichees? In the temper of the modern times Bullfry thought of the appropriate organ to whom to complain on behalf of his fellow passengers – perhaps, with an appropriate contradictor, this might be his forensic entree to judicial life.

The English, of course, had always had the right idea! To ensure a steady flow of applicants for judicial office they offered a 'positional good' ... High Court – 'Sir Jack Bullfry'; Court of Appeal – 'Lord Justice Bullfry'; House of Lords – 'Lord Bullfry of the Gorbals'.



NSW Bar v Victorian Bar football match

By Stephen Free

On 6 September 2008 a squad of determined and damp barristers contested the inaugural football match between the NSW Bar and the Victorian Bar. The match was played in horrendous conditions after torrential rain submerged the arena at St John's Oval, Sydney University. The aquatic setting made for a scrappy match but both sides battled away with admirable spirit.

At full-time scores were locked at 2-2, with Shereef Habib and Cameron Jackson on the scoresheet for NSW. In the finest barristerial tradition of representative adaptability, Jack Harris distinguished himself in goal for the Victorians after the visiting goalkeeper was dispatched to RPA following a nasty collision with a local goalpost. But Harris proved to be no match for the NSW penalty takers as the match proceeded to a shootout, with NSW prevailing 4-2. Simon Burchett, in goal for NSW, chimed in with a timely save. Greg Watkins and Jim Fitzpatrick were named best and fairest for NSW and Victoria respectively. There will be a return fixture in Melbourne in 2009 and other fixtures are being planned to feed the healthy appetite for football of the NSW bar.

The victorious NSW Bar football team. Back row, L to R: Michael Holmes, Vahan Bedrossian, Iain Todd, David Patch, Mark Gibian, Donald Mitchell, Jeh Coutinho, Carlos Mobellan, Lachlan Gyles, John Marshall SC, Stephen Free, Houda Younan, Cameron Jackson, Anthony Lo Surdo, Graham Turnbull SC. Front row, L to R: Greg Watkins, Gillian Mahoney, Colin Magee, Nick Tiffen (referee), Simon Burchett, Simon Phillips, Shareef Habib. Photo By Kim Free.

Special mention and thanks go to our generous sponsors Suncorp and LexisNexis, David Stanton, Nick Tiffen and his daughter for officiating, President Katzmann for braving the conditions to award the trophies, George Porthouse for his coaching expertise and Anthony Lo Surdo and Simon Phillips for their organisational endeavours.

By Stephen Free

Richmond Chambers supports local junior rugby league

Richmond Chambers (Lismore) has donated a set of 20 rugby league jumpers to Goonellabah Primary School. Until then, the league team had been playing in borrowed singlets. Almost half of the school's students are Indigenous and they are enthusiastic supporters of the game.

Nick Harrison and Eoin Johnston of Richmond Chambers presented the jumpers to the team

Fellow barristers Michael McCall and David Imlah were unable to attend the presentation, which was held at the school during NAIDOC week. Nick has served on the local senior rugby league judiciary for many years and Eoin, after an early stint in league, has spent the bulk of his life involved with rugby union. Both addressed the students on the value of sport and learning and the discipline required to succeed.

Back row: left to right are Mark Spencer, Stephanie Wallace (teachers), Nicolas Harrison and Eoin Johnston (Richmond Chambers), middle: Marcus Dargan and Stanly Knight. Front: Jamie Saunderson, Wally Kelly, Jade Cook and Jai Knight.

NSW Bar v Victorian Bench and Bar hockey match

By Edward Muston

Front row, L to R: Esther Lawson, Andrew Scotting, David Jordan, Verity McWilliam. Back row, L to R: James Gibson, Bruce McManamy, Ganasan Narianasamy, Geoff Warburton, Edward Muston, James Ward, Peter Maddigan, Rob Montgomery, Rob Shilkin, James Hardiman.

The 2008 clash for the Bert Balfe-Leycester Meares Cup between the NSW Bar hockey team and their Victorian counterparts was, in most respects, much like all previous encounters. The game was played on a particularly hot Saturday afternoon in late October. As has become something of a tradition on the Sydney leg, the game was played at the Kyeemagh RSL hockey pitch which, conveniently, provides ready access to chilled beverages and assorted fried foods for the post match celebrations. Both sides were a little light on for numbers and required the assistance of ring-ins. But, as always, the game was hard fought and played in excellent spirit.

However, in one fundamental respect the 2008 game did depart significantly from tradition – after eight long years the NSW Bar finally won.

Upon arrival at the ground, one could be excused for having thought that word had passed around about this exciting annual fixture. Around 200 people had gathered at the Kyeemagh RSL. Speculation was rife that the assembled masses were eager to witness the lightning fast speed of Neild; the striking power of McManamey, Warburton and Muston; the evasive wing play of McWilliam and Jordan; and the defensive wall that is Scotting, Lawson and Gibson. Our excitement was short lived.

Shortly before hit off, 22 of those spectators retired to the dressing sheds to don their costumes for the American football game, which was to commence immediately after the hockey. Thereafter, around 150 further spectators retired to the clubhouse for the Brighton Seagulls junior rugby league club presentation day. A further 18 potential spectators disappeared when the members' lucky badge draw commenced and three retired to the gaming lounge. Nevertheless, six genuine and very vocal spectators remained and were present to watch the NSW Bar's fittest and finest take the field.

From the outset, the Victorians played an attacking style of hockey, dominating the possession and forcing Scotting, Gibson and Lawson to work hard in defence. Nevertheless, defend they did and, approaching half-time, the score was locked at 0:0. Moments before the half-time whistle was blown, NSW managed to snatch the ball away from the Victorians and secure a short corner, which (thanks to a powerful shot from perpetual ring-in Ganasan Narianasamy) was converted into a 1:0 lead at the halfway mark.

Being down a goal for the first time in eight years seemed to incite the Victorians, who commenced the second half with a searing attack on the NSW defensive line. However, with the wind behind them and victory in sight, NSW began to dominate possession. Jordan and McWilliam were out flanking the Victorians to the left and right while Warburton and McManamey produced a number of piercing runs through the centre. Nevertheless, Victoria continued to look dangerous and came very close on several occasions to claiming an equaliser.

Finally, a breakaway run by Neild caught the Victorian defenders off guard. Dragging the ball into the Victorian quarter, Neild fired off a well timed pass to Muston who smashed it past the Victorian goalie to secure a (more comfortable) 2-0 lead, which NSW successfully held for the remaining 10 minutes of the game.

Once again, thanks must be extended to Scotting for organising the game, the ground and the umpires. Thanks also to the Victorians for travelling to Sydney for the 'away game'; always a daunting prospect. It was a pleasure to host this year's event and an even greater pleasure to win it. We look forward to next year's clash in Melbourne and would encourage anyone who might be interested in heading down to defend the honour of the NSW Bar to pass on your details to Scotting, who will ensure that you receive the annual press-ganging email as soon as a date is fixed for the game.

THE AUSTRALIAN BAR ASSOCIATION CONFERENCE

STRASBOURG AND LONDON
26 JUNE TO 1 JULY 2009

Expressions of interest are now being taken for the Australian Bar Association Conference to be held in Strasbourg and London between 26 June and 1 July 2009.

The Conference will commence in Strasbourg on Friday 26 June, 2009 for a full day session in the Grand Chamber of the European Court of Human Rights. The London component will commence on the evening of Sunday 28 June and conclude with a Gala Dinner at Lincoln's Inn on Wednesday 1 July, 2009. The London Business sessions will be held at the Mayfair Hotel.

The names of those interested will be placed on a Priority List to receive a registration brochure prior to any general mailout. Please send your full contact details to Dan O'Connor at the email address listed below or by facsimile.

Questions about registration?
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Questions about Travel?
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